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In The
Supreme Court of the United States
October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION,
Paul Langdon, M. Steven Boley,
Virginia Prentice, Marilyn Redden,
and William Moss, five of its individual Members,
and Dr. Joseph L. Davis, Superintendent
of the Columbus Public Schools,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioners are the Columbus Board of Education, five of its seven individual members, Paul Langdon, M. Steven Boley, Virginia Prentice, Marilyn Redden and William Moss, and Dr. Joseph L. Davis, Superintendent of the Columbus Public Schools. They pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on July 14, 1978.

Adverse respondents are individual plaintiffs and a plaintiff class consisting of all children attending Columbus Public Schools, together with their parents and guardians.¹

OPINIONS BELOW

The July 14, 1978 opinion of the Court of Appeals is not yet reported and is reproduced in the Appendix at pages 140-207. The March 8, 1977 liability opinion and order of the United States District Court for the Southern District of Ohio is reported at 429 F. Supp. 229, and is reproduced in the Appendix at pages 1-86. The July 29, 1977 order of the district court concerning desegregation plan guidelines and rejecting desegregation plans submitted by Petitioners, is not reported and is reproduced in the Appendix at pages 97-124. The district court's October 4, 1977 Memorandum and Order ordering implementation of a systemwide desegregation plan is not reported, and is reproduced in the Appendix at pages 125-137.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 14, 1978, and this petition for a writ of certiorari will be filed within 90 days of the entry of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In a school desegregation case, where mandatory segregation by law has long since ceased, does the imposi-

¹ Additional respondents are the Ohio State Board of Education and Franklin B. Walter, the Ohio Superintendent of Public Instruction (State Defendants), and Harriet L. Hammersmith, William K. Hammersmith, and Robert E. Hammersmith (Intervening Defendants).

tion of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceed the equitable jurisdiction of a federal court where the court has failed to determine how much incremental segregative effect discrete and isolated segregative acts had on the racial composition of the individual schools within the system at the time of trial as compared to what the racial composition would have been in the absence of such acts?

2. May a federal court employ legal presumptions, in combination with evidence of discrete and isolated constitutional violations, to justify a systemwide statistical racial balance remedy where (i) there is no evidence of a causal connection between those unconstitutional actions and the existence of other racially imbalanced schools, (ii) there is a high degree of residential segregation, and (iii) the systemwide remedy would not be warranted by the incremental segregative effect of the identified violations?

3. May a federal court infer segregative intent from the mere assignment of students to schools nearest their homes pursuant to a longstanding, statutorily required and educationally sound neighborhood school policy where the foreseeable effect of such assignment, because of segregated housing patterns in the urban school district, is to cause some schools to be racially imbalanced?

4. Where there was no direct proof that segregation of students was a factor which motivated the decision of school officials, may a federal court infer segregative intent solely from evidence that a collateral foreseeable effect of the decision made would be to continue or increase statistical racial imbalance within schools when the same decision would have been made for educational and administrative reasons?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Fourteenth Amendment to the United States Constitution, Section 1.

" nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the laws."

B. Ohio Revised Code, Chapter 33:

§ 3313.48 Free Education to be Provided; Minimum School Year

"The board of education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

STATEMENT OF THE CASE

A. Introduction

The decisions of the courts below cannot be properly understood without an appreciation of some basic characteristics of the Columbus public school system at the time this case was tried.

For the 1975-76 school year, the Columbus City School District had a total enrollment of 95,998 students, making it the second largest school district in Ohio. The student enrollment in that year was 67.5% white and 32.5% non-white.

The boundaries of the school district are generally coterminous with the boundaries of the City of Columbus. The City and the school system experienced a unique and tremendous growth from 1950 to the time of trial. The

population of Columbus increased by 22.8% in the 1950's and by an additional 25.4% in the 1960's, while the geographic area increased from 40 square miles in 1950 to over 173 square miles in 1975 as a result of its aggressive annexation policy. School enrollment more than doubled during this period, and 103 new schools were built.

There was also a dramatic increase in the number and percentage of black residents in Columbus during this period. The number of black residents almost tripled from 1940 to 1970, and the percentage of black residents increased from 11.7% to 18.5% in that period. At the same time, the black student population of the Columbus schools increased at an even faster rate, and by 1970 over 29% of the student enrollment was black.

As in many large cities in the United States, the black residential population in Columbus is concentrated in a geographically contiguous area. In 1970, 71% of all blacks resided within just 23 contiguous census tracts located in the east central area of Columbus. This concentration is reflected in the racial composition of enrollments in the neighborhood schools serving that area.

In Ohio, statutory segregation of school children ceased long ago. In 1887, the Ohio General Assembly repealed a law which had permitted separate schools for black children. Prior to that time, in 1881, the Columbus Board had abolished separate schools for black children, and assigned all students to attend schools in districts where they resided. Thus, the Columbus Board of Education's neighborhood school policy has been in continuous force since before 1900 and before any meaningful residential racial segregation in Columbus.

Adherence to a neighborhood school policy in a city which exhibits patterns of residential segregation necessarily results in some schools which are not racially balanced, and Columbus is no different in this respect.

However, despite the concentration of blacks and general residential segregation, the Columbus schools are substantially more integrated than the residential population of Columbus. This is due in large part to the Columbus Board's promotion of integration in a manner consistent with the neighborhood school policy.

B. Procedural History

This action commenced on June 21, 1973, upon the filing of a complaint seeking declaratory and injunctive relief concerning an \$89.5 million school construction and improvement program. The plaintiffs, 14 black and white students and their parents, alleged that the Columbus Board of Education, its individual members, and its Superintendent (hereinafter collectively referred to as the "Columbus Board") had, by virtue of the United States Constitution and certain Board resolutions, a legal obligation of affirmative integrative action in the expenditure of the construction funds. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1343(3) and (4). After the plaintiffs had withdrawn their motion for a preliminary injunction and filed one amended complaint, a second amended complaint was filed on October 22, 1974. The second amended complaint was styled a class action, and it alleged that the Columbus Board had intentionally segregated the public schools by creating and maintaining a neighborhood school policy notwithstanding a segregated housing pattern in the city, by using optional attendance areas, by segregating teachers and principals, and by failing to desegregate. The second amended complaint also named the Ohio State Board of Education and its Superintendent of Public Instruction, and it alleged that they were liable for failing to bring about the desegregation of the Columbus public schools. The plaintiffs sought an order requiring desegregation of the schools.

A motion to intervene was filed by NAACP lawyers on February 5, 1975, on behalf of 11 other black and white students and their parents. The complaint in intervention contained essentially the same allegations as the second amended complaint and sought the systemwide desegregation of the Columbus public schools. The district court granted the motion to intervene, certified the case as a class action, and designated one of the NAACP lawyers as lead counsel for the entire plaintiff class.

The case was tried in 36 trial days from April 19 to June 17, 1976. On March 8, 1977, the district court issued its Opinion and Order, including findings of fact and conclusions of law, which found that the Columbus public schools were unconstitutionally segregated "as a whole." The court enjoined the Columbus Board and the State Board from discriminating on the basis of race in the operation of the Columbus system, and ordered both defendants to formulate and submit desegregation plans.

In accordance with the district court's order, the Columbus Board of Education formulated and submitted a desegregation plan on June 10, 1977, reserving all rights to appeal. The State Board filed its plan on June 14, 1977. Shortly thereafter, this Court announced its decisions in three major urban school desegregation cases: *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (June 27, 1977); *Brennan v. Armstrong*, 433 U.S. 672 (June 29, 1977); and *School District of Omaha v. United States*, 433 U.S. 667 (June 29, 1977). In all three cases, lower court decisions finding systemwide violations and ordering systemwide remedies were vacated and remanded with the direction to determine the incremental segregative effect of any unconstitutional school board actions and to formulate remedies limited to the correction of that effect. Prompted by these decisions, the Columbus Board, on July 8, 1977, filed an amended desegregation plan designed to racially balance the specific schools identified

in the Court's liability decision as being involved in the constitutional violations found.² Hearings on all of the plans submitted by the defendants began on July 11, 1977. At the start of the remedy hearings, both the Columbus and State Boards moved the district court to make the determination of incremental segregative effect required by this Court's decisions in *Dayton*, *Brennan* and *Omaha*, before it proceeded to fashion a remedy. The court denied these motions.

On July 29, 1977, the district court issued its order rejecting the desegregation plans formulated by the Columbus Board and the State Board and ordered development of a new systemwide racial balance remedy plan. [A. 97.] On August 31, 1977, the Columbus Board filed a desegregation plan which conformed to the requirements of the district court's July 29 Order that every school in the Columbus system be racially balanced.³ On October 4, 1977, the district court entered a Memorandum and Order approving the August 31 Plan and ordering that it be implemented in September, 1978. [A. 125.]

² The district court entered a Memorandum and Order July 7, 1977, granting leave to file the amended plan. [A. 90.] Although it permitted the plan to be filed, the district court stated its opinion that this Court's decisions in *Dayton*, *Brennan* and *Omaha* had no effect on this litigation, and that "systemwide liability is the law of this case pending review by the appellate courts." [A. 95.]

³ Although the Board developed and submitted the plan in accordance with the court's remedy directives, the Board in no way approved of the racial-balancing provisions of the plan and reserved its right to appeal all orders requiring implementation of the plan or any part of it. The Board has persistently contended that a systemwide racial balance remedy is not constitutionally required in this case. The Columbus Board believed, however, that if any such plan was to be ordered, its staff had the ability and expertise to design the most reasonable plan for the Columbus school system.

The Columbus Board of Education took interlocutory appeals under 28 U.S.C. §1292(b) from the March 8, 1977 liability order and from the July 29, 1977 interim remedy order. Both orders were certified for interlocutory appeal by the district court on its own motion, and the Sixth Circuit granted the Board's petitions for permission to appeal. The Board also appealed the October 4 remedy order. The appeals were consolidated in the Court of Appeals and argued on February 15, 1978.

On July 14, 1978, the court of appeals affirmed the district court's orders and judgments with respect to the Columbus Board, but remanded the case for additional findings concerning the liability of the State Board. [A. 140.] A Judgment to that effect was entered on July 14, 1978. [A. 208.] On July 31, 1978, the Court of Appeals denied the Columbus Board's application for a stay of its mandate and judgment pending the filing of a petition for a writ of certiorari.

On August 11, 1978, Mr. Justice Rehnquist stayed the mandate and execution and enforcement of the judgment of the Court of Appeals pending the timely filing of a petition for a writ of certiorari. [A. 217.] The stay of the lower court's judgment remains in effect pending disposition of this petition.

C. The District Court's Decisions

The district court's liability findings, issued March 8, 1977, were predicated upon a finding that the Columbus Board was responsible for the creation of five predominantly black schools in the east area of the school district prior to 1943. Although the court conceded that there was "substantial racial mixing of both students and faculty in some schools," it found that as a result of the existence of the five schools there was not a "unitary school system" when this Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). [A. 10-11.] The court then reviewed

the actions of the Columbus Board in the 20 years intervening between *Brown* and the filing of the second amended complaint.

The district court first found that enrollments in the Columbus system had increased rapidly since 1950. Enrollment grew from 46,352 in 1950-51 to 110,725 in 1971, then declined to 95,998 in 1975-76.⁴ This "rapid growth demanded new school facilities and placed pressures upon the school officials seeking to provide quality school facilities for the expanding enrollments in a continually enlarging geographical area." [A. 12.] The Columbus Board responded by building 103 new schools between 1950 and 1975. These schools were built in "substantial conformity" with the specific recommendations contained in the "comprehensive, scientific and objective" analyses of the Columbus school plant needs performed by the Bureau of Educational Research of The Ohio State University. [A. 13-14.] The six research reports prepared by the Bureau were based upon the neighborhood school concept and made specific recommendations for the "size and location of new school sites as well as additions to existing sites." [A. 14.] Although the court found that the Columbus Board had substantially followed these objective recommendations and had considered all of the many relevant school siting factors, it nevertheless found it necessary "to consider those foreseeable effects of the construction practice which promote or preserve a segregated school system." [A. 21.]

The court found that the Columbus Board had, in accordance with its neighborhood school policy, built schools "in locations where the expanding and growing population demanded additional facilities." [A. 21.] Of the 103 new schools opened between 1950 and 1975, however, 87 opened with a "racially identifiable student

⁴ During the 1950's, enrollment increased at a rate of 3,700 each year. In the 1960's, the rate of increase was 2,700 each year. Thus, about 100 new classrooms were needed each year.

body," that is, a student racial composition greater than a certain statistical range from the systemwide mean. [A. 21, 78.] Although it purported to recognize that "given segregated residential patterns, not all schools can be built in an integrated setting," the court nevertheless made a generalized finding that "in some instances the need for school facilities could have been met in a manner having an integrative effect rather than a segregative effect." [A. 24-25.] Only two instances of new school siting, however, were condemned by the court. [A. 21-24.] Nevertheless, the district court inferred segregative intent from the mere continuance of the neighborhood school construction policy with knowledge of segregated housing patterns and the foreseeable racial effects of such actions. [A. 48-49.]

The district court found some other isolated, discrete actions after 1954 from which it also inferred segregative intent. These included the use of three optional zones, three boundary changes, and the use of two discontinuous attendance areas. [A. 26-42.] These discrete actions were among the hundreds of post-1954 actions challenged by the plaintiffs as intentionally segregative. Finally, although teacher assignments had been racially imbalanced in the past, the Board's implementation of a state civil rights consent agreement had racially balanced all teaching faculties by the time the second amended complaint was filed. [A. 15-16.]

The district court also inferred segregative intent from the failure to take action "to correct and to prevent the increase in racial imbalance." [A. 50-51.] Although the Columbus Board's recent efforts to promote integration through voluntary methods were "highly commendable," they fell short of providing the degree of racial balance the lower court found to be constitutionally required. [A. 59-60.]

The district court determined there was systemwide liability, stating that the "finding of liability in this case

concerns the Columbus school district as a whole." [A. 73.] In so finding, however, the court did not attempt to compare the present racial composition of the schools with what it would have been in the absence of the specific constitutional violations found in its opinion. In fact, that comparison was found to be unnecessary and impossible by the trial judge. [A. 58.] The Columbus and State Boards were ordered to formulate and submit systemwide desegregation plans. The court directed the defendants to prepare plans which would give each black child "an opportunity for integrated education" and cautioned the defendants about leaving any "racially imbalanced, predominantly white schools" under the plans. [A. 75.]

Three plans were formulated and submitted to the district court pursuant to its March 8 order. On July 29, 1977, the district court rejected all three plans and ordered development of a new plan to comply with five specific "principles" for pupil reassignment. [A. 97.] The district court found the July 8 amended plan constitutionally unacceptable, stating that it "falls far short of providing a reasonable means of remedying the systemwide ills." [A. 100.] The June 10 plan was also found to be constitutionally unacceptable. The State Board's plan was found to be constitutionally acceptable, but was rejected for its educational and logistical shortcomings. [A. 106.] Finally, the Court specifically approved the "numerical face" of the results of an early planning exercise by the Columbus Board's staff which developed school pairings which would result in a racial balance within $\pm 15\%$ of the 32.5% mean black student population in each of the system's school buildings. [A. 107.]

The July 29 decision concluded by ordering that a new plan be developed which would desegregate "the entire Columbus school system." [A. 111.] A new plan was formulated in accordance with the court guidelines and was filed on August 31, 1977. On October 4 the district court

ordered the plan's implementation in September 1978. [A. 125.] The desegregation remedy ordered by the court requires that every school in the system be racially balanced to within $\pm 15\%$ of the system's overall racial composition. Implementation of the remedy will involve the reassignment of over 42,000 children from the neighborhood schools which they currently attend to schools in different geographic areas of the city. These reassignments will involve extensive cross-town transportation of over 37,000 students on 213 buses. In order to accomplish this transportation with available equipment, six different school starting times must be scheduled so that each bus can make an average of three trips each morning and afternoon. The pairing and clustering of elementary schools under the plan requires the alteration of grade structures in nearly every elementary school.

D. The Court of Appeals' Decision

The Court of Appeals affirmed the liability and remedy judgments against the Columbus Board. [A.140.] Referring to the trial court's discussion of the Columbus schools prior to 1954, the court of appeals concluded that a "dual school system" existed as of 1954, and that "under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for 24 years." [A. 160.] With that finding as its predicate, the court of appeals took the view that any action taken by the Board after 1954 which did not eradicate all racial imbalance was unconstitutional. The appellate court held:

"[T]he District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil reassignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if

there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation." [A. 165.]

With respect to the post-1954 actions, the Sixth Circuit, quoting extensively from the lower court's findings on liability, agreed with the analysis and conclusions of the district court. The appellate decision added that the gross data alone, showing that 87 of the 103 new schools opened as "racially identifiable" schools and that 71 of the 87 were still racially identifiable at the time of trial, "requires a very strong inference of intentional segregation." [A. 173.] The court of appeals stated that these "repeated instances" of constructing neighborhood schools which were "racially identifiable" was the equivalent of choosing segregative sites and justified a finding of "unconstitutional systemwide segregation." [A. 173.] The other acts identified in the trial court's decision as unconstitutional (boundary changes, optional areas, discontinuous areas) were characterized as "isolated in the sense that they do not form any systemwide pattern" of segregation. [A. 175.]

The court of appeals found that the district court had correctly imposed a systemwide remedy even in the absence of any attempt to determine incremental segregative effect in the manner directed in *Dayton*. [A. 197.] Instead, the court of appeals was of the opinion that legal presumptions could be used to justify a systemwide statistical racial balance remedy even though the specific constitutional violations cited by the district court were isolated in nature.

REASONS FOR GRANTING THE WRIT

This school desegregation case presents important questions pertaining to the proper legal standards which must be adhered to by federal courts in the determination of constitutional violations and in the fashioning of equi-

able remedial decrees. If the lower courts' interpretation of these legal principles is permitted to stand, any large urban school district in a city with segregated housing patterns may be presumed to be in violation of the equal protection clause and under a constitutional duty to achieve racial balance in each school in the system. The uncontrolled use of legal presumptions in these cases leads inevitably to the imposition of systemwide racial balance remedies because the use of such presumptions has the effect of turning the constitutional prohibition against racially discriminatory action into an affirmative duty to racially balance all schools.

The opinions of the courts below illustrate the need for explicit guidelines from this Court to limit school desegregation remedial orders to the correction of segregation caused by school officials and not that caused by others. The lower federal courts must be instructed that in making the transition from the liability stage to the remedy stage of school desegregation cases, they are not to forsake fact-finding, supported by a reasoned statement of legal principles, in favor of what they may find more fair or socially desirable. However well-intentioned, federal courts have no general jurisdiction in these cases to restructure public education. Under the aegis of constitutional authority and with the improper use of presumptions, the federal courts are doing just that. Large urban school districts are being forced to restructure their entire school systems, to transport students away from their nearby neighborhood schools, and to spend large amounts of scarce resources to implement ambitious racial balance remedies.⁵ This is seen as wasteful by taxpayers, undesirable and threaten-

⁵ In Ohio, many school districts do not even have sufficient resources to continue operations for the remainder of the current school year. The Columbus system now projects an \$8.8 million deficit for 1978, and that it will be forced to close schools by mid-November unless emergency state loans are made available.

ing by parents whose children are forced to participate in these massive relocations, and counterproductive by many educators. This Court should issue a writ of certiorari to correct the substantial legal errors committed by the courts below, and to set forth explicit standards confining the fashioning of equitable remedial decrees to the correction of the demonstrated effects of specific unconstitutional conduct on the part of school officials.

I. THE DECISIONS BELOW ARE IN CONFLICT WITH AND MISAPPLY DECISIONS OF THIS COURT IN FINDING THAT LIABILITY CONCERNS THE SYSTEM AS A WHOLE AND IN IMPOSING A SYSTEMWIDE RACIAL BALANCE REMEDY WITHOUT FIRST DETERMINING INCREMENTAL SEGREGATIVE EFFECT

A. In Failing to Determine Incremental Segregative Effect, the Decisions Below Conflict With the Decisions of this Court in *Dayton*, *Brennan* and *Omaha*

The courts below violated the dictates of this Court's decisions in *Dayton*, *Brennan* and *Omaha* by failing to determine the current incremental segregative effect of the remote and isolated constitutional violations found by the district court, and by failing to tailor a remedy confined to the correction of that effect. Both courts approved the imposition of a systemwide statistical racial balance remedy which goes far beyond the correction of any possible current effect of the limited violations which were found.

Neither the district court, nor the court of appeals, conducted the inquiry which this Court mandated in *Dayton*.

"The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has

long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, *must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.* The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."

Dayton Board of Education v. Brinkman, 433 U.S. at 420. (Emphasis added.)

The lower courts refused to make this mandatory comparison of present racial distribution with the racial distribution that would exist but for the constitutional violations.

An examination of the district court's March 8, 1977 opinion discloses that the court absolutely failed to make any factual inquiry into the incremental segregative effect of constitutional violations found, but rather premised its findings of systemwide liability on a *presumption* that the violations would have a systemwide impact. No attempt was made to find that portion of segregation in the schools which was caused by the defendant school officials as opposed to that portion caused by segregated housing patterns attributable to economics, choice, and discrimination by non-parties in the housing market. Indeed, the trial court specifically found that it was *not* required to make such a comparison:

"The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools would have looked like today with-

out the other's influence. I do not believe such an attempt is required." [A. 58.]

The district court did find, however, that no "reasonable action by the school authorities could have fully cured the evils of residential segregation." [A. 58.] More importantly, it found and concluded that

"It is plainly the case in Columbus that had school officials never engaged in a single segregative act or omission, the system-wide percentage of black students would nevertheless not be accurately reflected in each and every school in the district." [A. 74.]

Notwithstanding these findings and its refusal to determine incremental segregative effect, the district court, relying on legal presumptions, found that liability "concerns the Columbus district as a whole" and imposed a systemwide remedy. [A. 73.] This generalized approach, devoid of fact-finding on incremental effect, was affirmed by the court of appeals.

The district court was required to make the specific factual inquiry mandated by *Dayton*, and thereby to sort out that portion of any current racial segregation caused by school officials from that caused by others. Although perhaps a "difficult task, . . . nonetheless, that is what the Constitution and our cases call for." *Dayton*, 433 U.S. at 420. The district court's finding that not all schools in Columbus would be racially balanced even in the absence of any segregative actions by school officials is inconsistent with its imposition of a systemwide remedy. Since the plaintiffs failed to prove, and the court was unable to find, any current condition of segregation resulting from such actions, no remedy was constitutionally permissible under *Dayton*, *Brennan* and *Omaha*.

The conflict between this Court's decisions and those of the lower courts is further illustrated by the district court's comments concerning the application of *Dayton*,

Brennan and *Omaha* to this case. In its July 7, 1977 order permitting the Board to leave to file an amended desegregation plan, the court stated:

"In my view, the hope that the *Dayton* case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried." [A. 93.]

The court's attempt in that order to distinguish *Dayton* on the premise that a determination of incremental segregative effect was only required in cases of "isolated" violations, and not where there was a finding of "systemwide liability," was in direct conflict with *Brennan* and *Omaha*. In both of those cases, the lower courts had found systemwide liability and had ordered systemwide remedies. Nevertheless, this Court vacated those decisions and remanded the cases with instructions to make the mandatory inquiry into incremental segregative effect.⁶ Thus, the district

⁶ In *Omaha*, the district court had ordered a systemwide desegregation plan in conformity with an earlier decision by the Eighth Circuit, 521 F.2d 530 (8th Cir. 1975), finding extensive constitutional violations which created systemwide liability. 418 F. Supp. 22 (D. Neb. 1976). The plan was affirmed by the court of appeals. 541 F.2d 708 (8th Cir. 1976). Despite the unambiguous finding of the courts below that the violation was "systemwide," this Court vacated the judgments and directed the courts below to conduct the *Dayton* inquiry. 433 U.S. 667.

In *Brennan*, the district court found intentional segregation in the "entire" Milwaukee school system and that Milwaukee officials had operated a "dual" system. *Amos v. Board of Directors*, 408 F. Supp. 765, 821 (E.D. Wis. 1976). The Seventh Circuit affirmed the finding of systemwide liability. *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976). Thereafter, the district court ordered implementation of a systemwide desegregation plan. *Armstrong v. O'Connell*, 427 F. Supp. 1377 (E.D. Wis. 1977). Despite the finding of systemwide violations, this Court vacated and remanded the liability judgments with the direction that the mandatory *Dayton* inquiry be made. 433 U.S. 672.

court's attempt to confine the rule of *Dayton* to the facts of that case was clearly improper. Under *Omaha* and *Brennan*, the district court's finding that "systemwide liability is the law of this case" did not excuse it from making the inquiry into incremental segregative effect. Nor does the court of appeals' single cryptic footnote dismissing the applicability of *Omaha* and *Brennan* justify or explain its refusal to require such an inquiry. [A. 200.]

In his August 11, 1978 decision granting the Columbus Board's stay application, Mr. Justice Rehnquist, after reviewing the decisions below and the July 27, 1978 decision of the Sixth Circuit in the Dayton school desegregation case [A. 219.], stated that these decisions "clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion." [A. 213.]⁷ The Sixth Circuit's approach in the Columbus case "evinced an unduly grudging application of *Dayton*." [A. 213.] Mr. Justice Rehnquist further concluded that in these cases the Sixth Circuit Court of Appeals had

"employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. *Penick v. Columbus Board of Education*, *supra*, slip op. at 36 (July 14, 1978). The Sixth Circuit is apparently of the opinion that presumptions, in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations." [A. 213-214.]

⁷ In *Dayton*, this Court remanded the case directly to the district court for further proceedings. On remand, the district court conducted evidentiary hearings, and on December 15, 1977 rendered a decision dismissing the plaintiffs' complaint. The Sixth Circuit reversed all the findings of fact made by the District Judge as "clearly erroneous," and held that he "misunderstood" this Court's mandate on remand. The court of appeals reinstated the systemwide racial balance remedy. *Brinkman v. Gilligan*, Case No. 78-3060 (6th Cir. July 27, 1978). [A. 219.]

Mr. Justice Rehnquist therefore found the Sixth Circuit's view inconsistent with *Dayton* and worthy of review on certiorari:

"That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 school children, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first." [A. 214.]

We respectfully submit that Mr. Justice Rehnquist's assessment of the proceedings below is correct, and that the Court should therefore grant certiorari in this case.

B. There Must Be Factual Findings and Conclusions of Law on Incremental Segregative Effect Before a Remedy Can Be Fashioned

Dayton, *Brennan* and *Omaha* require that findings of incremental segregative effect be entered *before* a remedy is fashioned. In the present case, there was no evidentiary support or findings upon which the court of appeals, in July, 1978, could make a finding of incremental segregative effect. Instead, it resorted to the use of a legal presumption to find that "school board policies of systemwide application necessarily have systemwide impact." [A. 198.] This after-the-fact attempt to supply some "findings" to support the lower court's October 4 systemwide remedy order was improper.

Petitioners respectfully submit that the Sixth Circuit's purported effort at making a determination of incremental segregative effect from the record which was before it was, in fact, a rather transparent attempt to avoid the clear conflict of the trial court's systemwide liability and remedy judgments with the decisions of this Court in *Dayton*,

Brennan and Omaha.⁸ Although the court of appeals purported to apply *Dayton* to this record, the opinion discloses no attempt to make the required inquiry into "the racial distribution of the [Columbus] school population as presently constituted" as "compared to what it would have been" in the absence of the school board actions which the district court found to be constitutional violations. *Dayton*, 433 U.S. at 420. In fact, it would have been impossible for the court to make that comparison on the basis of the record before it. The trial court's only relevant finding on this issue was that even in the absence of any segregative acts, "the systemwide percentage of black students would nevertheless not be accurately reflected in each and every school in the district." [A. 74.] Yet, such racial balance is precisely what the systemwide remedy approved by the court of appeals requires.

Petitioners do not lightly suggest that the Sixth Circuit is disregarding the recent decisions of this Court. However, its decision in this case, especially when read in conjunction with its July 27, 1978 ruling in the *Dayton* school desegregation case, demonstrates that the Sixth Circuit has adopted an approach to the adjudication of school desegregation cases which conflicts with *Dayton*, *Brennan and Omaha*.

⁸ The appellate court's attempt to make the necessary "complex factual determination" (*Dayton* at 420) was clearly outside the proper scope of appellate review. If it felt that the trial court failed to make adequate findings under Rule 52, Fed. R. Civ. P., it should not have attempted to make these findings itself, but should have reversed, or vacated the judgment and remanded the case for additional findings by the trial court. *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); 5A Moore, *Federal Practice*, ¶¶ 52.06[2], 52.11[4]; 9 Wright & Miller, *Federal Practice and Procedure: Civil*, § 2577 (1971). Civil rights cases do not present an exception to this general rule. See, e.g., *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975); *Davis v. Board of School Commissioners*, 422 F.2d 1139 (5th Cir. 1970).

C. The Lower Courts Presumed a Causal Connection Between Remote and Isolated Acts and the Current Racial Imbalance in the School System

Where there is no history of statutorily mandated segregation, it is incumbent upon the plaintiffs to adduce proof of causal connection between racially imbalanced schools and intentionally discriminatory actions by school officials:

"[I]n the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action."

Keyes v. School District No. 1, 413 U.S. 189, 198 (1973).

This requirement was reaffirmed and elaborated upon in *Dayton*, which defined the causation standard in terms of the demonstrated current incremental segregative effect of intentionally discriminatory action. Lower federal courts are required to make findings, supported by factual proof, of a causal relationship between alleged discriminatory acts and the racial composition of schools, and to specifically quantify that effect. Despite this, the courts below substituted legal presumptions for a detailed factual inquiry into cause and effect, thus permitting the imposition of a systemwide remedy in the absence of factual proof of a systemwide effect.

The lower courts' abandonment of the causation requirement is most apparent from the trial court's liability opinion. First, the district court based its liability findings to a great extent upon actions by predecessor boards of education dating back to 1871, which the court found to have created, by 1943, an "enclave" of five predominantly black schools on the near east side of the city. Even if it is assumed that these acts were intentionally discriminatory, however, there was no attempt by the plaintiffs to prove,

or the district court to find, a causal connection between these acts and the current existence of racially imbalanced schools. Instead, relying on a "fruit of the poisonous tree" theory, the court concluded that these acts were responsible for or tainted the contemporary school system. It was just such a theory which this Court rejected in *Dayton*, 433 U.S. at 417. Second, while the court identified the immediate impact on the racial composition of schools involved in the isolated post-1954 violations, it again made no effort to determine whether these effects continued to the date of trial. Finally, although the trial court acknowledged that a "myriad" of other factors were responsible for residential racial imbalance, it found it was not required to attempt to separate their effects from those attributable to actions by school officials. [A. 58.]⁹

Consequently, it is apparent that the courts below abandoned the requirement set forth in *Keyes* and *Dayton*, that plaintiffs must prove a cause and effect relationship between acts found to be intentionally discriminatory and a current condition of racially imbalanced schools. In substitution therefor, the lower courts employed legal pre-

⁹ In fact, the record contained ample evidence of intervening events and circumstances which were acknowledged as the cause of the residential racial imbalance in Columbus, the principal cause of racially imbalanced schools. These factors included demographic trends, economics, personal choice, and discrimination by non-parties. Within the category of discrimination by non-parties were: (1) racially motivated site selection and assignment policies of public housing authorities; (2) racially motivated site selection, financing, sale and rental policies of FHA and VA; (3) racially motivated site selection, relocation and redevelopment policies of urban renewal programs; (4) zoning and annexation policies; (5) restrictive covenants; (6) policies of financial institutions that discourage prospective developers of racially integrated private housing; (7) policies of financial institutions that allocate mortgage funds and rehabilitation loans to blacks only if they live in black areas; (8) practices of the real estate industry such as limiting the access of black brokers to realty

assumptions to arrive at a judgment of systemwide liability and systemwide remedy. This Court should grant certiorari to review this departure from its decisions.

D. The Statistical Racial Balance Remedy is in Conflict with *Swann*

This Court has consistently disapproved of any desegregation plan which requires statistical racial balance in every school. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-24 (1971); *Milliken v. Bradley*, 418 U.S. 717, 740-741 (1974); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976). In *Dayton*, the Court reaffirmed its consistent position that the Constitution does not command that schools be racially balanced. 433 U.S. at 417.

Although careful not to say so explicitly, the district court's July 29 order required development of a systemwide desegregation plan which would racially balance the enrollment of all schools in the system to within $\pm 15\%$ of the systemwide black student enrollment, thus eliminating all "racially identifiable" schools in the system

associations and multiple-listing services, refusal by white realtors to co-broker on transactions that would foster racial integration, block-busting and panic selling, racially identifying vacancies overtly or by nominal codes, steering, and penalizing brokers who attempt to facilitate racial integration; and (9) racially discriminatory practices by individual homeowners and landlords.

In view of the district court's findings concerning the impact of residential racial imbalance on the racial composition of schools, it is apparent that the courts below sought to use the vehicle of this litigation to correct the effects of residential segregation, discrimination by non-parties, and socio-economic stratification. While such an objective may be laudable as a matter of social policy, it is clearly beyond the scope of a federal court's remedial jurisdiction in this type of case. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-23 (1971).

under the court's definition.¹⁰ [A. 97.] The plan ultimately ordered by the court accomplishes that objective. [A. 125.] Although the Columbus Board strenuously objected to the requirement that each school be racially balanced within a $\pm 15\%$ range or target, these objections were not addressed by the court of appeals. The Court should review this case to make it clear that such use of statistical racial ratios is not constitutionally permissible under *Swann*.

II. THE DECISIONS BELOW CONFLICT WITH AND MISAPPLY DECISIONS OF THIS COURT AND HIGHLIGHT A CONFLICT AMONG THE CIRCUITS CONCERNING THE MANNER IN WHICH DISCRIMINATORY INTENT OR PURPOSE MAY BE PROVEN

The lower courts adopted a legal rule which effectively dilutes the requirement of proof of invidious discrimination as an element of a violation of the equal protection clause. By drawing an inference of segregative

¹⁰ The district court adopted the following definition of racially identifiable schools:

"The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools."

[A. 78.]

The "range" adopted by the court was $\pm 15\%$ from the 32.5% black student enrollment in the system. Thus, under the court's approach, a school is racially balanced only if it has a black enrollment of between 17.5% and 47.5%.

intent from the mere continuance of a neighborhood school system and the construction of new schools in racially imbalanced neighborhoods, the lower courts misapplied decisions of this Court. Under the lower courts' opinions, any school system which employs a neighborhood assignment policy in an urban area with residential racial imbalance will be presumed to be in violation of the Constitution.

A. The Courts Below Inferred Segregative Intent From the Mere Continuance of the Neighborhood School System

Although the district court explicitly recognized the worth of the neighborhood school policy and the benefits derived from such a policy [A. 55], the Columbus Board's continuance of a neighborhood school policy since before 1900 was inexplicably found to be evidence of segregative intent.¹¹ The district court's inference of segregative intent from adherence to the neighborhood school policy is apparent from a question posed and answered in its opinion:

"If a board of education assigns students to schools near their homes pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists?" [A. 48.]

¹¹ The neighborhood school policy has a statutory foundation in Ohio. The Sixth Circuit has interpreted Ohio Revised Code § 3313.48 to compel Ohio boards of education to follow a neighborhood school policy. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

The United States Congress has enacted a statute declaring the neighborhood to be the "appropriate basis for determining public school assignments." 20 U.S.C. § 1701(a)(2).

After stating that "a majority of the United States Supreme Court has not directly answered this question regarding non-racially motivated inaction," the district court answered the posed question in the affirmative. [A. 48-49.] The court of appeals approved, adding that mere proof of construction of 103 neighborhood schools between 1950 and 1975, 87 of which opened "racially identifiable," required "a very strong inference of intentional segregation." [A. 173.]

This Court has not yet directly confronted the question of whether segregative intent can be inferred from adherence to a neighborhood school policy in a school system which is residentially imbalanced. In *Keyes*, the Court specifically reserved the question

"whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation."

Keyes, 413 U.S. at 212.

Subsequent decisions, however, require that this question be answered in the negative. In *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Austin Independent School District v. United States*, 429 U.S. 990 (1976), and *Dayton*, the Court explicitly required proof of discriminatory motive, and not merely proof of a racially disproportionate impact.

Particularly in *Austin* and *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the Court has indicated its negative answer to the question reserved in *Keyes*. In *Austin*, the Court vacated and remanded, in light of *Washington v. Davis*, a judgment of the Fifth Circuit which had relied on the foreseeable effect concept in drawing an inference of segregative intent from mere

adherence to a neighborhood school policy.¹² In the *Pasadena* case, the Court held that school systems were not constitutionally required to reassign students to overcome racial imbalance attributable to demographic patterns. 427 U.S. at 436.

In this case the courts below have answered the question reserved in *Keyes* in a manner which is inconsistent with this Court's subsequent decisions. Since it is an acknowledged fact that residential racial imbalance is a characteristic of nearly all urban areas of this country, if the standards announced below are allowed to stand, no urban school system in this country can adopt a neighborhood school policy without being presumed to be in violation of the equal protection clause. This Court should therefore grant certiorari to answer the question whether neighborhood school systems are *per se* unconstitutional.

B. The Lower Courts' Adoption of a Foreseeable Effects Standard of Liability is in Conflict with *Washington v. Davis*.

As early as its decision in *Keyes*, this Court made it clear that proof of intent or purpose to segregate was an essential element of a violation of the equal protection clause. The Court's subsequent decisions in *Washington v. Davis*, *Arlington Heights* and *Dayton* reaffirmed and

¹² The Fifth Circuit had held:

"[S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent."

United States v. Texas Education Agency, 532 F.2d 380, 392 (5th Cir. 1976).

Mr. Justice Powell's concurring opinion in *Austin* cited this holding as contrary to *Washington v. Davis*.

elaborated upon that rule. Nonetheless, ever since *Keyes* was decided, the lower federal courts have adopted conflicting interpretations of the intent requirement. The interpretations adopted in this case are in conflict with this Court's decisions and serve to highlight a conflict among the circuits.

Although acknowledging the requirement of proof of segregative intent, the lower courts adopted a foreseeable effects standard of proof which excused the plaintiffs of any burden of proof on intent. This was done in two basic ways. First, if the school board took a specific action with knowledge or reason to know that a collateral effect of the action (whether desired or not) was to maintain or increase racial imbalance, the court drew an inference of segregative intent.¹³ Under this approach, the Columbus Board's neighborhood school policy was *per se* unconstitutional.

Second, whenever the Board was presented with two alternative courses of action, one with an integrative effect and one with the effect of maintaining or increasing racial imbalance, the failure to choose the integrative alternative, regardless of the preponderance of other factors weighing in favor of the less integrative alternative, was taken as evidence of segregative intent. Thus, a decision not to alter the grade structures and to pair two elementary schools, regardless of non-racial justifications, was condemned as segregative because it did not improve racial balance. [A. 35-42.] The court felt "constrained" to draw an inference

¹³ This formulation is similar to the tort concept of intent, and was expressed by the district court in the following terms:

"The intent contemplated as necessary proof can best be described as it is usually described—intent embodies the expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions." [A. 44-45.]

of segregative intent from the failure "after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance." [A. 19-20.]

The employment of these inferences by the courts below amounted to the adoption of an "effect" standard—that an act would be presumed to be intentionally discriminatory if it had a racially disproportionate impact. The only apparent qualification to the "effect" test which these courts adopted was to engraft onto it a requirement that the actor must know or have reason to know that the effect might result.

In *Washington v. Davis*, the Court held that official action that has a racially disproportionate impact does not violate the equal protection clause unless it is also discriminatorily motivated. Although the Court did not elaborate upon the manner in which such a motive must be proven, it did reject the practice of inferring such an intent or motive from the impact of governmental action in the absence of other relevant facts from which such an intent or motive could be inferred. 426 U.S. at 242.

The conflict between a "foreseeable effect" standard and this Court's decision in *Washington v. Davis* became apparent almost immediately in *Austin*, where the Court vacated and remanded a lower court decision which had employed a "foreseeable effect" test for reconsideration in light of *Washington v. Davis*. Justice Powell's concurring opinion noted that the Fifth Circuit had erred by imputing segregative intent to school officials by drawing an inference from the foreseeable effect of official action.

In *Village of Arlington Heights*, the Court elaborated on its holding in *Washington v. Davis* and established the manner in which discriminatory intent or purpose must be proven. The Court held that a plaintiff claiming that government action was discriminatory had the burden of proving that discrimination was "a motivating factor." Impact alone is not sufficient to prove this except in the

rare case where it is so stark that the decision would be "unexplainable on grounds other than race."¹⁴ 429 U.S. at 266. Otherwise, as in this school desegregation case, the plaintiff must introduce other evidence which is probative of discriminatory motivation, such as a connection with another invidiously discriminatory decision, a departure from normal procedures in making the decision, a sudden willingness to disregard factors ordinarily considered important, or incriminating statements of decision-makers. 429 U.S. at 266-268.

In the instant case, the district court did not require the plaintiffs to prove that racial discrimination was "a motivating factor" in decisions of the Columbus Board. In adopting the "foreseeable effect" test, therefore, the district court and court of appeals violated the dictates of *Washington v. Davis*, *Austin*, and *Village of Arlington Heights*.¹⁵

¹⁴ For examples of such cases, see, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). As stated in *Washington v. Davis*, such proof may be appropriate in cases where the selection of jurors is challenged on constitutional grounds. *Washington v. Davis*, 426 U.S. at 242. The Court subsequently applied this relaxed standard of proof in *Castenada v. Partida*, 430 U.S. 482 (1977), where the Court relied almost entirely on disproportionate impact in holding that a Texas county had discriminated in its selection of grand jurors. As *Austin*, *Dayton*, *Brennan*, and *Omaha* indicate, this relaxed standard would normally not apply in a school desegregation case.

¹⁵ At least one commentator has recognized that the two intent formulations adopted by the lower courts in this case are improper under *Washington v. Davis* and *Arlington Heights*:

"Some courts and commentators thought that the tort law intent standard — that an actor, here the decisionmaker, intends the probable, natural, or foreseeable consequences of his decision — applied in the equal protection context. [Citation omitted.] Since the village was probably aware of the consequences of its refusal to rezone, *Arlington Heights* seems to preclude this interpretation. In any event, it would gener-

The error was compounded by treating the foreseeable effects standard as a legal presumption which shifted to the defendants the burden of proving that their acts were not discriminatorily motivated. However, *Washington v. Davis*, *Arlington Heights* and *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), indicate that the use of the foreseeability test to shift the burden of proof on this issue is improper and that the district court should have maintained the burden of proof on the plaintiffs until they proved that discrimination was "a motivating factor" in the Columbus Board's decisions.

C. The Decisions Below Highlight a Conflict Among the Circuits as to Whether an Act Can be Presumed to be Motivated by Discriminatory Intent Simply Because its Disproportionate Impact is Foreseeable.

In addition to the Sixth Circuit, the Second, Fifth and Eighth Circuits have held that mere proof of the foreseeable effect of official action, rather than the presence of racial motivation, satisfies the segregative intent requirement of *Keyes* in school desegregation cases. See *Hart v. Community School Board*, 512 F.2d 37 (2d Cir. 1975); *United States v. Texas Education Agency*, 564 F.2d 162 (5th Cir. 1977); and *United States v. School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

ally amount to the impact test rejected by *Washington v. Davis* . . ."

"Other commentators have suggested that a decisionmaker would violate the intent standard of *Washington v. Davis* if it chose a more segregative measure over an alternative that served its purpose equally well . . . [T]he propriety [of such a standard] is questionable. And *Arlington Heights* seemed to preclude this interpretation of *Washington v. Davis* as well."

The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 166-67 n. 33 (1977).

The Ninth Circuit has rejected the foreseeable effect test. See, *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973), cert. denied, 416 U.S. 951 (1974).

This conflict among the circuits was discussed in the district court's liability opinion and was described as follows:

"The difference, if any, between the Second Circuit's approach to the standard of liability and that of the Ninth Circuit appears to be that the Second Circuit would affirm a finding of liability based upon proof of affirmative intentional acts and omissions after notice which foreseeably result in segregation even in the absence of a desire to segregate. The Ninth Circuit would appear to require proof of a deliberate policy of segregation, but would permit this requirement to be met by the drawing of reasonable inferences from evidence of defendants intentional acts and omissions." [A. 47-48, n.3.]

Noting, however, that the law of the Sixth Circuit governed this case, the district court adopted the foreseeable effect test set forth in the Sixth Circuit's decision in *Oliver v. Kalamazoo Board of Education*, 508 F.2d 178 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975), which, in turn, had approved the approach of the Second Circuit in *Hart*. Thus, liability was imposed even in the "absence of a desire to segregate." This conflict of decisions should be resolved by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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Dated: October 11, 1978

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In The
Supreme Court of the United States

October Term, 1978

No. _____

78-610

COLUMBUS BOARD OF EDUCATION,
Paul Langdon, M. Steven Boley,
Virginia Prentice, Marilyn Redden,
and William Moss, its individual Members,
and Dr. Joseph L. Davis, Superintendent
of the Columbus Public Schools,

Petitioners,

vs.

GARY L. PENICK, et al.,

Respondents.

**APPENDIX TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Gary L. Penick, et al.,

Plaintiffs,

v.

Columbus Board of Education, et al.,

Defendants.

Civil Action

No. C-2-73-248

(Filed March 8, 1977)

O P I N I O N A N D O R D E R

DUNCAN, District Judge. This matter is before the Court following trial on the issue of liability. The Court sets forth hereinbelow its findings of fact and conclusions of law, in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. INTRODUCTION

A. OPENING STATEMENT

The Court has listened to and then carefully examined the evidence in this most important case. After having considered the evidence and applied what I understand to be the law of the United States, I conclude that plaintiffs are entitled to judgment. It is the duty of the Court to set forth the reasons for arriving at that conclusion. In doing so, it is of the utmost importance that all concerned citizens are able to understand this decision clearly. I am well aware that many people are unfamiliar with and distressed by the law of the land which requires that school desegregation decisions, involving the education of our precious children, must often

be made by a single judge rather than other governmental officials or the voters. Moreover, the language that the Court and lawyers traditionally use to communicate the reasons for our decisions is often unfamiliar and mysterious to those not trained in the law. In the writing that follows, the Court will strive to avoid language that may not be clear to all who choose to read this decision.

On the other hand, the Court cannot evade its responsibility to counsel in this case who have worked long, hard and sincerely in behalf of their clients. The legal authorities and precedents upon which the Court relies must be communicated to the lawyers. To facilitate a reading and understanding of this opinion, the Court has prepared an appendix containing a glossary of terms and a few maps.

The pages that follow contain a discussion of the evidence presented during the trial of this case, and an application of the law of the United States to that evidence. The Court will endeavor to describe the posture of the Columbus public schools at time of trial, and to examine how it came about. The complexity and the sheer volume of the evidence presented in this case have delayed this opinion long past the point at which the Court would have preferred to have rendered a decision. This delay in reaching a decision should not be construed to reflect a hesitancy on the part of the Court in determining the basic result required by the evidence and the law. I am firmly convinced that the evidence clearly and convincingly weighs in favor of the plaintiffs.

Since 1954, when the United States Supreme Court decided the now famous case *Brown v. Board of Education* ("Brown I"), 347 U.S. 483, our citizens, parents, children, school officials, other local public officials, congressmen, presidents of the United States, and judges have to some degree or other grappled with the effect that this case and those cases that follow it have had upon a system of education that has been a significant contributor to the enormous progress of this nation.

Cases have arisen in the South and now the North, in rural as well as urban school districts, in Cincinnati, Cleveland, Dayton and now Columbus. A school desegregation problem is one we could all do better without, but there is no denying that it is just that — a problem for our community — a problem that simply won't go away if left alone. Although I have mentioned such problems in other areas of the country and Ohio, this case is unique; there are some identifiable similarities, but there are also marked differences. This fact is mentioned only to relate that this decision is based on those facts brought out in this trial and no others.

As mentioned above, I am sure there are those who earnestly believe that matters such as this should not be the subject of court decisions. Plaintiffs have claimed that they and the class of persons whom they represent have been denied the equal protection of the laws by defendants — thus, a constitutional issue is presented to the Court. Counsel for the Columbus defendants and for the State of Ohio defendants do not dispute the Court's jurisdiction. However, as I view it, the real reason that courts are in the school desegregation business is the failure of other governmental entities to confront and produce answers to the many problems in this area pursuant to the law of the United States. This Court is quick to admit that the litigation model is not the most efficient way to solve problems of far-reaching social impact, but our courts must always protect the constitutional rights of all our citizens.

Therefore, this Court in this case has done its best to find the facts and make reasonable conclusions. If my conclusions are in error, the error will be easy for those who review to discern. It is my duty as a judge of this Court to follow the law — and likewise it now is the duty of the citizens of this community to follow this decision so long as it is the law.

B. PROCEDURAL HISTORY OF THIS CASE

The Court has jurisdiction of the issues pursuant to 28 U.S.C. §§ 1331(a) and 1343(3) and (4). The civil rights claimed to have been violated are those secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties at the trial of this case are as follows and will be so identified in these findings and conclusions:

Intervening Plaintiffs. The intervening plaintiffs are 11 students attending schools in the Columbus Public Schools and their parents, representing a class of persons similarly situated. This plaintiff group was permitted to intervene in March, 1975. It is represented by counsel associated with the national office of the National Association for the Advancement of Colored People, one of whom was designated as lead counsel for all plaintiffs by order of the Court. The intervening plaintiffs are sometimes also referred to herein as the "intervenor" or the "plaintiffs."

Original Plaintiffs. The original plaintiffs are 14 students in the Columbus Public Schools and their parents, representing a class of persons similarly situated. This action was originally filed on behalf of these students and parents. Following the intervention and the designation of lead counsel, the original plaintiffs and their counsel presented evidence at trial on certain issues that they believed were not included within the case presented by the intervening plaintiffs.

Columbus Defendants. The Columbus Board of Education, its seven elected members, and Dr. John Ellis, Superintendent of the Columbus Public Schools, are collectively referred to herein as the Columbus defendants.

State Defendants. The State Board of Education, State Superintendent of Public Instruction Dr. Martin Essex, Governor James A. Rhodes, and Attorney General William J. Brown are also named defendants. For ease of reference the "State defendants" will refer to all four of these defendants.

The case was filed on June 21, 1973, by Gary L. Penick and 13 other named children (or their parents) who are students in the Columbus school system. These plaintiffs claimed that \$9.5 million dollars earmarked for school construction had to be expended in such a manner as to require the Columbus defendants to carry out affirmative action to guarantee integrated educational experiences. Looking to the Board's resolutions germane to the bond issue from which the construction funds were generated, plaintiffs alleged that those resolutions, the United States Constitution, and a claimed Board reluctance to abide the requirements of its resolutions in their construction planning processes entitled plaintiffs to declaratory and other equitable relief.

On October 9, 1973, the original plaintiffs moved for a preliminary injunction to stop the construction program. The motion was heard by Judge Carl B. Rubin of this Court on April 15 and 17, 1974. At the time of the hearing, only the original plaintiffs and the Columbus defendants were parties, the Court having previously dismissed the State defendants upon the plaintiffs' own motion. After presenting evidence but before resting, the plaintiffs moved to withdraw their motion and sought leave to file an amended complaint. The Court permitted the withdrawal and amendment.

The original plaintiffs filed their amended complaint on July 19, 1974, renaming the State defendants and adding the Franklin County Recorder as a defendant. A second amended complaint was filed on October 22, 1974.

The second amended complaint was styled as a class action. It alleged that the Columbus defendants had intentionally segregated the public schools by creating and maintaining a neighborhood school policy notwithstanding a segregated housing pattern in the city. The new school construction program was claimed to further segregation. The original plaintiffs also claimed that the Columbus defendants had segregated the schools by using optional attendance areas, by segregating

teachers and principals, by failing to desegregate, and by conspiring with the County Recorder to violate the Fair Housing Law of 1968. The State defendants were alleged to be liable for failing to bring about the desegregation of the Columbus schools. The plaintiffs sought an order requiring desegregation of the Columbus Public Schools.

The motion to intervene was filed on February 5, 1975, by NAACP lawyers on behalf of 11 students in the Columbus Public Schools. The applicants for intervention sought permission to file their complaint in intervention, to have the case certified as a class action, and to have them designated as representatives of the class. The complaint in intervention named the Columbus and State defendants, as well as the Franklin County Recorder, who was subsequently dismissed. The complaint in intervention was essentially the same as the second amended complaint. The intervening plaintiffs sought an order requiring the defendants to develop and implement a "system-wide" plan of desegregation.

Although the intervenors sought to represent the same class as the original plaintiffs, the Court granted intervention under Rule 24 of the Federal Rules of Civil Procedure on March 10, 1975. Following a status conference with all counsel, the Court designated one of the attorneys for the intervenors as lead counsel for all plaintiffs.

The trial commenced on April 19, 1976, and was completed on June 17, 1976, after 36 trial days. The record is extensive. Over 70 witnesses were heard and over 600 exhibits were admitted. The trial transcript is in excess of 6600 pages. The Court heard the closing arguments of counsel on September 3, 1976.

II. PRE-1954 HISTORY OF THE COLUMBUS PUBLIC SCHOOLS

As a necessary starting point, a backward look at the Columbus school district from May 17, 1954, when the Supreme Court of the United States decided the case *Brown v. Board of Education* ("Brown I"), 347 U.S. 483, is required. It is essential that one know the 1954 racial picture of the system — whether it was unitary (no unlawful racial segregation) or dual (unlawful racial separation), and how it became what it was.

This visit with the history of the system is neither for the purpose of dragging out skeletons of the past nor a vindictive finger-pointing exercise. In many respects litigation in court is a matter of hindsight. Perhaps given the present requirements of law, some public officials might have pursued their duties differently — perhaps others would not have. However, this look to the past must be made to discover whether past acts or omissions are in any degree responsible for the admitted current racial imbalance in the Columbus schools.

Prior to 1871, the evidence indicates not only a complete separation of the races in the Columbus school system, but also repeated demands by black citizens for adequate schools for black children.¹

In 1871 the Supreme Court of Ohio decided the case *The State ex rel. Carnes v. McCann*, 21 Ohio St. 198. In that case, a black parent challenged an Ohio statute which "authorized and required" all the boards of education in the state "to establish, within their respective jurisdictions, one or more separate schools for colored children, when the whole number, by enumeration, exceeds twenty" The statute is quoted in the Supreme Court's opinion, 21 Ohio St. at 206. Recognizing

¹ See, e.g., *Early Black History in the Columbus Public Schools*, by Myron T. Seifert, historian for the Columbus Public Schools, admitted at trial as plaintiffs' exhibit 351.

that blacks in the post-Civil War era were entitled to protection under the Fourteenth Amendment to the United States Constitution, the Supreme Court of Ohio nevertheless held that the statute providing for separate schools for black children affronted neither the United States nor the Ohio Constitution. Thereafter, in 1878, the General Assembly of Ohio enacted House Bill No. 105, 75 Ohio L. 513, which provided that "where in their judgment it may be for the advantage of the district to do so, [local boards of education] may organize separate schools for colored children" This statute in turn was repealed in 1887, 84 Ohio L. 34. In passing on the state of the law effective in 1888, the Supreme Court of Ohio held that Boards of Education could not maintain separate schools for black and white students. *Board of Education v. The State*, 45 Ohio St. 555 (1888).

It was 1878 before the first black person graduated from high school in Columbus. In that year all black children attended Loving School at the corner of Long and Third Streets, many passing closer white schools en route. In 1879 a very few blacks attended Second Avenue, Douglas and East Friend schools. However, with only these few exceptions, blacks attended Loving School.

In 1881 by resolution the Columbus Board abolished separate schools for black children. Children were assigned to attend school in districts where they dwelt. Miss Celia Davis, a black woman, taught at the racially mixed Medary school in 1897. Several other blacks taught in mixed schools during the period 1900-1907.

The Columbus Board of Education caused the Champion Avenue School to be built in 1909. The school, located in a predominantly black residential district, was staffed with all black teachers. In August, 1909, Charles W. Smith, a black parent, sued the Columbus Board of Education in the Common Pleas Court of Franklin County, alleging that the Board's action establishing Champion as a black school was illegal

under Ohio law. The Court of Common Pleas heard evidence, and on March 11, 1911, dismissed the case. Mr. Smith appealed the dismissal, and on December 31, 1912, the Circuit Court of Franklin County in Case No. 3094 affirmed the trial court's action. On January 6, 1913, Dr. William O. Thompson, one of the members of the Columbus Board of Education, reported to the Board that the Circuit Court had "affirmed the opinion of Judge Rogers, and further held that the creation of a school district is a matter of the discretion of the Board of Education, and not a subject for judicial determination, and dismissed the appeal." Apparently the trend earlier established toward integration then halted in Columbus.

During the 1920's and early 1930's Champion remained a school populated by black students with predominantly black faculty, and a black principal. Although some secondary and elementary schools were attended by both races, all of the black teachers employed in the system were at Champion.

In 1938 Pilgrim Junior High, which had been a racially mixed school, was converted to an elementary school. Champion's then all-black elementary faculty was transferred to Pilgrim, and Champion became a junior high school with a black faculty and black students. The school attendance areas were gerrymandered so that white students who lived very near Pilgrim School were permitted to attend Fair Avenue School, which was considerably more distant from their houses on Greenway and Taylor Avenues. White children who lived on those streets had attended Pilgrim before it was converted to an elementary school for black children.

In 1941 all black teachers in the system were employed at Mt. Vernon, Garfield, Pilgrim or Champion Schools, all predominantly black schools. By 1943 five schools were attended almost exclusively by black children, and the faculties of each were composed entirely of black teachers. In September of that year the entire professional staff of Felton School, composed of 13 teachers and a principal, was removed and re-

placed with 14 black persons. The same kind of 100% white to 100% black faculty transfer had occurred at the Mt. Vernon and Garfield schools in prior years. In September, 1943, the Vanguard League, a civil rights organization, complained to the Columbus Board about gerrymandering as follows:

A more striking example of such gerry-mandering is Taylor and Woodland Avenues between Long Street and Greenway. Here we find the school districts skipping about as capriciously as a young child at play. The west side of Taylor Avenue (colored residents) is in Pilgrim elementary district and Champion for Junior High. The east side of Taylor (white families) is in Fair Avenue elementary district and Franklin for Junior High.

Both sides of Woodland Avenue between Long and Greenway are occupied by white families and are, therefore, in the Fair Avenue-Franklin district. Both sides of this same street between 340 and 500 are occupied by colored families and are in the Pilgrim-Champion, or "colored" school, district. White families occupy the residences between 500 and 940, and, as would be expected, the "white" school district of Shepard-Franklin applies.

When *Brown I* was decided in 1954, there were no black high school principals in Columbus. All black administrators were assigned to predominantly black schools. There were no white principals in predominantly black schools. Under the policy and practice of the Columbus defendants' predecessors, black student teachers were required to do their student teaching at predominantly black schools.

Giving full recognition to substantial racial mixing of both students and faculty in some schools, the Columbus school system cannot reasonably be said to have been a racially neutral system on May 17, 1954. The then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had

originally intentionally caused and later perpetuated the racial isolation, in the east area of the district, of black children and faculty at Champion, Mt. Vernon, Garfield, Felton and Pilgrim. Thus, the Columbus Board of Education maintained what amounted to an enclave of separate, black schools on the near-east side of Columbus, thereby depriving hundreds of black children an opportunity for an integrated educational experience. Defendants do not appear to assert that these results were an accommodation to the neighborhood school concept.

In the Court's view, in 1954 the Columbus defendants' predecessors had caused some black children to be educated in schools that were predominantly white; however, the Board also deliberately caused at least five schools to be overwhelmingly black schools, while drawing some attendance zones to allow white students to avoid these black schools. This separateness cannot be said to have been the result of racially neutral official acts. As a result, in 1954 there was not a unitary school system in Columbus.

Over 20 years passed between the decision in *Brown I* and the filing of the second amended complaint in this case. It is necessary now to examine the actions and omissions of the Columbus Board of Education during these decades.

III. POST-1954 HISTORY OF THE COLUMBUS PUBLIC SCHOOLS

A. AN OVERVIEW

I agree with the Columbus defendants that "it would be impossible to properly consider the record without beginning with a review of the tremendous growth that has characterized the entire community of Columbus, Ohio, and the Columbus Public School System in particular, over the past 25 years." From 1950 to 1960 the population of Columbus increased by 95,000 persons while the city more than doubled its land area; in the 1960's, with an aggressive annexation policy, the popu-

lation increased by over 68,000 persons. The following table illustrates the population growth since 1940:

Columbus, Ohio
Population
1940-1970

Census Year	Total Population	Increase Since Prior Census	Increase Since Prior Census
1940	303,087	15,523	5.3%
1950	375,901	69,814	22.8%
1960	471,316	95,414	25.4%
1970	539,677	68,361	14.5%

Columbus grew from about 40 square miles in 1950 to over 173 square miles in 1975 as a result of 466 separate annexations. Concomitant with the increase in population and land area was a marked rise in the population of the Columbus Public Schools. The enrollment increased from 46,352 in 1950-51 to 83,631 in 1960-61. The growth continued in the 1960's, reaching over 110,000 by the end of the decade. After attaining a high of 110,725, the total declined to 95,998 in 1975-76. Obviously the rapid growth demanded new school facilities and placed pressures upon the school officials seeking to provide quality school facilities for the expanding enrollments in a continually enlarging geographical area.

A closer view of the nature of the population growth shows the dramatic increase of black Columbus residents. In 1940, 11.7% of the population was black. During the next 30 years, the black population almost tripled; in 1970, 18.5% of the total population was black. This growth was reflected in the composition of the public school population. In 1970, 29% of the enrollment was black, as compared to the city's overall 18.5% black population.

It is clearly apparent to the Court that there is residential segregation in Columbus. On this point, plaintiffs and the Columbus defendants are in agreement. In 1970, 71% of all blacks lived within 23 contiguous census tracts. Although census base maps received in evidence at trial give some aid in the identification of the racial composition of particular census tracts, one cannot view them as accurately descriptive of the racial characteristics of any tract in any years intervening the compilation of census data. This is particularly so in those cases where maps were color-coded reflecting racial composition without reference to the density of the total population. There are instances of large color-coded areas where few people live. For example, the Columbus State Hospital's assigned color code is of graphic significance but concerns an area of low population density.

The census base maps, however, do provide a reasonable basis for my finding that from 1950 through 1970, the heaviest concentration of black residents of Columbus has been in contiguous areas which have spread from the central area of the city to the east, northeast, and to a lesser degree to the southeast.

It is true that the Columbus Board of Education had to be seriously concerned not only with accommodating the increase in the numbers of children to be educated, but also with upgrading and expanding its educational program. Improvements and programs, such as reduced class size, library learning centers, and special and vocational education, all reduced school capacity or required entirely new facilities. Actually, in 1949 the Columbus school plant was inadequate even for the 44,531 students then enrolled.

In 1950, pursuant to a request of the then Columbus school superintendent, the Bureau of Educational Research at The Ohio State University began a comprehensive, scientific and objective analysis of the school plant needs of the school system. The Bureau studied and reported on community growth char-

acteristics, educational programs, enrollment projections, the system's plan of organization, the existing plant, and the financial ability of the community to pay for new school facilities. Thereafter, a number of general and specific recommendations were made to the Columbus Board by the Bureau. The recommendations included the size and location of new school sites as well as additions to existing sites. The recommendations were conceived to accommodate the so-called "community or neighborhood school concept." The 1950 concept was related to a distance criteria grounded on walking distance to schools as follows: $\frac{3}{4}$ mile for elementary, $1\frac{1}{4}$ miles for junior high and 2 miles for senior high students.

The Board of Education adopted and relied upon the Bureau's recommendations in proposing and encouraging the passage of bond issues in 1951, 1953, 1956, 1959 and 1964. School construction of new facilities and additions to existing structures were accomplished in substantial conformity with the Bureau's periodic studies and recommendations.

The rapid growth of Columbus also demanded a larger professional staff to serve the city's schools. The numbers of black professionals employed by the Columbus Board has increased since 1969 from 632 or 11.8% of the total number of 5,349, to a 1975 high of 926 or 17.5% of a total 5,298.

In 1951 a cadet principal program was begun. In 1972 27 persons were selected as cadet principals; 13 of them were black. Since 1969, 44 of the 100 cadet appointments have been black teachers. In the last five years the number of black administrators assigned has increased from 44 to 69, a 56.8% increase during that time. However, in 1954 there still were no black high school principals in Columbus, and by 1956 there still were no black administrators in any but the black schools, and no white principals in the black schools. Although the number of black administrators at majority white schools increased from only four in 1971 to fourteen in 1975, the number remains proportionately low.

Between 1964 and 1973 the Columbus defendants generally maintained their prior practice of assigning black teachers to those schools with substantial black student populations. As an example, as late as the 1972-73 school year, there were 250 black elementary teachers assigned to schools in which the student body was 80-100% black, which represented 63.3% of all of the black elementary teachers in the system. In the same school year, 34 elementary schools, all of which contained 80-100% white student bodies, had no black teachers assigned to them.

In July, 1974 the Columbus defendants consummated a conciliation agreement with the Ohio Civil Rights Commission after a complaint had been filed by the Columbus Area Civil Rights Council alleging faculty racial segregation. The agreement included the following language:

The Plan will also insure that the experienced teachers and teachers with advance training and degrees shall be reasonably distributed throughout the school system.

...

To the degree possible, the goals established in this plan shall be accomplished by September 1973 through a process of *voluntary transfers* and *selective assignments* of new professional staff members. Such a process shall be supplemented by *required assignments* of present professional staff members, as needed, . . . (Emphasis added.)

Of special note here is Section 5 of the plan which read:

The assignment and transfer of professional members to and from schools *where the average training and experience of professional staff members is significantly below the system average* shall be made so that this differential is reduced or as a minimum not significantly increased. (Emphasis added.)

It is true, as plaintiffs claim, that the Columbus defendants were not at the time of trial 100% in conformity with the agree-

ment. The Court believes that the failure to completely comply with the strict letter of the requirements of the agreement does not represent a substantial factual matter helpful in the resolution of the issues in this case.

In 1965 the Columbus Board created the Council on Intercultural Education to obtain advice and suggestions on racial matters involving the schools. In August, 1966 the local chapter of the NAACP presented a position paper to the Council protesting that unconstitutional school segregation was abroad in the Columbus schools and suggesting procedures for desegregation. In May, 1967 the Columbus Urban League called for the integration of the school system and suggested how it could be accomplished. The Columbus Board in 1967 officially adopted a policy to take racial balance into consideration in drawing attendance zones. In addition the Columbus Board adopted a voluntary transfer program to improve racial balances. Under the plan as adopted, students were eligible to transfer schools if the transfer resulted in better racial distribution at each school; no transportation was provided. This plan existed for six years, and had little integrative impact on the school system.

In 1969 the voters defeated a \$75,950,000 school bond issue. In 1971 a representative committee was formed under the name Project UNITE to study the needs of the school system. A sub-committee of that group identified specific facility needs and made recommendations to the Board of Education. A November 1972 bond issue was approved by the voters. Included in the promised proposed construction program was a commitment to giving each student the opportunity for integrated educational experiences through the use of new special, magnet-type developmental learning centers, district-wide career centers, special programs to attract students from other schools, and a commitment to locate new buildings whenever possible to favor integration without resorting to unreasonable gerrymandering. But see the discussion concerning

the Innis Road and Cassady Elementary schools in Part B of this section.

Perhaps best descriptive of the philosophy of the Columbus Board is its July 18, 1972, officially-adopted formal goal statement on integrated education:

It shall be the goal and the policy of the Columbus Public Schools to prepare every student for life in an integrated society by giving each student the opportunity of integrated educational experiences. Such a goal does not imply the mandatory or forced transportation of students to achieve a racial balance in any or all schools. The Superintendent of Schools shall implement this policy by the development of proposals for the approval of the Board of Education. The first priority of the Superintendent shall be the development of a plan to provide the transportation necessary to give all students access to vocational and career facilities and all special programs or courses offered by the Columbus Public Schools.

In late November, 1972 the Columbus Board voted down a resolution which would have established a site selection advisory committee to assist the Board in preventing new schools from being built on sites which would result in racially identifiable new schools. Likewise, on May 1, 1973, the Columbus Board rejected a motion that it seek the assistance of the State Department of Education in obtaining financial and technical assistance to desegregate the schools. By vote this Board also decided not to request federal funds with which to desegregate. On September 3, 1974, the Board passed a resolution providing that the Superintendent devise a more effective means of making available more integrated educational opportunities by September 1, 1975.

In April, 1973 the Columbus Board formally adopted the "Columbus Plan." The first version provided for four types of student transfers: racial balance, vocational program, educational program, and occupational program. Only since

1975 has the Board provided transportation for the full-day racial balance transfers. In the 1975-76 school year, 3,612 students participated in Columbus Plan transfers; of these, 584 full-day transfers were for racial balance. Even more voluntary participation was expected in 1976-77.

In the school year 1975-76 four alternative or magnet schools were in operation. Two more will be open in 1976-77. Four new career centers, which hopefully will have an integrative effect, will be fully operational by 1977, involving about 4,000 students. Integrated study trips, all-city activity and exchange activity all have been engaged in and encouraged in an effort to provide positive integrated experiences.

Nevertheless during the 1975-76 school year, when this case was tried, 70.4% of all the students in the Columbus Public Schools attended schools which were 80-100% populated by either black or white students; 73.3% of the black administrators were assigned to schools with 70-100% black student bodies; and 95.7% of the 92 schools which were 80-100% white had no black administrators assigned to them.

B. SPECIFIC ACTIONS—POST-1954

In deciding the issues of the case, a close review of the racial composition over the years of the Columbus School system is helpful. Since the Department of Health, Education and Welfare began to require that racial statistics be submitted, a rather accurate appraisal of the racial character of the schools can be made. For those years when no such data were kept, the numbers of students of one race or another cannot accurately be determined; however, a hindsight review of other social statistics provides a basis to make reasonable inferences as to the probable racial composition of the schools for those years.

In making the analysis that follows, the Court has not forgotten the truism that the mere presence of racial imbalance

in the make-up of school student bodies, without more, will not permit a finding of unconstitutional segregation.

To analyze the mass of statistical evidence received at trial, it is necessary for the Court to establish a frame of reference. Plaintiffs' expert witness, Dr. Gordon Foster, used statistical criteria in terming a school "racially identifiable." Using actual or estimated racial statistics concerning the black student enrollment in the total Columbus school system, he applied a statistical variance formula (plus or minus a specific percentage point range, chosen by reference to the relative size of the overall black student enrollment in a given time period) to the system-wide average to establish a rough yardstick for determining whether the percentage of black student enrollment in particular schools was within the general range of the system-wide average. See the definition of "racially identifiable" in the glossary in the appendix to this opinion. For the period of 1950 to 1957, he estimated the black student enrollment to be approximately 15% of the total enrollment. Because of the small percentage of blacks in the system as a whole, the measure of racial identifiability he adopted was plus or minus 5%. In 1957, he used an estimate of 20% non-white population and a range of plus or minus 10%. In 1964, he used an estimate of 25% non-white and 26.6% non-white at the secondary level and a range of plus or minus 15%. In 1975, he used the actual racial percentage of 32.5% non-white and a plus or minus 15% range. Dr. Foster testified that whenever there was a close situation, he called the school racially unidentifiable. The Court notes the necessity for using the smaller range when the percentage of black pupils was at a low level in the system. Similar ranges have been used by some courts as a rough gauge for measuring the racial identifiability of schools. There is ample evidence to support the use of such ranges and the evidence indicates that Dr. Foster's estimates are reasonable.

Based upon the law as it is set out in Part IV of this opinion, I am constrained, from certain facts which I believe to be

proved, to draw the inference of segregative intent from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance.² And although defendants have contended that the Columbus Board of Education's actions since 1954 have been racially neutral, the plaintiffs' proofs included a number of Board actions which cannot reasonably be explained without reference to racial concerns.

School Construction

The area of site selection for school construction is a particularly difficult subject. Looking with hindsight on what was done, we must not only consider the effect of the Columbus defendants' site selection decisions, but also ask what other steps could or should have been taken. Many factors must be considered in making site selections for new schools, including acquisition and construction costs, the present demography and projected development, the availability of services, accessibility, and public relations. It is rarely possible to isolate and identify any particular factors which were ultimately determinative in the selection of a site. The evidence does show that all of these factors were considered when the need for new school facilities arose and a site was selected. The evidence also shows that in many cases alternative site selections were suggested. Many of the probable consequences of particular alternatives were predictable and known to the Columbus defendants.

² Evidence was introduced in attempt to prove or disprove racial preferences in student transfers, assignment of non-teaching and non-administrative employees, assignment of students and substitute teachers and special education programs. The plaintiffs' proofs regarding these matters do not bear sufficient impact to be helpful in the resolution of the issues.

It is noted that the assignment of non-professional staff is racially suspect; however, the Court does not find sufficient nexus between that fact and the issues being litigated, and it is not a part of the factual setting from which the Court draws conclusions against defendants.

The Columbus defendants have contended throughout that they have followed a neutral neighborhood school policy. In keeping with that policy, schools have generally been built in locations where the expanding and growing population demanded additional facilities. Of 103 schools constructed between 1950 and 1975, 87 opened with a racially identifiable student body according to the calculations of Dr. Foster. Of the 87 schools, three have been closed. These schools closed with racially identifiable student populations. Seventy-one of the 87 new schools remained racially identifiable at the time of trial.

It is necessary for the Court to consider those foreseeable effects of the construction practice which promote or preserve a segregated school system. It is apparent to the Court, and presumably to the defendants, that schools which open with a racially identifiable student body tend to stay that way. The Court finds that in some instances initial site selection and boundary changes present integrative opportunities.

The evidence supports a finding that the Columbus defendants could have reasonably foreseen the probable racial composition of schools to be constructed on a given site. In some instances the Columbus defendants had actual knowledge of the likelihood that some schools would open and remain racially identifiable if built on the proposed sites. One such case was Gladstone Elementary School. See map 1 in the appendix to this opinion. Although Gladstone was apparently opened in 1965, the first statistics available concerning its racial composition concern the year 1966, when it had a student population which was 78% black. Gladstone's black enrollment has been in excess of 90% since 1967. Mr. Lumpkin, who later became the president of the Gladstone Parent Teacher Association, testified that prior to its construction he communicated to the Board of Education that Gladstone would predictably open as a predominantly black school. The 1960 census map shows that in that year the area in which Glad-

stone was eventually built was predominantly white. The 1970 census map indicates that this same area was predominantly black. This reflects the definite trend of an expanding black population northward into this area in the 1930's. This trend was fairly well advanced in 1966, given Gladstone Elementary's 78% black enrollment that year.

Gladstone was built between Hamilton Elementary and Duxberry Park Elementary with the greater portion of the Gladstone attendance zone being drawn from the southwestern portion of the former Duxberry zone. This section of Duxberry had a higher black density than did the northern and eastern sections. Thus, the black student population in Duxberry dropped from 40% in 1965 to 33% in 1966. Linden Elementary, to the north of Hudson Street, remained virtually 100% white throughout the middle 1960's. The construction of Gladstone south of Hamilton and Duxberry served to contain the black student population in the area south of Hudson Street.

The need for greater school capacity in the general Duxberry area would have been logically accommodated by the construction of Gladstone north of its present location, nearer to Hudson Street. This would, of course, require some redrawing of boundary lines in order to accommodate the need for class space in Hamilton and Duxberry. If, however, the boundary lines had been drawn on a north-south pattern rather than an east-west pattern, as some suggested, the result would have been an integrative effect on Hamilton, Duxberry and the newly-constructed school.

The Court also finds that the site selection and attendance zone boundaries for Sixth Avenue Elementary resulted in a foreseeably blacker school. Sixth Avenue opened as a primary center (grades K-3) in 1961 and closed in 1973. During this entire period, Sixth Avenue was racially identifiable with a black student population of at least 85%.

The Sixth Avenue school was built in accordance with a recommendation contained in the 1958-59 study of the Public

School Building Needs of Columbus, Ohio. Recommendation number 11 on page 58 of that document describes an area bounded by High Street on the west, Chittenden Avenue on the north, New York Central Railroad on the east, and Fifth Avenue on the south. Sixth Avenue elementary was built on the proposed site. The attendance zone for Sixth Avenue was as recommended, except that Fourth Street was its western boundary. This area can generally be described as the eastern portion of the Weinland Park Elementary attendance zone and the northeastern corner of the Second Avenue Elementary attendance zone. Both the 1960 and 1970 census maps (and the underlying statistical data) show that these portions of the former Weinland Park and Second Avenue Elementary attendance zones had the highest percentage of black residents within the area. The census data shows that the population west of Fourth Street was largely 0 to 27.9% black with two or three blocks being in the 28 to 49.9% range. The east side of Fourth Street is generally in the 50 to 89.9% black range, with several blocks in the 90 to 100% black category. The Sixth Avenue attendance zone consists almost entirely of 50 to 100% black population. The black population in the area left within the attendance zones of Weinland and Second after Sixth opened is generally below 27.9%, with a few blocks in the 28% to 49.9% range.

In 1964, three years after Sixth Avenue opened and the first year for which racial statistics are available, Sixth Avenue had a black student enrollment of 91%. In that year Weinland Park and Second Avenue had black student populations of 30% and 28%, respectively. The boundary lines for these schools remained relatively unchanged until 1973, when Sixth Avenue closed. Sixth Avenue closed with a black enrollment of 94.6%. In that year Weinland Park and Second had black enrollments of 30.5% and 16.7%, respectively. In the 1974-75 school year following the closing of Sixth Avenue, the boundary lines for Weinland and Second were redrawn to resemble the 1960 attendance zones. With the closing of Sixth the black

population of Weinland rose from 30.5% to 46.7% while Second Avenue rose from 16.7% to 20.7%. The Court finds that the construction site and attendance zone drawn for Sixth Avenue Elementary between 1961 and 1973 resulted in Sixth Avenue being the black school in the area while making Weinland Park and Second Avenue whiter.

The impact of building a new elementary school at the Sixth Avenue location and drawing the attendance zone boundaries where they were drawn was clearly foreseeable to the Columbus defendants. Some students living in the area east of Fourth Avenue, shown to be predominantly black on both the 1960 and 1970 census maps, were compelled to walk to Sixth even though Weinland Park was closer to their homes. Even if the Court were to find compelling non-segregative reasons for the construction of this new school on its Sixth Avenue site, it is readily obvious from the census maps that the objectives of racial integration would have been better served, without abandoning the neighborhood school policy, by drawing the attendance zones east and west between High Street and the railroad tracks, rather than north and south along Fourth Street. The Columbus defendants have offered no explanation for the fashion in which Sixth Avenue was opened and maintained during this period.

The Court is well aware of the Board's obligation to provide class space as the need arises, whether it be in an area of expanding geographic growth, or within the inner-city area due to increasing population or the closing of obsolete structures. Given segregated residential patterns, not all schools can be built in an integrated setting. In such circumstances the selection of sites for new schools alone may not serve as a tool for integration. The intervening plaintiffs argue that the construction of a school in an area known to have been covered by racially restrictive covenants and subject to discriminatory real estate practices constitutes an impermissible participation by the school officials in racial discrimination.

The Court does not infer segregative intent from the mere construction of schools in an area needing the facilities even though that area had been covered by racial covenants. Without the use of pairings, transportation, or other techniques, the racial imbalance in these schools could not have been cured by the siting of schools even had the Columbus defendants devoted their attention to the racial integration of the schools.

The opportunity for active integration did exist, however, without the use of transportation, in some parts of the city. Even greater integration could have been achieved with the use of pairings and limited transportation. This opportunity existed, and continues to exist in those areas of the city where the population shifts from one race to another. An examination of the census maps for the years 1950, 1960 and 1970 discloses a general pattern of high density (50 to 100%) black population in the center of the city fringed by areas of lesser, but still substantial, (10 to 50%) black population. The remainder of the city is predominantly white, although there are pockets of white population within the central city area, and pockets of black population in the outlying areas.

The Columbus defendants argue that housing in the City of Columbus is segregated as a result of private discrimination and other factors affecting residential development over which the school board has no control and little influence. The Columbus defendants maintain that they have adopted a racially neutral neighborhood school policy. They contend that the use of a neighborhood school policy in a city with segregated housing patterns results, through no fault of the school authorities, in racially imbalanced schools. Under the neighborhood school policy, the site selected for a new school limits the attendance zone boundaries that can be drawn for that school. The evidence shows that in some instances the need for school facilities could have been met in a manner having an integrative rather than a segregative effect.

The Near-Bexley Option

East of the downtown area of Columbus, and entirely surrounded by the Columbus city limits, lies the City of Bexley, Ohio. East of Bexley, and also entirely surrounded by the Columbus city limits, is the City of Whitehall, Ohio. With the exception of one small area of Columbus which jumps across Alum Creek to the eastern side of the creek, the western boundary of Bexley follows the course of Alum Creek. The Columbus residential area to the west of Alum Creek was in 1960 and 1970, according to census data, heavily populated by blacks. For that area in those years, census tracts generally appear as either 50-89% black or 90-100% black. A different picture existed for the area to the east of Alum Creek, encompassing the City of Bexley and the small portion of Columbus which lies immediately east of the creek. According to census data, 99% of Bexley residents were white in 1960, and 99.3% were white in 1970. Census data further indicate that in 1960 there were 159 people residing in that area of Columbus which lies immediately east of Alum Creek; all of these people were white.

From the 1959-60 school year through the 1974-75 school year, the Columbus Board of Education established and maintained an optional attendance zone encompassing the area of Columbus which lies directly east of Alum Creek. Students living in that area were within the attendance areas of schools located to the west of Alum Creek, nearer the Columbus downtown area. This 1959-1975 option permitted these students to elect to attend Columbus city schools located to the east of the City of Bexley. For ease of reference, the Court will refer to this option as the "Near-Bexley Option."

Absent the Near-Bexley Option, students living in the optional zone area would have been required to attend Fair Avenue Elementary (opened in 1890), Franklin Junior High School (opened in 1898) and East Senior High School (opened in 1922). The following statistics are applicable to these near-east side schools:

	1964	1969	1974
Fair Avenue Elem.			
% black students	92.0	95.0	96.7
% black faculty	83.3	37.1	23.3
Franklin Jr. H.S.			
% black students	85.8	96.3	93.7
% black faculty	32.6	34.6	45.8
East Sr. H.S.			
% black students	94.9	98.9	98.9
% black faculty	12.7	28.9	31.3

The schools on the receiving end of the option were Fairmoor Elementary (opened in 1950), Eastmoor Junior High School (opened in 1962) and Johnson Park Junior High School (opened in 1958), and Eastmoor Senior High School (opened in 1955). The following statistics are applicable to these schools:

	1964	1969	1974
Fairmoor Elem.			
% black students	0.1	0.9	4.6
% black faculty	0	4.0	18.2
Eastmoor Jr. H.S.			
% black students	30.5	34.4	45.3
% black faculty	0	9.8	15.2
Johnson Park Jr. H.S.			
% black students	0.3	2.9	26.7
% black faculty	0	2.0	12.7
Eastmoor Sr. H.S.			
% black students	10.6	17.8	34.9
% black faculty	0	4.0	15.2

Eastmoor Junior High School was a receiving school for the Near-Bexley Option during the 1959-60, 1960-61, and 1963-64 through 1974-75 school years. Johnson Park was a receiving school for the option during only the 1961-62 and 1962-63 school years; there are no racial statistics available for Johnson Park Junior High School for these two years. The 1960 census data indicate that the Johnson Park attendance area was predominantly white at that time.

The Near-Bexley Option, then, concerned a small, white enclave on Columbus' predominantly black near-east side. The option area, although part of Columbus, had more in common, geographically and racially, with Bexley than with Columbus. In practical effect, the Near-Bexley Option permitted white students in the optional zone to escape attendance at black Fair Avenue Elementary, Franklin Junior and East Senior High Schools, and permitted them instead to attend white (or whiter) Fairmoor Elementary, Eastmoor Junior or Johnson Park Junior, and Eastmoor Senior High Schools. And, as an examination of maps 2, 3, and 4 in the appendix demonstrates, to exercise the option Columbus students had to traverse the City of Bexley to arrive at the option schools.

Nothing presented by the Columbus defendants at trial, at closing arguments, or in their briefs convinces the Court that the Near-Bexley Option was created or maintained for racially neutral reasons. The Court finds that the option was not created and maintained because of overcrowding or geographical barriers.

These defendants contend that the option involved only a few students. The July 10, 1972, minutes of the State Board of Education, at page 44, appear to indicate that in 1972, there were 25 public elementary school students and two public high school students residing in the optional zone. However, the fact that the option was created, and maintained by the Columbus Board of Education for some 16 school years, is of itself some evidence that the option was not merely a paper exercise.

The Court is not so concerned with the numbers of students who exercised or could have exercised this option, as it is with the light that the creation and maintenance of the option sheds upon the intent of the Columbus Board of Education. It is noteworthy that the July 10, 1972, minutes of the State Board of Education indicate awareness by the State Board that a proposed transfer of the Near-Bexley Option area to the Bexley school district "[r]aises the question of percentage of racial mix." (The proposed transfer was opposed by the Columbus Board of Education, and was denied by the State Board.) Quite frankly, the Near-Bexley Option appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools.

Highland, West Mound and West Broad Elementary Optional Zones and Boundary Changes

Another area illustrative of action by the Board promoting racially segregated schools is on the west side of Columbus. Four elementary schools are involved: Burroughs, Highland, West Broad and West Mound. The census data for the years 1950, 1960 and 1970 show an area of black population between West Broad Street and Sullivant Avenue bounded on the west by Eureka Avenue and on the east by the Columbus State Institute. This area is referred to locally as the Hilltop. The western portion of this area fell mostly in the 50% to 100% black range. The eastern portion, between Belvidere and the Columbus State Institute, was in the 0 to 9.9% black range in 1950 and has become increasingly blacker in later years. The 1970 census data shows this area to have several blocks in each of the ranges of 10 to 27.9%, 28 to 59.9% and 60 to 89.9% black.

Highland Elementary has served the majority of this area between 1950 and the present. During this period the Columbus defendants established two optional attendance zones

within the Highland boundaries, and also changed the attendance zone boundaries of Highland. Although the opportunity existed for the integration of the four elementary schools in this area, the option zones and boundary changes tended to preserve and promote the racial imbalance of these schools.

One optional zone appeared in 1955 and continued through the 1956-57 school year. See map 5 in the appendix. In those years, and since 1939, the Highland attendance zone included an area north of West Broad Street to the Pennsylvania Railroad tracks bounded on the west by Eldon Avenue and on the east by the Columbus State Hospital. This portion of Highland north of Broad Street was composed in each of the census years, 1950, 1960 and 1970 of blocks in the 0 to 9.9% black range, as was the entire West Broad attendance zone. For the school years 1955-56 and 1956-57 that portion of Highland north of Broad was made into an optional attendance area with students having the option of attending the predominantly white West Broad or the predominantly black Highland.

Highland was 63 students over capacity in 1955, and 67 students over capacity in 1956. West Broad, however, was also over capacity in 1955 and 1956 by 115 and 113 students, respectively. An examination of the attendance zones in the West Broad Street area reveals that several required students to cross this street to reach their school. The Court concludes that the Highland-West Broad optional zone was not created to alleviate overcrowding or because of a geographic barrier. This optional zone allowed the white students north of Broad Street to escape Highland and go to West Broad. The result was to contain blacks within Highland and to maintain West Broad as a predominantly white school.

In 1957 the boundary lines for Highland and West Broad were redrawn, eliminating the option zone and placing that area permanently within the West Broad attendance zone. Because West Broad's capacity problems were greater than those of Highland, a purpose of the boundary change could not

have been to alleviate the overcrowding at Highland. Since the West Broad attendance zone dipped south of Broad Street west of the Highland zone, the Court concludes that West Broad Street was not considered a geographical barrier in the decision to redraw these boundaries.

In 1964, the first year in which the racial statistics for enrollment are available, Highland had a black student enrollment of 75%. West Broad Street was 100% white in 1964. The Court finds that the optional attendance zone and boundary changes between Highland and West Broad had a foreseeable and actual effect of promoting racial imbalance.

Another optional attendance zone was created within the Highland boundaries in 1955. This optional zone was in the southeastern corner of Highland and gave the students living there the option of attending either Highland or West Mound Street. See map 5 in the appendix. This option continued through the 1960-61 school year. The census data for 1950 shows that the West Mound Street attendance zone was, with the exception of one block, within the range of 0 to 9.9% black. The remaining block was in the 10 to 27.9% black category. In 1960 the West Mound attendance area was still largely in the 0 to 9.9% black range with four blocks in the 10 to 27.9% category and one block in the 28 to 49.9% range. The option area east of Wrexham and south of Doren was in the 0 to 9.9% black range in the 1950 census. In the 1960 census the option area continued to be predominantly white with a small portion falling in the 10 to 27.9% black range.

The effect of the Highland-West Mound option was to allow those students living in the whiter portion of the Highland attendance zone to opt out of attendance at identifiably black Highland in favor of the whiter West Mound Street School. The defendants contend that this optional zone was created to alleviate overcrowding in Highland. During the option years Highland was over capacity and West Mound Street was under capacity ranging from four students below capacity in 1957 to 105 in 1960. The effect of the option on

the overcrowding at Highland was the foreseeable result that the white students within the option zone would exercise the option to attend West Mound. Thus, even though an option zone may have eased the capacity problem, this particular option zone tended to make Highland blacker and West Mound whiter. In 1961 the option was terminated and the greater part of the option area was rezoned permanently to West Mound Street.

The intervening plaintiffs have shown that feasible alternatives were available and known to the Columbus defendants. One of these alternatives was to move the option area to the west, or make the boundary changes west of where they were made. This alternative would have allowed students from the blacker part of the Highland attendance area to attend West Mound, thus having an integrative effect on West Mound while easing the overcrowding at Highland. Another alternative would require redrawing the attendance zones in this area for Highland, West Mound, West Broad, and Burroughs. Dr. Foster testified that the total capacity of these four schools was 3,060 at the time of trial and the enrollment was 2,773. The following statistics are applicable to these schools:

Burroughs	1964	1969	1974
% black students	16	14.6	12.5
% black faculty	0	3.1	18.5
Highland			
% black students	75	71.7	72.7
% black faculty	4.6	22.6	16.7
West Mound			
% black students	15	16.1	16.5
% black faculty	0	7.7	17.4
West Broad			
% black students	0	0.7	1.0
% black faculty	0	3.0	12.1

The racial balance at all four schools could have been enhanced by redrawing the attendance zones for these four schools through the Hilltop area. This could also be achieved by pairing. The Court finds each of these alternatives to be feasible and there has been no showing that they are unsound as a matter of academic administration. The Court concludes that the actions of the Columbus defendants had a substantial and continuing segregative impact upon these four west side schools.

Moler Elementary Discontiguous Attendance Area

In the early and mid-1960's, the Columbus Board of Education was faced with overcrowded elementary schools in the southeastern area of the Columbus school district. Stockbridge Elementary, Alum Crest Elementary, Watkins Elementary and an addition to Stockbridge Elementary were opened in the southeastern area during this period. In the 1963-64 school year, the Board of Education assigned the eastern portion of the Watkins Elementary School attendance area to Moler Elementary School. This eastern portion of the Watkins area did not abut the Moler attendance area. See map 6 in the appendix. To arrive at Moler, students living in the discontiguous attendance area were transported through the Alum Crest attendance area. This discontiguous attendance area remained in effect through the 1975-76 school year, when this case was tried.

Census data for 1960 indicate that neither the Moler attendance area proper nor its discontiguous attendance area had a significant number of black residents. The same census showed that the Alum Crest attendance area did have a significant black population. The following statistics are applicable:

	1964	1969	1974
Alum Crest Elem.			
% black students	50	77	78.7
% black faculty	33.3	40	25
Moler Elem.			
% black students	0.2	8.7	50.1
% black faculty	0	10.5	11.8

Between September, 1966 and June, 1968, about 70 students, most of them white, were bused daily past Alum Crest Elementary from the discontinuous attendance area to Moler Elementary. The then-principal of Alum Crest watched the bus drive past the Alum Crest building on its way to and from Moler. At the time, the Columbus Board of Education was leasing 11 classrooms at Alum Crest to Franklin County. There was enough classroom space at Alum Crest to accommodate the students who were transported to Moler. When the principal inquired of a Columbus school administrator why this situation existed, he was given no reasonable explanation.

The Court can discern no other explanation than a racial one for the existence of the Moler discontinuous attendance area for the period 1963 through 1969.

The Heimandale Discontinuous Attendance Area

The Fornof Elementary attendance area is in the southern part of the Columbus school district. To the east of the Fornof area, and adjacent to it, is the Heimandale Elementary attendance area. The 1950 census shows no appreciable black population in either attendance area. The 1960 census indicates that Fornof's area remained predominantly white, with all census tracts having less than 10% black residents. The Heimandale attendance area, on the other hand, reflects a

substantial black population by 1960, with most of the area between 28% and 50% black, and some tracts as high as 90-100% black. The 1970 census data for both areas are similar to the 1960 data. In 1964, the first year for which such statistics are available, Fornof had 0.2% black students, and no black faculty members. In the same year, Heimandale had 40% black students and 40% black faculty.

For six school years, from 1957-58 through 1962-63, the Columbus Board of Education perpetuated a discontinuous attendance area involving Heimandale and Fornof. Students living on three streets (Wilson, Bellview and Eagle Avenues) located near the center of the Heimandale attendance area were assigned to attend Fornof instead of Heimandale. Less than 10% of the persons living on these streets were black. There was no geographical or capacity justification for the Heimandale discontinuous attendance area. The existence of this area meant that students living on Wilson, Bellview or Eagle Avenue did not attend their neighborhood school, Heimandale, which had a significant number of black students, and did attend Fornof, which was a racially identifiable white school.

The Innis-Cassady Alternatives

In 1971, the Columbus school district absorbed the Mifflin school district. The area involved is north of the City of Bexley, between 13th Avenue and Morse Road. The Mifflin school district had been in poor financial straights; schools in the district were severely overcrowded. The Columbus Board of Education initially maintained the Mifflin district boundary as a school attendance area, but was required to assign some pupils to a nearby temporary facility while more permanent arrangements were being made.

The north-south length of the area involved is greater than the east-west breadth. Cassady Elementary School, opened as a Mifflin school in 1964, is located on Agler Road roughly

midway between 13th Avenue and Morse Road. The residential area south of Agler Road was and is predominantly black, while the area north of Agler Road was and is predominantly white. Because Cassady Elementary was so overcrowded, the first school built with funds raised under the 1972 bond issue was Innis Road Elementary School, which was intended to alleviate the overcrowding at Cassady. Innis was built to the north and west of Cassady; it opened in 1975.

The Columbus Board of Education had announced in 1972 that improved racial balance of student enrollment was a factor which was relevant in site selection and boundary drawing. In 1975, prior to the September opening of Innis Road Elementary, the administrative staff of the Columbus Public Schools presented to the Columbus Board of Education two alternative attendance proposals concerning Innis and Cassady. Dr. John Ellis, Superintendent of the Columbus Public Schools, explained at trial why two options, rather than a single recommendation, were presented to the Board:

The basic reason was to see, as we attempt to wrestle with the very difficult issue of how can we insure we are doing everything that we can that is reasonable and appropriate and right to increase the approved integration within the Columbus School District. We are honestly attempting to achieve that end, and we looked at a couple of different alternatives in these cases to see whether or not we could come up with a better plan than — to see if there was a better approach, and as it turned out, both approaches had some problem with the standpoint of distances and transportation and crossing highways and preferences of people and a host of factors that go into the establishment of boundaries.

Dr. Ellis and Mr. Robert W. Carter, Executive Director of Administration, Columbus Public Schools, both testified at trial that in their respective opinions, the alternatives presented to the Board of Education concerning Innis and Cassady were

both educationally sound. The administrative staff did not recommend one alternative over the other.

One alternative entailed dividing the old Mifflin district into two attendance areas, with a horizontal boundary line dividing an Innis attendance area to the north from a Cassady attendance area to the south. The administrative staff and the Board of Education knew that adopting this alternative would mean that Cassady would draw its enrollment from the predominantly black southern portion of the old Mifflin district, while Innis would draw its enrollment from the predominantly white northern portion.

The other alternative entailed maintaining the old Mifflin district as the attendance area for both Cassady and Innis, with one school designated as a primary center (kindergarten through third grade) and the other as an intermediate school (grades four through six). The administrative staff and the Columbus Board of Education knew that adopting this alternative would mean that the black student enrollment in each school would be roughly equivalent to the white student enrollment.

The Columbus Board of Education chose the first alternative. It divided the old Mifflin district into two elementary attendance areas, one to the south for Cassady and one to the north for Innis. When Innis Road Elementary School opened for the 1975-76 school year, its student enrollment was 27.3% black. Cassady Elementary School during the same year had 89.3% black students.

During closing arguments, counsel for the Columbus Board of Education explained the Board's decision as follows:

The Board based its decision on the fact that it at the time decided to maintain the K-6 organization throughout the district and that the pairing of these schools, given the geographical location of these two areas, would have required a substantial amount of transportation to effect a pairing situation.

The Columbus defendants' proposed findings of fact run in a similar vein:

[T]he pairing of such schools would have required substantial transportation because of the large size of the combined areas. The Board voted not to pair the schools.

... The alternative proposal would have required substantial transportation because of the greater distances involved. The Columbus Board was also justified in its decision to maintain the K-6 organization that now exists throughout the system with the exception of Cole-rain, which is a primary and crippled children center. Other primary centers are no longer in existence. Sixth Avenue has been closed. The K-3 primary center at Hudson, which was assigned to Hamilton, was recently eliminated with an addition. The school system has never had a K-3 primary center without a K-6 home school
....

These defendants' own proposed findings amply demonstrate that when in the past a diversion from the K-6 structure served interests, such as overcrowding and special educational concerns, which were considered important by the Board, the Columbus Board of Education did not hesitate to abandon the K-6 structure in favor of primary centers and intermediate schools.

The Court can find no evidence in this record supporting defendants' argument that pairing Innis and Cassady would have necessitated "substantial transportation" of students. Dr. Ellis testified that *both* alternatives "had some problem with the standpoint of distances and transportation and crossing highways"

It is truly ironic that Innis Road Elementary was the first school built with the \$89.5 million raised when Columbus voters approved the November 7, 1972, bond issue. A \$75.95 million bond issue had been defeated at the polls in 1969. Dr.

John Ellis became Superintendent of the Columbus Public Schools in August, 1971. In November of that year he proposed Project UNITE, which is mentioned in Part A of this section of this opinion. On December 7, 1971, the Board of Education approved a resolution authorizing the implementation of the project. After a tremendous amount of community participation in the project, including nine public forums, the steering committee of Project UNITE presented its official report to the Board of Education on May 30, 1972. Thereafter, before the November balloting, the Board approved various aspects of the Project UNITE report. The approved proposals were in turn capsulized in a document styled "THE BOND ISSUE, 1972: PROMISES MADE," which was widely distributed in the community and was the subject of news media presentations.

At the June 27, 1972 meeting of the Columbus Board of Education, Superintendent Ellis noted that Project UNITE "spoke in many ways to the fact that we should consider the question of integration as a policy for the consideration of the Board." The following resolution was moved and seconded:

It shall be the goal of the Columbus Public Schools to make available integrated educational experiences for all students. Therefore, the Board of Education and administration shall reflect that goal in the enactment of policy and in administrative action.

Two of the three blacks on the seven-member Board spoke in favor of an amendment which would have replaced the words "to make available" with the words "to provide." Two white Board members spoke against the amendment, asserting that the "to provide" language connoted mandatory integration. The amendment was defeated on a 2-5 vote, and the original resolution passed on a 4-3 vote, the black members voting nay. Thereafter, at the same meeting, a resolution which would have placed the \$89.5 million bond levy before the voters was moved and seconded. This motion required a two-thirds

majority vote of the Board for passage. A similar levy had been defeated by the voters in 1969, and there was Board discussion about the severe need for school construction in the district. One of the Board members then made the following statement:

So I would like to read this because the concern that I have had . . . as a Board member is that I have been appeased and put in position where I had to go along, and I think that my conscience won't allow me to go along with things that I think are wrong now and have been wrong for many, many years.

We have made several simple requests of this Board, and none of these were honored. And this is the essence today where we voted in the usual four-to-three manner.

I don't mind being voted down. I don't mind being wrong. But I certainly think that the world and the nation have pointed out repeatedly that some of the things that happened in Columbus are wrong. . . . We [black Board members] have been told that we should not deter the education of kids by voting against the bond issue because we need more, we need bricks, and I think that this is one thing that this Board is in agreement with. We do need more than bricks, but what goes on behind those walls is much more important to the lives of kids than the fact that we need buildings.

. . .

[T]he thing that we as a group ask, number one, [is] that this Board give a sincere statement to the effect that either segregated education is good or integrated education is good.

. . .

[I]t all goes back to the statement, this positive statement of accord, for what is the best possible education for boys and girls in Columbus, and how it can best be achieved. And since we can't come to that accord, we feel we would be forcing something on the public that they not only

wouldn't want to vote for, but would vote down and for that reason I cannot support the bond issue.

The resolution concerning the bond levy did not pass at the June 27 meeting. Three weeks later, at a July 18, 1972, meeting, the Board adopted the formal goal statement concerning integrated educational opportunities which is set out in Part III(A) of this opinion. At the same meeting, the Board voted unanimously to submit the bond levy to the voters.

The "Promises Made" pamphlet included a section styled "How Will This Bond Issue Enhance or Restrict the Process of Racial Integration?" The Board's July 18, 1972, formal goal statement was quoted. The Board's resolution included the statement, "The Superintendent of Schools shall implement this policy by the development of proposals for the approval of the Board of Education." "Promises Made" included the following statements (emphasis supplied):

New buildings will be located whenever possible to favor integration. In such areas, school attendance area boundary lines *or organizational changes* will be made to improve the opportunity for schools to be integrated without resorting to unreasonable gerrymandering.

In a cover letter included with "Promises Made," Superintendent Ellis stated:

It is vital that the Columbus Board of Education and school administration keep the promises they have made while promoting the school bond issue. Public faith in all public institutions appears to be low. One way to help rebuild good faith is to follow the principle that a promise made should be kept.

The Columbus voters approved the November 1972 bond levy by a 55.7% majority. When Innis Road Elementary was completed, Dr. Ellis complied with his duty under the Board's July 18, 1972, resolution, and he kept his bargain with the

voters. He presented an educationally sound, integrative alternative to the Board concerning Innis and Cassady. Here, he in effect said, is an opportunity to use school attendance area boundary lines and organizational changes to improve integration of schools without resorting to unreasonable gerrymandering. The Columbus Board of Education refused the offer.

IV. CONSTITUTIONAL QUESTIONS

A. THE CONCEPT OF "INTENT"

Recognizing the enormous importance attendant to the Court's duty to correctly apply the law to the facts of this case, the parties have provided extensive arguments in efforts to persuade the Court toward their respective legal theories. The Court will first set forth a number of rather general legal propositions about which the parties apparently have little real disagreement.

In order to receive any remedial action from the Court, plaintiffs must show that their constitutional rights have been violated. In *Keyes v. School District No. 1*, 413 U.S. 189, 198 (1973), the Court phrased the requirement:

[P]laintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.

Therefore, regardless of the existing statistical racial imbalance of all or any of the Columbus schools, this Court cannot and should not issue any remedial order if there has not been shown a deprivation of a constitutional guarantee which caused the imbalance. See also *Washington v. Davis*, 426 U.S. 229 (1976). Racial imbalance in a school system solely caused by discrimination in housing does not provide a basis for a Court to find that school authorities have violated constitutional rights. See *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), cert. denied 389 U.S. 847 (1967). Mere

racial imbalance resulting from population shifts would not be enough to constitute unlawful segregation in the constitutional sense. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23-24 (1971).

In *Keyes* the Supreme Court held that "where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." 413 U.S. at 201. After the *Keyes* case was decided, the United States Court of Appeals for the Sixth Circuit set out the elements of proof involved in a school desegregation case. That Court stated:

A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools.

Oliver v. Kalamazoo Board of Education, 508 F.2d 178, 182 (6th Cir. 1974) (footnote omitted), cert. denied 421 U.S. 963 (1975).

Particularizing these legal principles to the instant case, if plaintiffs have been able to prove purposeful or intentional acts or omissions by defendants which have caused a meaningful part of the Columbus school system to be unconstitutionally segregated, then defendants are under an obligation to show that racial imbalance in the other components of the system is not the result of their purposeful acts or omissions. See *Higgins v. Grand Rapids Board of Education*, 508 F.2d 779, 789 (6th Cir. 1974).

As I recall the briefs and oral arguments of the parties, the litigants recognize the obligation of plaintiffs to show certain intentional or purposeful acts or omissions of the defendants

or their predecessors in office. Before turning to a discussion of the words "intent or purpose," it is helpful to confront the Columbus defendants' contention that the present Superintendent and Board members should not be deemed responsible for acts done by other persons who held those offices many years ago. Since these defendants are sued in their official capacities, the official acts of their predecessors are cognizable under certain circumstances. Obviously, if former segregative acts are later nullified or if the substantial impact of such acts or omissions has been attenuated by time or by changed social conditions to the extent that no substantial impact of the acts or omissions remains to injure the plaintiffs, then they are of no significance. Mr. Justice Brennan wrote in *Keyes*, 413 U.S. at 210-211, as follows:

The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

The Court, then, may consider the actions and omissions of defendants' predecessors in office.

The concept of intent is often used as jargon in the legal litany, and has been the subject of much discussion by both courts and commentators. The intent or purpose requirement is extremely important in this case, and must be clearly resolved by the Court. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, — U.S. —, — (1977).

The intent contemplated as necessary proof can best be described as it is usually described — intent embodies the

expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions. In order for an act to be intentional, it need not only be expected to visit harm or ill will on others. Some intentional acts obviously are designed to produce a harmful result; other such acts are not so designed.

In their post-trial reply brief, the intervening plaintiffs devote a number of pages to a discussion of the concept of intent. These plaintiffs evidently read the Columbus defendants to be arguing in their brief that racial animus (malevolent discriminatory purpose) is the intent standard to be applied in cases such as this. At closing arguments, counsel for the Columbus defendants set the record straight:

Plaintiffs in their reply brief argue that the Columbus Board was taking the position that to find liability, the Court would have to find that individual school board members were motivated by racial animus or malice or intended to do actual harm to black students. We do not take that position. That position was not taken in our brief.

We think that a finding of liability requires more than mere proof of racial imbalance or proof of actions taken that did not have the effect of eradicating racial imbalance. We think that the way that the plaintiffs urged the foreseeability test, if you will, is that any action taken which did not bring about some type of racial balance, whether on a percentage based on a percentage-wide system, mean time percentage or a plus or minus type system, that any action taken which did not cause that somehow permits an inference of segregative intent. We think from the plaintiffs' arguments and proofs that what they are really urging this Court to find is that this system is unconstitutional because every one of the 170 schools or every one of the 100 schools they built since 1950 did not open with the roughly equivalent racial balance. In

so doing, plaintiffs urge the Court to infer segregative purpose then from proof of acts, regardless of whether those acts were justified by educational concerns. We think that there is more to the test of intent than simply whether it was foreseeable that that action would in and of itself cause racial imbalance.

Now, if I can for a minute, I would like to turn to a couple of Sixth Circuit cases, mainly *Bronson v. Board of Education of the City School District of Cincinnati*, 525 F.2d 344 (1975), *cert. denied* 425 U.S. 934 (1976)]. The *Higgins* case is clear, I think, that intent does not mean malice. I don't know how the plaintiffs got that point from our brief. I don't see it there, and I think maybe they — I don't know, but maybe they wanted to make that argument so they could talk about this today. I am not sure.

The parties apparently do not disagree so much about the law as they do about its application to the facts of the case.

My review of the law convinces me that the plaintiffs need not prove that the defendants intended to do harm, or acted with ill will.³ They need only prove that school officials in-

³ The discussion of this problem in *Hart v. Community School Board*, 512 F.2d 37, 48 (2d Cir. 1975) is helpful. That court focused on the issue by making an assumption: "We assume that mere inaction, without any affirmative action by school authorities, allowing a racially imbalanced school [or school system] to continue, would amount only to *de facto* rather than *de jure* segregation. Since here there has been a finding of affirmative action, coupled with intentional inaction, the case is different." The *Hart* court then stated:

We conclude that enough has been shown of intentional state action through the community school board and its predecessor local school board to support a finding of segregative intent from the foreseeable consequences of action taken, coupled with inaction in the face of tendered choices. Instead of remanding, we treat the District Court's finding of a lack of racial motivation as irrelevant in the face of his findings of foreseeable effect.

Hart v. Community School Board, 512 F.2d 37, 51 (2d Cir. 1975) (footnote omitted).

The defendants refer the Court to decisions of the United States Court of Appeals for the Ninth Circuit which may be read to require proof of desire to discriminate as a necessary predicate for a finding of unconstitutionality. In *Soria v. Oxnard School District Board of*

tended to segregate. It is well within reason to believe that a person may intend to segregate or cause apartness for socially admirable reasons. It can be argued that many genuinely believed, perhaps some yet believe, that it is best to educate children with other children, administrators and faculty of their own race. Some may believe in complete sincerity that the total community good will be enhanced by segregation. As Mr. Justice Stewart wrote when he was a Circuit Judge in the case *Clemons v. Board of Education of Hillsboro*, 228 F.2d 853, 859 (6th Cir. 1956) (concurring opinion):

The Board's subjective purpose was no doubt, and understandably, to reflect the "spirit of the community" and avoid "racial problems" as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the

Trustees, 488 F.2d 579, 585 (9th Cir. 1973), *cert. denied* 416 U.S. 951 (1975), the Ninth Circuit read *Keyes* to require a "determination that the school authorities had intentionally discriminated against minority students by practicing a deliberate policy of racial segregation." The Ninth Circuit re-affirmed this reading in *Johnson v. San Francisco Unified School District*, 500 F.2d 349, 351 (9th Cir. 1974). In *Soria*, the Ninth Circuit sent the case back to the trial court for a determination of whether segregative intent should be inferred. 488 F.2d at 588. It did the same thing in *Johnson*, 500 F.2d at 352. A district court in the Ninth Circuit recently summarized the posture of the law in that circuit as follows:

Thus, under the Ninth Circuit formulation of the standard for unconstitutional *de jure* segregation, the school board is precluded only from practicing a purposeful policy of racial separation in the school system; the district is under no affirmative duty to improve racial balance in the schools. However, where the school board claims that actions which perpetuated racial imbalance were motivated by proper educational concerns, it is the function of the trial court to scrutinize closely the school board decision-making process to assure that false or facile justifications do not mask purposeful discrimination.

Diaz v. San Jose Unified School District, 412 F. Supp. 310, 330 (N.D. Cal. 1978).

The difference, if any, between the Second Circuit's approach to the standard of liability and that of the Ninth Circuit appears to be that the Second Circuit would affirm a finding of liability based upon proof of affirmative intentional acts and omissions after notice which foreseeably result in segregation even in the absence of desire to segregate. The Ninth Circuit would appear to require proof of a deliberate policy of segregation, but would permit this requirement

Board's action, whatever [subjective] motives the Board may have had.

Intentional segregation of black school children by public officials is unconstitutional whether caused by those truly caring about blacks or those calloused to their concerns.

Perhaps one of the questions in this case can be posed in this fashion: If a board of education assigns students to schools near their homes pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists? A majority of the United States Supreme Court has not directly answered this question regarding non-racially motivated inaction. On the other hand, the United States Court of Appeals for the Sixth Circuit has addressed the question as follows:

It is thus seen that the law imposes no affirmative duty upon school officials to correct the effects of segregation resulting from factors over which they have no control. Neither are they operating a dual system when they fail accurately to anticipate the full effect of their racially

to be met by the drawing of reasonable inferences from evidence of defendants' intentional acts and omissions.

The *Hart* court describes its differences from the Ninth Circuit decisions as largely semantic. I believe it is somewhat more than semantic, but, in any event, the law of the Sixth Circuit is applicable in the case at bar.

In *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied 421 U.S. 963 (1975), the Sixth Circuit held:

A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

See also *Higgins v. Board of Education of City of Grand Rapids*, 508 F.2d 779 at 791, 793 (6th Cir. 1974).

neutral retention of a neighborhood school system, absent a finding of segregative intent.

... While it is true that a Court may *infer* such an intent from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregation patterns exist in fact. The inference is permissible, not mandatory.

Higgins v. Board of Education of City of Grand Rapids, 508 F.2d at 791, 793 (emphasis in original).

I do not read the Sixth Circuit cases as holding that *Keyes* forbids the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn. A standard requiring plaintiffs in a school desegregation case to adduce *direct* proof of a "racial motive" on the part of a multi-person school board would border on the impossible. There is nothing new or unique about drawing reasonable inferences from facts found, even when essential elements of proof are supplied from inferences drawn.

Applying the *Higgins* standard, I believe that the question posed above should be answered in the affirmative. Substantial adherence to the neighborhood school concept with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.

B. DRAWING THE INFERENCE OF SEGREGATIVE INTENT

The Columbus defendants argue that the official acts of the Columbus Board of Education have in recent history been racially neutral. They contend that the Board has acted in conformity with the neighborhood school philosophy, and that the racial imbalance which admittedly exists in the Co-

lumbus Public Schools is the sole result of housing segregation and other factors which are beyond the control of school officials. If the Columbus Public Schools were ever unlawfully segregated, say these defendants, then intervening decades of racially neutral Board policies, and certain recent efforts of the Board and of school administrators, have completely cleansed the school district of any present and continuing effects traceable to past illegalities.

Plaintiffs argue to the contrary. They direct the Court's attention to a series of Board actions, both remote and recent, which they contend are inexplicable except by reference to segregative intent. They assert that during this century the Columbus defendants and their predecessors in office have repeatedly engaged in purposeful and overt segregative acts. Against this background, they attack the Board's adherence to the neighborhood school philosophy, arguing that such adherence was not racially neutral in light of all the evidence adduced at trial. They insist that on this record it is entirely reasonable to infer segregative intent.

Notice to the Board

If there exists in this case a factor which distinguishes it from some other northern desegregation cases, it is the proof adduced concerning notice to the Columbus Board of Education. Various segments of the community, notably black parents and civic organizations, have repeatedly and articulately vocalized concern, anger or dismay concerning both overtly segregative actions and lost integrative opportunities.

As mentioned hereinabove, even before the turn of the century black citizens complained about the plight of black students in Columbus. In 1909, Charles W. Smith took the Columbus Board to court in a futile effort to secure equal rights for black school children. Since the 1954 *Brown* decision, the Columbus defendants or their predecessors were adequately put on notice of the fact that action was required to correct

and to prevent the increase in racial imbalance. The local NAACP group, Columbus Urban League, Columbus Metropolitan League of Women Voters, Columbus Area Civil Rights Council, Columbus Metropolitan Council on Quality Integrated Education, the Columbus Board-sponsored Ohio State University Advisory Commission on Problems Facing the Columbus Public Schools, and officials of the Ohio State Board of Education all called attention to the problem and made certain curative recommendations. An assistant state superintendent for public instruction testified in part:

Q. Mr. Greer, did you or your staff ever recommend that the Columbus administration employ various integrative techniques?

A. Yes, sir.

Q. Like what?

A. Well, in several of the sessions, early sessions, the question came up — this question came up: Is it possible or would it be possible for Columbus City to use any of the eleven or twelve different techniques that are available in the Department of Health, Education and Welfare handbook, pairing of schools, magnet schools, changing of boundary lines and so on, of the different kinds of procedures normally used in all these desegregation efforts, and we made recommendations based on, well, at least five or six of the different methods that seemed to be feasible for this city.

You may begin by moving certain boundaries just a half mile or two blocks in some cases in any number of cities to make change.

Others, you would have to use other methods such as pairing.

In some sections of the city, it might have required setting up magnets.

We even discussed the business of open enrollment and how much impact it would have when you combined it with all the other types of methods, yes.

The Ohio State University Advisory Commission on Problems Facing the Columbus Public Schools was appointed by Ohio State University President Novice G. Fawcett at the request of the Columbus Board of Education. The Commission was asked to clarify some of the problems facing the schools and to offer recommendations which would help solve them. In a report dated June 15, 1958, the Commission concluded that there were racially segregated schools in Columbus. The Commission recommended:

A fundamental barrier to the achievement of racial integration has been the construction of new housing, high rise, multiple and single dwelling, public and private, that is in effect segregated when it opens. New segregations crop up faster than the schools can achieve integration no matter how hard they try. The Commission recommends, therefore, that the Board of Education take immediate steps to place all plans for new school construction or additions to existing facilities under pre-construction open housing agreements hammered out in advance.

...

If such a policy were in effect in Ohio, it would: (1) encourage orderly development of open housing; (2) permit the interests of the business, industrial, and economic sectors of the community to combine with the civil rights interests in a forthright, genuine and highly creative set of policies to achieve outstanding educational as well as other urban improvements; (3) stand against the tendencies to re-segregate which are so prominent in most metropolitan areas; (4) make less necessary large-scale transportation programs to achieve equal educational opportunity; (5) prevent the occurrence of new segregations which often take place when new schools are opened; (6) fit with other attempts to desegregate schools where de facto segregation now exists in Columbus; (7) permit the Board of Education to concentrate on segregated sections of the community allowing it to work out a managed integration policy for those parts of the city; and (8) set

an immediate example of compliance with recent federal legislation on open housing.

...

The mobility of both the black and white populations in many sections of the city will undoubtedly continue for a period of years — at least until genuine open housing is achieved in the metropolitan area. During the era of rapid population movement, the school system must pursue deliberate integration practices.

From a careful review of the facts, I believe it fair to say that the Columbus defendants' response to notice of the racial imbalance problem and to a mass of advice about alternatives has been minimal. In 1968, some years after receiving the Ohio State University Advisory Commission report, the Columbus Board developed an Urban Education Coalition, initiated a series of neighborhood seminars, and went on record stating that efforts would be accelerated to achieve better racial distribution in the attendance areas of the Columbus Public Schools, to exploit opportunities for interracial educational experiences involving pupils in suburban districts with Columbus pupils, to plan new approaches to integrated education, to encourage teachers to develop wholesome feelings toward minority group children, to understand more fully the problems of such children, and to recruit black teachers, supervisors and administrators. Notably absent was any *action* to adopt the more substantive areas of the Commission's recommendations as set forth above.

As is noted earlier in this opinion, a resolution, defeated by a majority of the Board would have created a site selection advisory board designed to provide a mechanism for preventing the selection of construction sites which would result in racially segregated schools. In 1973 a motion that the Columbus Board of Education formally request the State Department of Education to develop and present to the Columbus Board plans for effectively desegregating the Columbus Public Schools was

defeated. Also, the Board declined to apply for federal funds for desegregation.

Defendant Dr. John Ellis, Superintendent of Columbus Schools, stated in regard to methods used for education of black and white children:

Q. What steps are you taking to achieve that in Columbus?

A. The major effort that we have taken I would characterize as two-fold. First, through the school building program, we have added a variety of career centers that are open and available to students from across the school district. At the elementary and junior high school level, we have designated schools as developmental learning centers that are open to children beyond the neighborhood district. We are also offering different alternative schools such as an informal school, a traditional school, an ICE school, a positive reinforcement school, all schools that will have students from across the entire school system. So one thrust is to insure that we have a wide diversity of educational programs that will appeal to the great needs of a metropolitan area.

The second part of our approach, and all of this I assume could be embraced under the label "Columbus Plan," is to insure that pupils know about the opportunities and that a transportation network is created so that the opportunities are not merely ephemeral but can become actual.

The action of the Columbus Board was described at trial by its then-president: "[W]e are putting all our cards, if you will, on the Columbus Plan because it is a positive plan and because people seem to accept it." Another member of the Board opined that she does not believe in desegregation, does not view the Columbus Plan as a desegregation plan, but does believe in voluntary integration.

Neighborhood School Concept

Educators, state officials, parents and children all may derive benefits from a neighborhood school policy. While it is not the only available policy, the Court recognizes its worth. Savings in time and money may result from the policy.

Chief Judge Battisti has remarked as follows concerning the neighborhood school concept:

Of all the issues raised at trial, perhaps none engendered as much discussion as the local school board's purported "neighborhood school policy." At various times, such policy was both a sword and a shield. The plaintiffs wielded it as an offensive weapon and viewed the board's application of the neighborhood school policy as clear evidence of its segregative intent; the board, on the other hand, cloaked itself in the neighborhood school policy viewing such policy not only as a viable defense, but also one mandated by law.

Reed v. Rhodes, 422 F. Supp. 708, 790 (N.D. Ohio 1976).

Many of life's difficult decisions, surely many decisions of this Court, require that priorities be established among known social pluses. This is such a case. The protection of constitutional rights of those who litigate here is this Court's most important function. A neighborhood school policy, revered by many as it is, cannot be a contributor to unconstitutional deprivation. Those who rely on it as a defense to unlawful school segregation fail to recognize the high priority of the constitutional right involved. The Chief Justice of the United States, writing for a unanimous Supreme Court, has stated in this regard:

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not

equal in a system that has been deliberately constructed and maintained to enforce racial segregation.

Swann, 402 U.S. at 28.

At trial the Court did not hear any evidence disputing the value of providing an integrated education. The Court is mindful that many citizens and educators sincerely dissent from the law that favors the non-segregated education of our children. Many believe that court remedies designed to foster integrated education are not educationally worth their trouble. This Court need not enter this popular debate. The existing applicable law, as I understand it, will be applied; nothing more, nothing less.

Residential Segregation

In *Austin Independent School Dist. v. United States*, — U.S. —, — (1976), Mr. Justice Powell, speaking in a concurring opinion for himself and two other justices, stated:

The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

The conclusions I draw from the facts of the instant case are somewhat congruent with that general statement. Counsel for the defendants have objected to testimony of racial residential segregation; however, the evidence, in my view, is relevant, and it has been considered.

Intervening plaintiffs' expert witness Dr. Karl Taeuber, a University of Wisconsin professor of sociology with outstanding

qualifications, testified concerning a summary statistical index of the degree of black-white racial segregation. The index is a scale that goes from 0 to 100. Zero represents a situation of no residential segregation by race. No segregation means that in the census data that every single city block would have the same percentage of white and blacks as the city ratio of black to white households. For example, if there are 20% blacks in the city, then every block would have 20% black and 80% white. That would be zero residential segregation. If every block were completely occupied by blacks or completely occupied by whites, that would be complete segregation; the index value would be 100. Based on census data in evidence, Dr. Taeuber evaluated Columbus in certain census years as follows:

Year	Index
1940	87.1
1950	88.9
1960	85.3
1970	84.1

Dr. Taeuber concluded that blacks who have economic alternatives available seek to avoid living in a 100% black area, but that their choices are constrained because in reality there is a dual housing market; one for blacks and another for whites.

Housing segregation has been caused in part by federal agencies which deal with financing of housing, local housing authorities, financing institutions, developers, landlords, personal preferences of blacks and whites, real estate brokers and salespersons, restrictive covenants, zoning and annexation, and income of blacks as compared to whites.

The Court finds that in Columbus, like many other urban areas, there is often a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves. The racial composition of a neighborhood tends to influence the racial identity of a school as white or black. This identifi-

cation comes in the form of student, teacher, and administrative assignments as well as the location and attendance boundaries of the school. When the number of black pupils increases, the number of black teachers increases, and a black principal is assigned; the school then becomes less attractive for white students to attend. The racial identification of the school in turn tends to maintain the neighborhood's racial identity, or even promote it by hastening the movement in a racial transition area. White families tend to cease migrating into such a neighborhood, and tend to move out of the area.

The Court has received considerable evidence that the nature of the schools is an important consideration in real estate transactions, and the Court finds that the defendants were aware of this fact. The defendants argue, and the Court finds, that the school authorities do not *control* the housing segregation in Columbus, but the Court also finds that the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required.

I do not suggest that any reasonable action by the school authorities could have fully cured the evils of residential segregation. The Court could not and would not impose such a duty upon the defendants. I do believe, however, that the Columbus defendants could and should have acted to break the segregative snowball created by their interaction with housing. That is, they could and should have acted with an integrative rather than a segregative influence upon housing; they could and should have been cautious concerning the segregation influences that are exerted upon the schools by housing. They certainly should not have aggravated racial imbalance in the schools by their official actions.

Recent Efforts

The Court is impressed with the positive efforts of the Columbus defendants to provide a number of innovative educational alternatives. Columbus in the near future will have programs of vocational, alternative and special education which will compare favorably with any system in the country. The new Fort Hayes training center presents an opportunity for education which certainly will provide students with more and different marketable skills. Participation in the Columbus Plan nears 4,000 students, and full transportation is now provided. The Columbus defendants forecast, and the Court agrees, that substantial numbers of students will participate in these programs in the years to come.

However, no witness testified, no exhibits show, and I am unable to find that the sum of the new programs has any probability of substantially curing the system's racial imbalance, which the Court finds directly resulted from defendants' intentional segregative acts and omissions. Increased numbers of majority white schools have black administrators employed. However, 70% of all black principals were assigned to identifiably black schools at the time of trial.

The number of black teachers in each school almost compares to the ratio of black to white teachers in the total system. Suffice it to say that this has occurred only after the Ohio Civil Rights Commission's complaint and the consummation of a consent order before that Commission. Moreover, the Court cannot find, as plaintiffs urge, that the Columbus defendants have failed to comply with the consent order and have downgraded efforts to recruit black faculty and administrators. The effort to comply with the consent order appears to be substantially successful; also, the effort to recruit black teachers appears to have been sincere and reasonable.

The recent efforts of the Columbus defendants are in many ways highly commendable, but fall far short of providing the

Court a basis to find that the defendants are solving the constitutional problems the evidence reveals.

For example, there is little dispute that Champion, Felton, Mt. Vernon, Pilgrim and Garfield were de jure segregated by direct acts of the Columbus defendants' predecessors. They were almost completely segregated in 1954, 1964, 1974 and today.⁴ Nothing has occurred to substantially alleviate that continuity of discrimination of thousands of black students over the intervening decades. Neither the magnet alternative school nor the Columbus Plan will predictably provide students at those schools their constitutional rights.

Burden of Proof

As mentioned hereinabove, the *Keyes* court provided for a shift in the burden of proof when plaintiffs' proofs reach a certain standard. A defendant must then assume the obligation to show that the constitutional right to equal protection has not been denied to plaintiffs. *Keyes, supra*, 413 U.S. at 208.

In the instant case I have found that a number of schools on the near-east side of Columbus — Felton, Champion, Garfield and Pilgrim — were deliberately segregated or racially imbalanced by acts of school officials. During the intervening years the imbalance has survived unattenuated by any acts of defendants. Years of the practice of racial considerations in the assignment of teachers and administrators have negatively influenced the racial character of the schools. Recent acts have lessened the sting of the practice, but have not served to substantially remove the evil it helped create. Again, recent concern in this regard is too little and too late to abate the need for a remedy.

Defendants' evidence falls short of showing that the racial character of the school system is the result of racially neutral

⁴ Felton Elementary School was closed in 1974. At that time, it was a racially identifiable black school.

social dynamics or the result of acts of others for which defendants owe no responsibility. Defendants have not proved that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions, see *Mt. Healthy City School District Board of Education v. Doyle*, — U.S. — (1977).

Finding of Segregative Intent

From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times, has approved optional attendance zones, discontinuous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion.

*Higgins v. Board of Education of
City of Grand Rapids*

All parties cite the *Higgins* case, 508 F.2d 779 (6th Cir. 1974). The Sixth Circuit affirmed the well-written trial court decision, which found in part for the defendant Grand Rapids Board of Education. It may be worthwhile to compare some of the *Higgins* facts to the facts of our Columbus case. Like Columbus, there were many schools racially imbalanced in Grand Rapids. All of the high schools, however, had been racially balanced. Following a master plan adopted by the school board, Grand Rapids made substantial improvement in racial balance when, in attempting to relieve overcrowding of the innercity schools, the conscious decision was made to use integrative feeder patterns to outlying schools. In Grand Rapids, few new schools opened racially identifiable, while in Columbus many new schools have opened racially identifiable in recent years.

The trial court in *Higgins* did not find that a substantial part of the Grand Rapids school district was officially segregated either before or after the *Brown I* decision. The plaintiffs adduced no proof of intact busing in Grand Rapids. Plaintiffs challenged only "a few instances" of boundary line and feeder pattern changes, and the Court of Appeals held that these proofs "were properly dismissed by the district court as too isolated to support charges of gerrymandering to achieve forbidden racial discrimination." 508 F.2d at 786. Plaintiffs considered only one optional zone created by the Grand Rapids Board of Education to be "significant," 395 F. Supp. at 459, and as to this zone the trial court held that "the criteria of the school administration in granting the option and in considering attaching the area to the Creston zone were at least completely neutral and . . . there is no credible evidence to support a rational inference of racial overtones or bias in the decision." 395 F. Supp. at 472.

In finding in part for plaintiffs, the United States District Court for the Western District of Michigan noted that up until

1970 most black faculty in Grand Rapids were assigned to predominantly black schools; like Columbus, this condition had improved in recent years in Grand Rapids. Nevertheless, the trial court determined that the practices of the board regarding faculty assignment had violated the rights of plaintiffs under the Equal Protection Clause, and ordered relief concerning these assignments. 395 F. Supp. at 484 and 490.

In affirming, the Sixth Circuit stated:

Another relevant factor to be considered in assessing the finding below that segregation in the Grand Rapids school system is not the result of intentional acts by the school board, is the testimony of the plaintiffs' own witness that many of the more commonly used or classic segregative techniques found in other cases were absent in Grand Rapids. These devices included intact bussing, bussing blacks past white schools having extra capacity to more distant black schools, widespread use of optional attendance zones, use of multiple and overlapping attendance zones, disparity between physical quality of black and white schools, constant gerrymandering of attendance zones, and discriminatory use of transfer policies.

Higgins v. Board of Education of Grand Rapids, 508 F.2d 779, 787 (1974). In contrast, many of these "classic segregative techniques" have been used in Columbus.

C. THE STATE DEFENDANTS

Governor and Attorney General

These state officers are defendants in this case. The facts do not show either officer did anything, or failed to do anything that he was obligated to do, which caused plaintiffs the harm for which they seek redress.

State Board of Education and
Superintendent of Public Instruction

The Ohio Constitution clearly places the responsibility for public education upon the State of Ohio. Because local school boards initiate school levies for local voters' consideration, expend funds locally, and generally exercise administrative control over local schools, many people may well believe that such local boards of education have primary responsibility for the maintenance and operation of the public schools in Ohio. In fact, the state remains primarily responsible. This mandate has been our law since the adoption of the 1851 Ohio Constitution.⁵

The Sixth Circuit has commented on the obligation of the state administrative agency at follows:

Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools.

Brinkman v. Gilligan, 503 F.2d 684, 704 (6th Cir. 1974).

At no time have these state defendants *actively* moved to do anything to correct the racial imbalance in the Columbus schools. Nor did they act to make a determination as to whether black children were being deprived of their rights. The State Board and Superintendent assure that such matters as teacher qualifications, school building standards, curriculum requirements and annexations are lawfully administered. See R.C. 3301.07. The Court is of the opinion that the law of Ohio requires that the State Board of Education act to assure

⁵ OHIO CONST. art. I, § 7; art. II, § 26; art. VI, § 2 (1851). OHIO CONST. art. VI, § 3 (1912).

that school children in the various local school districts enjoy the full range of constitutional rights. The Board has not done this in Columbus even though it has received sufficient statistical evidence of student and faculty racial imbalance and is well aware of the existence of racially imbalanced schools in Columbus.⁶

⁶ Counsel for the State of Education argued as follows during closing arguments.

I am not pleading ignorance.

I am saying to the Court that the State Board has constructive knowledge of everything that is reported to the State Department of Education about the racial makeup of pupils and staff in the schools of Columbus. It has constructive knowledge. It is bound by that knowledge.

Now, it is not so much a matter of investigation, Your Honor. It is a question of whether or not, knowing that the State Board and Department should have told Columbus to make certain specific changes, and if Columbus refused to change, should the State Board and Department have threatened to withhold funds? Now, before they can do that, they have to have some reasonable basis to believe what they have constructive knowledge of is a violation of law.

[When we look at the recommendations that have been made to Columbus [by the State Board], all of this is a panoply of activity that has desegregation as its objective. Now, the plaintiffs claim that the State Board is totally uninterested in desegregation, that it has a policy of maintaining segregation, but I say that this is absurd and does not stand up under the evidence in this record.

The final question, a quasi question, is whether the State Board and Department could have done more. Could they have gone to Columbus and could they have demanded that certain things take place? Sure. We can all do more, but that is not the decisive legal issue. The question is not whether the State Board could have done more. The question is whether the State Board of Education had a policy of maintaining segregation, because that is what the majority of the Keyes decision talks about. Did it have segregative intent? The assessment of that question is important to the trier of facts.

... [T]he explanation for the State Board's failure to demand that Columbus take certain specific acts and corrective action is not due to a policy of maintaining segregation. It is due, instead, to the State Board's belief that the Columbus Board has certain powers that are given to it by the statutes of Ohio and that the Columbus Board and its Superintendent must be allowed to exercise those powers except where the exercise is in plain violation of the law. It had reason to believe that the Columbus Board was not in violation of the law, and that is the reason that it didn't demand the things that it demanded

The State Board and the State Superintendent are Ohio's resident experts on school desegregation matters. They have the means to collect information, which they have done, to conduct hearings, to make findings, and to enforce orders based on their findings.⁷ In 1956 the Attorney General of Ohio advised that the State Board had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, to local districts which segregated pupils on the basis of race in violation of *Brown I*.⁸ The facts of this case offer no satisfactory reason for these state officials' failure to perform their duties as advised by the Attorney General. Mere "suggestions" to the Columbus Board were not enough. These defendants cannot be heard to say that they could not understand their obligations; the Attorney General made those clear.

in Middletown, the things that it demanded in Toledo, the things that it demanded in North College Hill.

The State Board and the Department do not have a policy of maintaining segregation in the State of Ohio. They could do more, but they don't have a policy of maintaining segregation in this state, and their failure to do more is not the product of a segregative or segregationist state of mind.

⁷ R.C. 3301.16 provides that the Board shall revoke the charter of any school district which fails to meet the minimum standards. The Board may then dissolve the district and transfer its territory to one or more adjacent districts.

The State of Ohio provides financial assistance through the School Foundation Program to all qualifying, chartered districts in the state. The funds are provided by the legislature and are allocated by the Department of Education among the districts in accordance with the provisions of R.C. 3317.01 et seq. The Board disburses substantial federal funds to districts which qualify under different federal programs. Before a district may receive any federal funds, it must submit assurances that it is in compliance with law.

• The Attorney General opined:

Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds

Dr. Kenneth Connell, representing the Columbus Area Civil rights Council, visited the offices of the state defendants in the spring of 1971 and requested that action be taken regarding the Columbus schools. No action was taken. As I understand the state defendants' argument, they claim that they would have investigated had Columbus school officials so requested. This position borders on the preposterous. It cannot reasonably be expected that those who violate the constitution will be anxious for an investigation in order that a remedy may be leveled against them.

The sheer multitude of appellate court decisions cited by the parties arising from school segregation cases all over this country from 1954 until this case was at issue, coupled with notice of the racial imbalance in the Columbus schools, would have led even the most socially optimistic to suspect that Ohio's second largest city might have some problem in that regard which required attention.

The state defendants are to be commended on the accumulation of data, advisory resumes and personnel to be used for desegregation. Dr. Robert Greer has worked long and hard in a leadership role in finding avenues designed to lead to equal educational opportunities. Information was provided to local districts, and rather gentle persuasion employed to encourage desegregation. But some firm action is needed when the horse won't drink the water.

The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

V. CONCLUSION

As is not uncommon in complex cases such as this one, the Court in a pretrial decision ordered that the trial of this case be bifurcated, or split into two parts. The first part of the trial, concerning whether the Columbus Public Schools are in fact unlawfully segregated, is now over, and the preceding portions of this opinion are intended to resolve the question of liability in accordance with the evidence and the applicable law. The Court is certifying today's decision for immediate interlocutory appeal. This action should permit any party who is aggrieved by the decision to contest it where the law permits it to be contested, in the United States Court of Appeals for the Sixth Circuit. Whether or not such an appeal is filed, it is now incumbent upon the Court and upon the parties to this lawsuit to proceed apace to the second stage of this proceeding, the remedy phase. In this kind of a case, it is common for the trial court, if liability on the part of the defendants has been proved, to require the defendant school boards to submit proposed plans directed toward the implementation of a remedy. See, e.g., *Brown v. Board of Education (Brown II)*, 349 U.S. 294, 299 (1955); *Evans v. Buchanan*, 393 F. Supp. 428, 447 (D. Del. 1975); *Morgan v. Hennigan*, 379 F. Supp. 410, 484 (D. Mass. 1974); *United States v. Board of School Commissioners of the City of Indianapolis*, 332 F. Supp. 655, 681 (S.D. Ind. 1971).

A school desegregation case such as the present one gives a trial court pause for a number of reasons. The evidence in this case harkens back to a previous era in the history of Columbus: a time fresh in the memory of some who testified at trial, when black parents and their children were openly and without pretense denied equality before the law and before their fellow citizens. This case is even more disturbing because it demonstrates the existence of substantial continuing effects of decisions made and actions taken during this bygone era upon the modern Columbus school system. And, since the days

when Columbus and the Columbus Public Schools were openly segregated on the basis of race, those public officials charged by law with the administration of the Columbus Public Schools have for the most part ignored repeated requests and demands for an integrated educational system. They have engaged in overt actions which readily permit an inference of segregative intent. They have repeatedly failed to seize opportunities, large and small, which would have promoted racial balance in the Columbus Public Schools.

A case such as this one is also disturbing because of the social costs which can be associated with the implementation of a remedy. Depending upon the school system involved, these social costs can include substantial expenditures of public funds, inconvenience and hardship for students, unrest on the part of various segments of the community involved, and flight by white residents from the desegregated school district, often resulting in more pronounced racial imbalance and in a loss of tax base. While the plaintiffs must, and will, receive vindication for the deprivation of their constitutional rights, the social costs should not be forgotten in the formulation of a remedy.

No federal trial court has a free hand in determining the scope and terms of a remedy to be applied in a school desegregation case. Far from it. The federal appellate courts, including the Supreme Court of the United States, have since *Brown I* produced scores of school desegregation decisions, including decisions concerning the proper remedy to be applied in such cases. The ongoing litigation concerning the Dayton, Ohio, public schools is a case in point. On February 7, 1973, after an evidentiary hearing, an extremely able and concerned district judge in Dayton filed an opinion which determined that the Dayton Public Schools were unlawfully segregated. On July 13, 1973, after considering three separate desegregation plans submitted to it, the district court essentially accepted a plan submitted by the majority of the Dayton

Board of Education. The plan provided for no transportation of students, and placed minimal reliance upon so-called magnet schools. The plan did include the elimination of all optional attendance zones, the revision of a voluntary student transfer program, and the creation of racially balanced faculty and staff for the Dayton schools.

On appeal, the United States Court of Appeals for the Sixth Circuit agreed with the district court's decision concerning liability, but disagreed with the remedy which it had ordered. Without mentioning transportation of students, the Court of Appeals held that "the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations." *Brinkman v. Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974). The case went before the district court again. That court ordered the closing of an all-black high school, the creation of numerous magnet schools, and the continuation of the voluntary student transfer program, but declined to order transportation of students. The case was again appealed to the United States Court of Appeals for the Sixth Circuit, which did not find the remedy plan ordered by the trial court to be acceptable. The Court of Appeals stated, *Brinkman v. Gilligan*, 518 F.2d 853, 855-56 (6th Cir. 1975):

The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful,

the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

The Court of Appeals sent the case back to the district court, and directed "that the court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*." 518 F.2d at 857.

The Dayton Board of Education attempted to obtain Supreme Court review of the second decision of the Court of Appeals in the Dayton case. The Supreme Court refused to accept the case, 423 U.S. 1000 (1975), and the district court in Dayton was again faced with the question of what remedy was required. This time, the trial court ordered that in all but "exceptional circumstances" each school in the Dayton system must reflect a student racial balance within 15 percentage points of the percentage of black students in the system as a whole. This remedial order required the transportation of a substantial number of Dayton public school students. On July 26 of last year, the Court of Appeals approved this plan over the objections of the Dayton Board of Education. *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir. 1976). The United States Supreme Court has recently agreed to review the Dayton Board's objections to the plan.

The developments in the Dayton case are important here in Columbus for two reasons. First, it is a recent case which sheds light upon the present state of the law governing desegregation remedies in this judicial circuit. The decisions of the United States Court of Appeals for the Sixth Circuit are binding precedent for this Court. Second, the Dayton case is important because the Supreme Court has recently agreed to hear the case and review the Sixth Circuit's decision in it. The Dayton case may provide a vehicle for the Supreme Court to elaborate more fully upon some of the themes discussed by

three of its members in *Austin Independent School District v. United States*, — U.S. — (1976). In the meantime, it is a fact of life that decisions such as those made by the Court of Appeals in the Dayton case reflect the state of the law concerning the appropriate remedy to be applied in the present case.

The concurring opinion of three justices in the *Austin* case and the recent decision of the Supreme Court accepting review of the Dayton remedy plan are circumstances which may lead some to believe that the law concerning remedy in desegregation cases is in a state of flux. If such soundings concerning Supreme Court direction are correct, this may be a particularly auspicious time for the litigants to come together and attempt to reach an amicable and fair resolution of the questions presented by the remedy phase of this lawsuit. Meanwhile, it is the obligation of the Court to read the binding appellate court decisions and to act accordingly in the absence of an agreement reached by the parties.

Although the Court has heard volumes of evidence concerning the history and the present posture of the Columbus Public Schools, the Court has not heard the parties relative to the remedy phase of the litigation. Therefore, I cannot state with particularity a precise plan and the ramifications, economic and otherwise, which would result if a particular plan were in fact implemented. Without attempting to be precise, the Court would like to make certain suggestions to the parties which may be helpful in their attempt to negotiate a remedy or, if that is impossible, their preparation of a remedy plan for court review.

Unfortunately, two important considerations compete, both of which importantly impact any proposed desegregation remedy, whether it is imposed by a court or agreed upon by the litigants. On the one hand, there is the *Brown I* principle, still quite valid today, that unlawfully segregated schools are inherently unequal. Because black children are expected and required to grow up, live and work in a majority white society,

it is not only unlawful, it is unfair for public officials, by their actions or their inaction, to promote with segregative intent racially imbalanced schools. On the other hand, there is the fact that a desegregation remedy that may be so burdensome upon a school system as to impair its basic ability to provide the best possible educational opportunities, is no remedy at all. All parents and school children, regardless of color, have a very strong interest in quality schools.

The finding of liability in this case concerns the Columbus school district as a whole. Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter. "[I]t is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal of keeping other nearby schools predominantly white." *Keyes v. School District No. 1*, 413 U.S. 189, 201 (1973) (footnote omitted). The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards.

I believe that it may be possible to eradicate unlawful segregation from the Columbus school system root and branch without embarking upon a scheme which envisions that every school in the district should have the same student racial breakdown as does the school district as a whole. In 1971 the United States Supreme Court held that racial balancing is not required by the Constitution:

The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24, 25 (1971). An equitable remedy in a school desegregation case such as this one should provide black school children with the *Brown I* promise of an integrated education, and should at the same time take into account the scope and effect of the actions and omissions upon which the finding of liability is premised.

It is plainly the case in Columbus that had school officials never engaged in a single segregative act or omission, the system-wide percentage of black students would nevertheless not be accurately reflected in each and every school in the district. System-wide statistical remedies have been implemented and approved by many courts, perhaps because of a concern that all schools, parents, children and neighborhoods should be required equally to bear the burdens of desegregation. The fact that such plans have been used in the past does not necessarily mean that they are the only legal alternatives available. In *Swann*, 402 U.S. at 26, the Supreme Court stated:

Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

In view of the findings of fact set forth in this opinion, it

is essential that plaintiffs now be afforded relief; if they are not, their constitutional rights will not be vindicated. Each black school child in Columbus must have an opportunity for the integrated education and attendant educational advantages contemplated by *Brown I* and the cases which have followed.

If a limited number of racially imbalanced, predominantly white schools remains under a plan or plans submitted for the Court's approval, those schools would receive close scrutiny under the *Swann* test, and the defendant school authorities would be required to satisfy the Court that their racial composition is not the result of present or past discriminatory actions or omissions of defendant public officials or their predecessors in office. As is noted earlier, it would be extremely difficult to attempt to roll back the clock at this point and determine what the school system would look like now had the wrongful acts and omissions discussed earlier in this opinion never occurred. Officials striving to satisfy the Court that a number of white schools are to remain such because of racially neutral circumstances would have a difficult, but perhaps not an impossible, task.

The foregoing comments and suggestions are by no means innovative. Generally, they incorporate the law as set forth by the United States Supreme Court in the *Swann* case and other cases. Nor are they exhaustive; they are meant only as a point of reference. In order to protect the opportunity for quality education for all the children of our community, the formulation of a fair and reasonable plan to remedy the ills that the Court has found must receive the best efforts of all involved in this complex litigation. The Court sincerely awaits the reception of an appropriate plan or plans providing a fair and lawful remedy for plaintiffs which will enhance the quality of education in Columbus.

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O R D E R

The Court finds the issues joined in favor of all named plaintiffs and the class or classes they represent, and against defendants Columbus Board of Education and its members, the Superintendent of the Columbus Public Schools, the State Board of Education of Ohio, and the State Superintendent of Public Instruction. The Court finds the issues joined in favor of the defendant Governor and Attorney General of the State of Ohio, and against all named plaintiffs and the class or classes they represent. Judgment concerning liability is entered in accordance with these findings. The Clerk will award all plaintiffs and the class or classes they represent those costs which are allowable to prevailing plaintiffs under the applicable law. These costs will be borne equally by the Columbus Board of Education and the State Board of Education. Pursuant to 28 U.S.C. § 1292(b), the Court certifies that with respect to the above findings of liability this judgment order involves controlling questions of law as to which there are substantial grounds for difference of opinion and further certifies that an immediate appeal from this judgment may materially advance the ultimate termination of this litigation.

It is ORDERED that the defendants Columbus Board of Education, State Board of Education, their constituent members, officers, agents, servants, employees, and all other persons in active concert or participation with them be, and they are hereby permanently enjoined from discriminating on the basis of race in the operation of the Columbus Public Schools, and from creating, promoting, or maintaining unconstitutional racial segregation in any Columbus school facilities.

Defendants Columbus Board of Education and State Board of Education are directed to formulate and submit to the Court proposed plans for the desegregation of the Columbus Public Schools beginning with the 1977-78 school year, within ninety (90) days of the entry of this order. Within twenty (20) days

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after the entry of this order, counsel shall advise the Court of the progress of any settlement negotiations concerning an agreed remedy plan.

It is further ORDERED that the Columbus Board of Education be, and it is hereby enjoined from proceeding with construction of new schools or additions to existing schools unless such construction has already commenced. Hereafter, such new construction may proceed only upon prior approval of this Court. It is further ORDERED that the Columbus Board of Education inform this Court and plaintiffs' counsel within twenty (20) days of any construction which has already commenced and of the stage of this construction.

It is so ORDERED.

APPENDIX

GLOSSARY

Racially Identifiable (Imbalanced) and Racially Unidentifiable (Balanced) — The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools. The Court has accepted the figures used by Dr. Gordon Foster concerning the Columbus Public Schools:

Year	Percentage Black Pupils in System	Statistical Variation	Range
1950-57	15 % (estimate)	+ 5%	10 % - 20 %
1957	20 % (estimate)	+ 10%	10 % - 30 %
1964 primary	25 % (estimate)	+ 15%	10 % - 40 %
1964 secondary	28.6%	+ 15%	11.6% - 41.6%
1975	32.5%	+ 15%	17.5% - 47.5%

A smaller percentage standard deviation is applied when the system-wide percentage of blacks is low. As the total percentage of blacks increases, the statistical deviation also increases, thus resulting in a broader range of racial unidentifiability or balance.

Use of statistics in this manner provides a rough gauge which is a useful reference point when examining particular

schools. Standing alone, such statistics are of little evidentiary value.

Black and Non-White — Although some of the evidence, including some statistical data, presented at trial used the term "non-white," the Court has used the term "black" throughout this opinion since the evidence does not reflect that Columbus has any other substantial non-white population.

Black School — A school having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black pupils — that is, a racially identifiable black school. See "racially identifiable."

White School — A school having a black student enrollment which is less than the applicable variance from the system-wide percentage of black pupils — that is, a racially identifiable white school.

One Race School — A school in which 90% or more of the students are of a single race.

Predominantly — The term "predominantly" is used in this opinion in reference to the racial composition of both schools and neighborhoods. The meaning of the term is not subject to precise definition in terms of percentages, but is used to describe statistical racial composition that is substantially outside the range of statistical deviation from the system-wide or community-wide racial percentage. The term is also used to describe instances of racial imbalance from the viewpoint of the residents of Columbus; that is to say, it is used to describe those schools or neighborhoods which the average Columbus resident might describe as black or white.

Dual School System — A school system in which there is officially imposed racial segregation.

Unitary School System — A school system in which there is no, or insignificant, officially imposed racial segregation.

Discontiguous Attendance Zone — A school attendance zone from which the student residents must cross another attendance zone in order to reach their assigned school.

Intact Busing — The practice of transporting a class of students (often with their teacher) from one school to another, keeping the class as an identifiable unit at the receiving school for most purposes, with minimal interaction with the students at the receiving school.

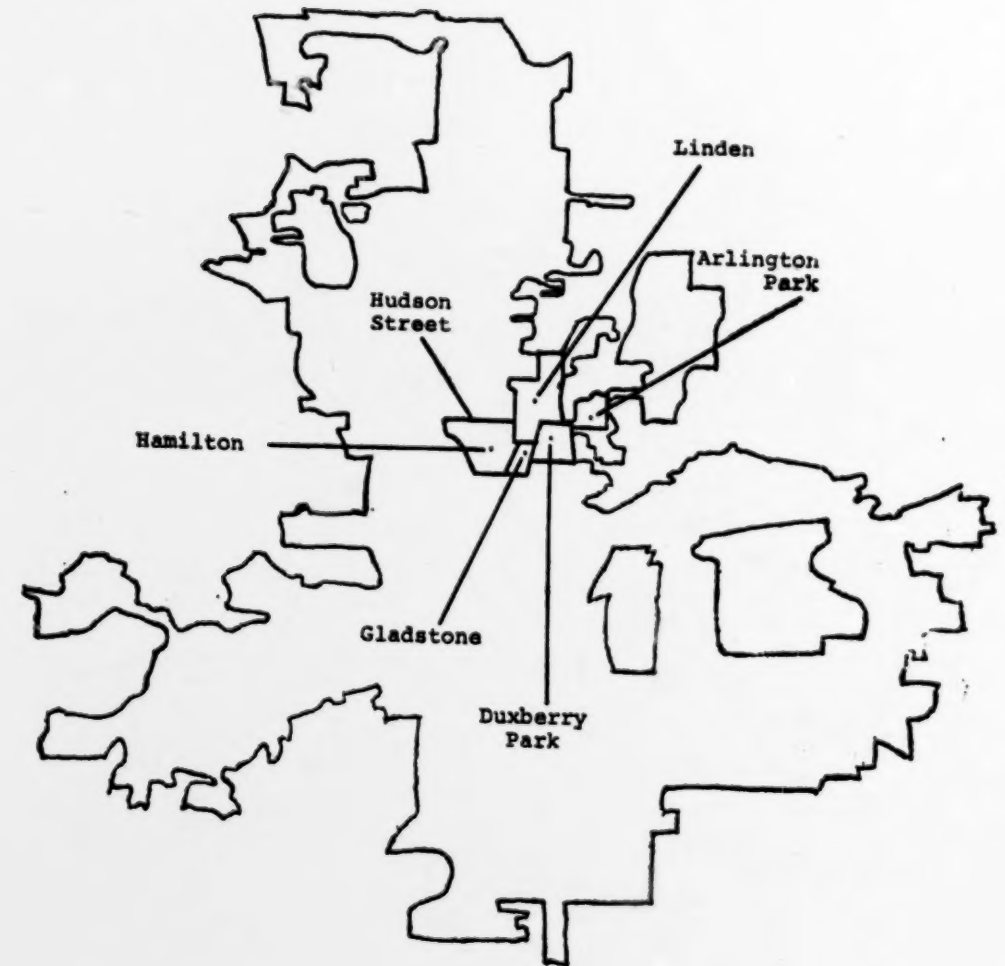
Magnet School — A school with special programs or facilities and an open enrollment designed to attract students from other parts of the school system. Depending upon the location of the school and the availability of transportation; magnet schools may serve as a method of voluntary integration.

Optional Attendance Zone — A portion of a school attendance zone from which the students may opt to attend a specific school other than the one which otherwise serves that area. That is, the student has a choice as to which of two or more schools to attend.

Pairing — A method of improving the racial balance of two schools having diverse racial compositions by consolidating the two attendance areas into a single zone. All of the students in the consolidated attendance area are then assigned to one school for certain grade levels (for example, K-3) and to the other school for the remaining grades (for example, 4-6).

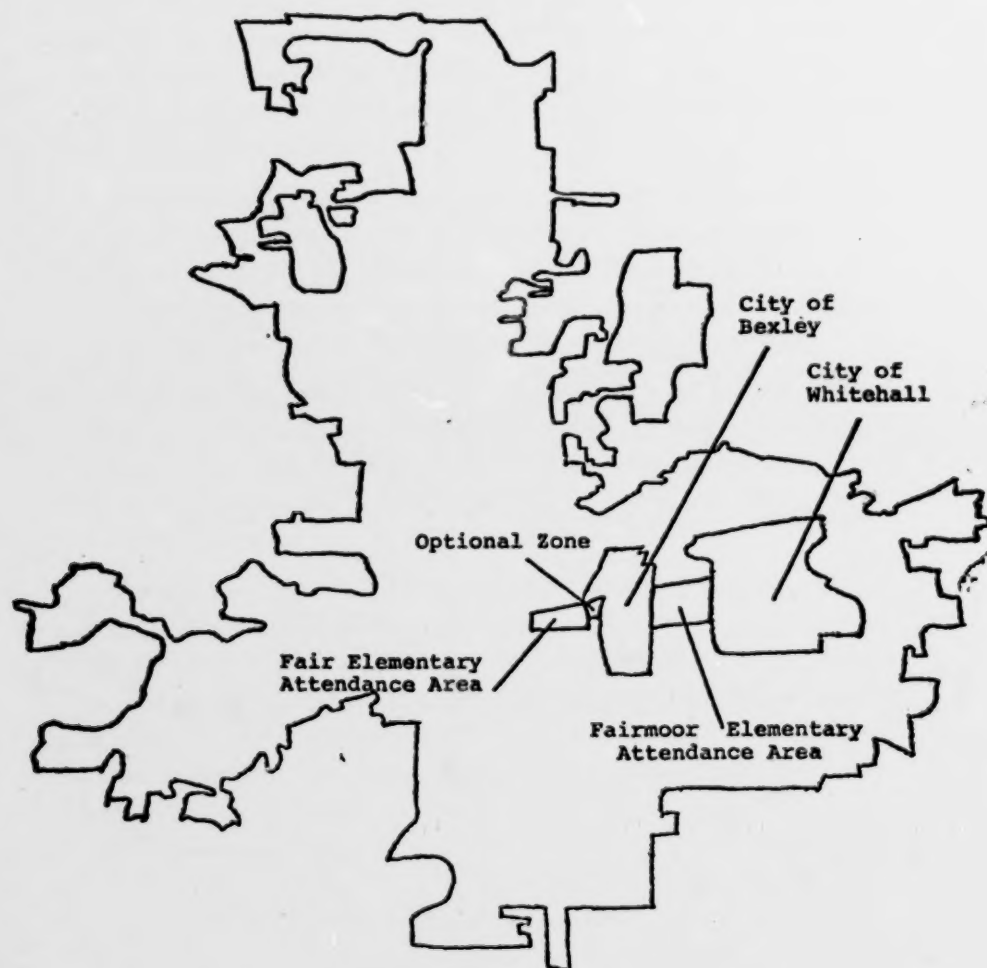
Gladstone, Duxberry Park, Linden,
Hamilton and Arlington Park
Elementary Schools

Map No. 1



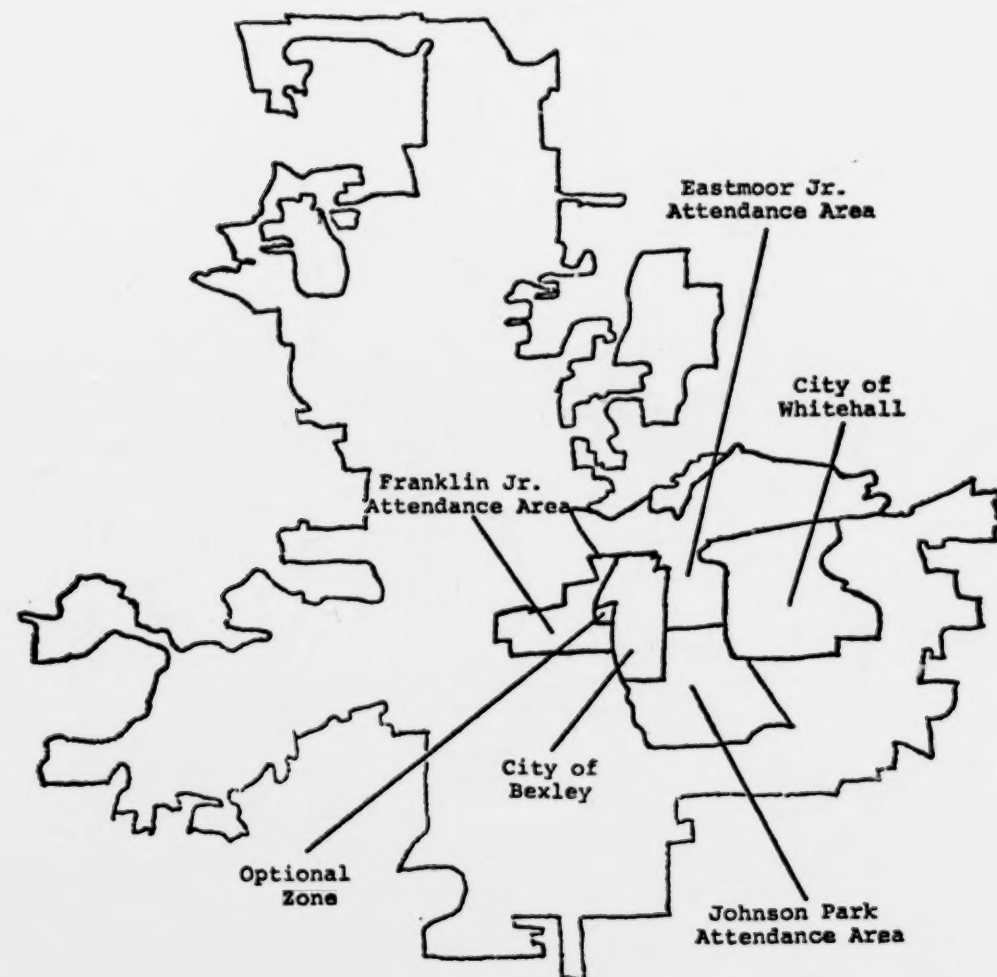
Near-Bexley Option – Elementary Schools

Map No. 2



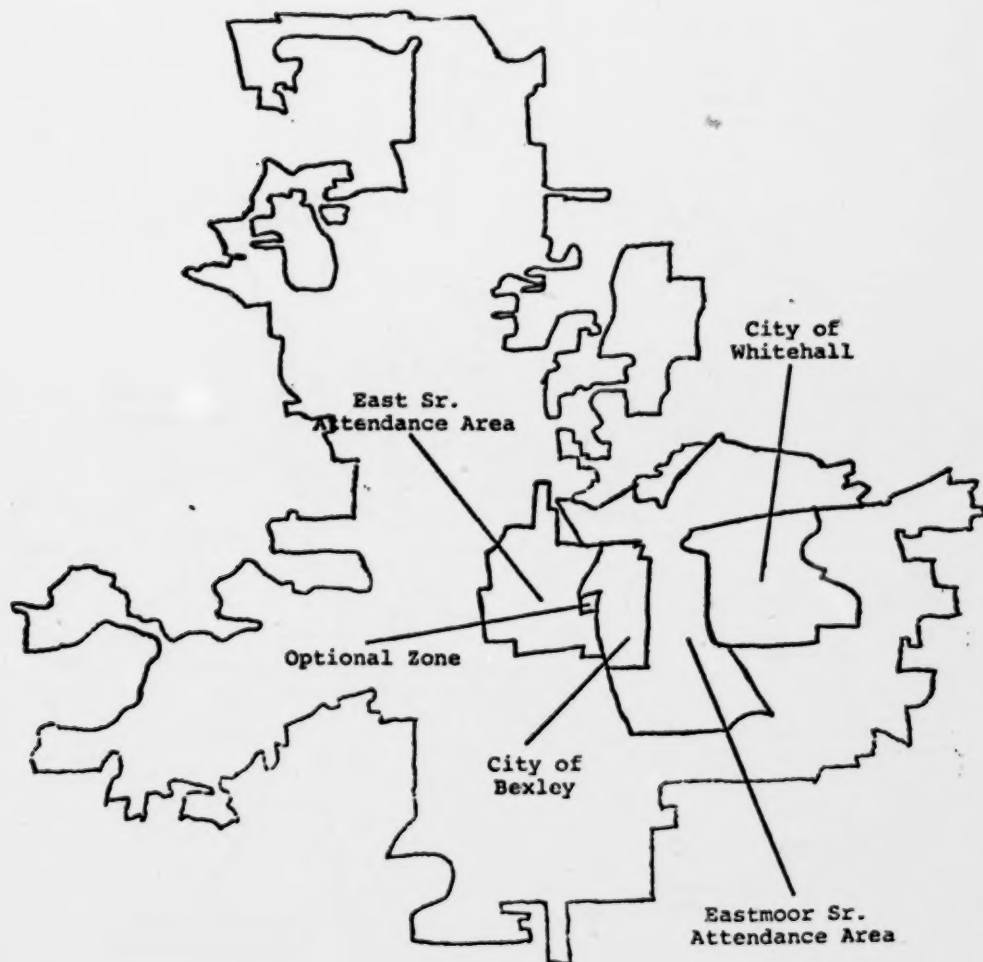
Near-Bexley Option – Junior High Schools

Map No. 3



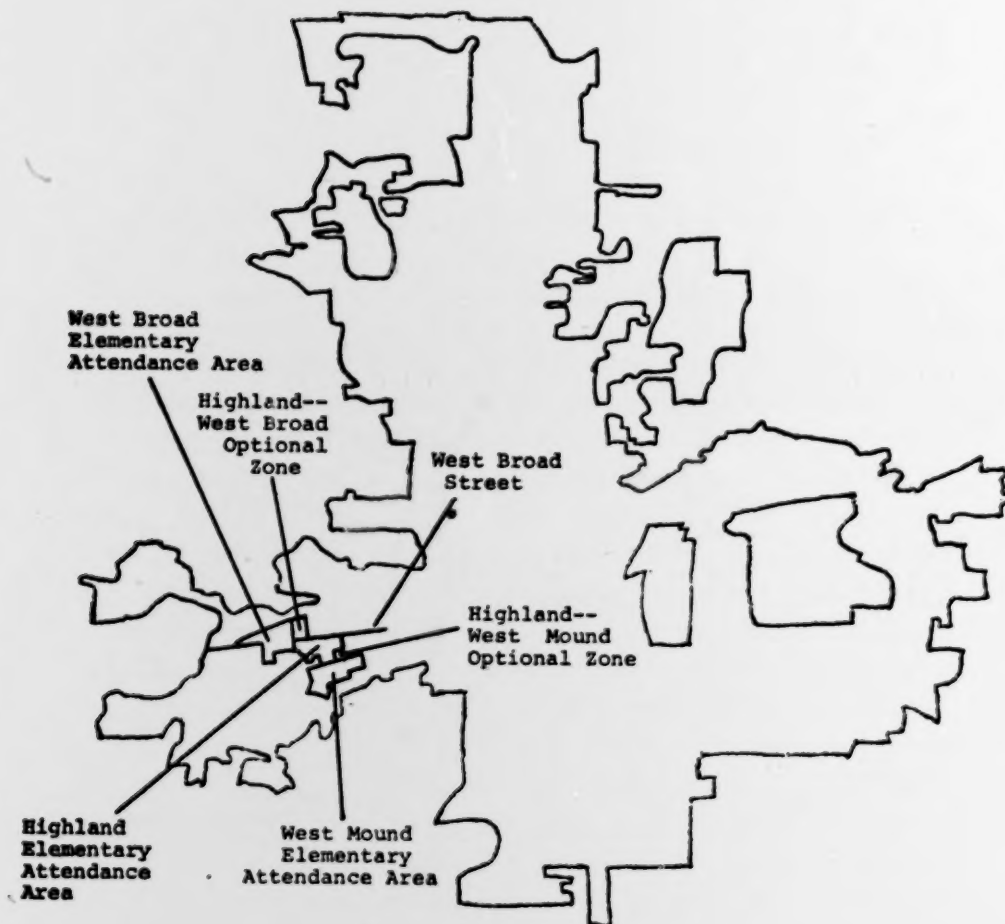
Near-Bexley Option — Senior High Schools

Map No. 4



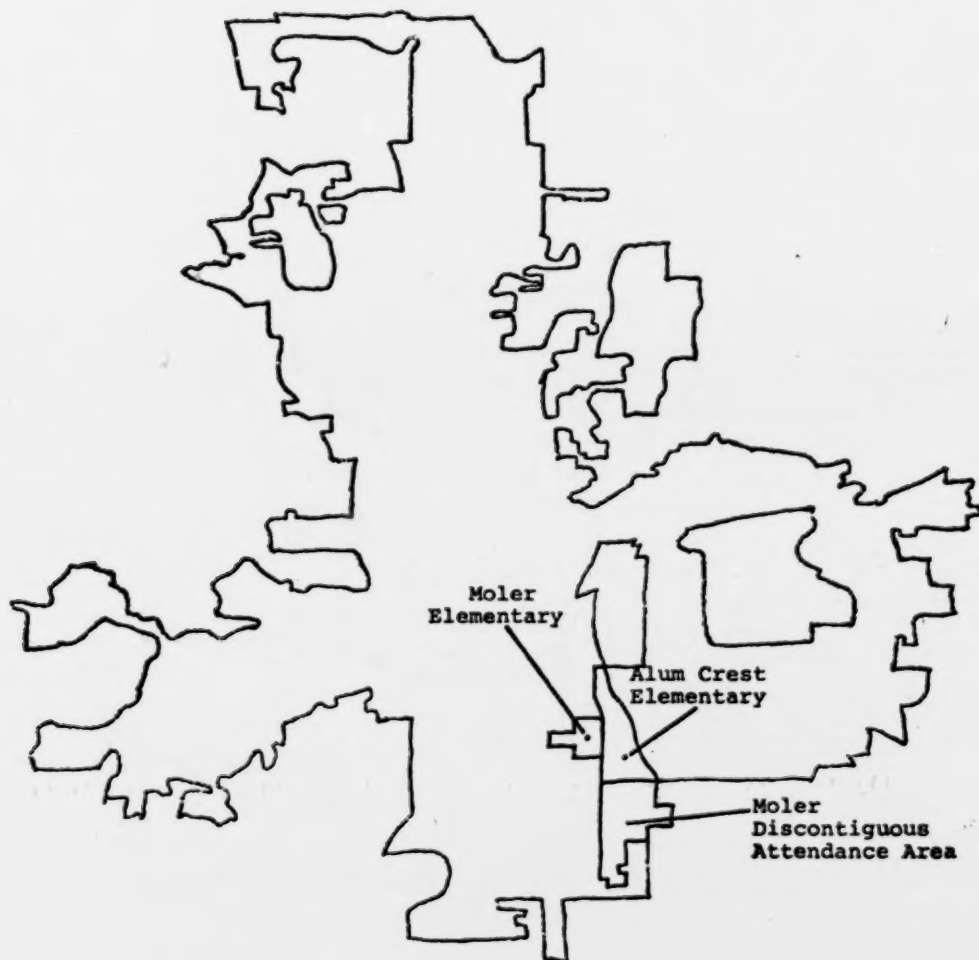
Highland, West Mound and West Broad Elementary Optional Zones

Map No. 5



Moler Elementary Discontiguous
Attendance Area

Map No. 6



**UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Gary L. Penick, et al.,
Plaintiffs,
v.

Columbus Board of Education,
et al.,

Defendants,

Civil Action

No. C-2-73-248

JUDGMENT

(Filed March 9, 1977)

This action came on for consideration before the Court, Honorable Robert M. Duncan, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT the Court finds the issues joined in favor of all named plaintiffs and the class or classes they represent, and against defendants Columbus Board of Education and its members, the Superintendent of the Columbus Public Schools, the State Board of Education of Ohio, and the State Superintendent of Public Instruction. The Court finds the issues joined in favor of the defendant Governor and Attorney General of the State of Ohio, and against all named plaintiffs and the class or classes they represent. Judgment concerning liability is entered in accordance with these findings. The Clerk will award all plaintiffs and the class or classes they represent those costs which are allowable to prevailing plaintiffs under applicable law. These costs will be borne equally by the Columbus Board of Education and the State Board of Education. Pursuant to 28

U.S.C. § 1292(b), the Court certifies that with respect to the above findings of liability this judgment order involves controlling questions of law as to which there are substantial grounds for difference of opinion and further certifies that an immediate appeal from this judgment may materially advance the ultimate termination of this litigation.

It is ORDERED that the defendants Columbus Board of Education, State Board of Education, their constituent members, officers, agents, servants, employees, and all other persons in active concert or participation with them be, and they are hereby permanently enjoined from discriminating on the basis of race in the operation of the Columbus Public Schools, and from creating, promoting, or maintaining racial segregation in any Columbus school facilities.

Defendants Columbus Board of Education and State Board of Education are directed to formulate and submit to the Court proposed plans for the desegregation of the Columbus Public Schools beginning with the 1977-78 school year, within ninety (90) days of the entry of this order. Within twenty (20) days after the entry of this order, counsel shall advise the Court of the progress of any settlement negotiations concerning an agreed remedy plan.

It is further ORDERED that the Columbus Board of Education be, and it is hereby enjoined from proceeding with construction of new schools or additions to existing schools unless such construction has already commenced. Hereafter, such new construction may proceed only upon prior approval of this Court. It is further ORDERED that the Columbus Board of Education inform this Court and plaintiffs' counsel within twenty (20) days of any con-

struction which has already commenced and of the stage of this construction.

Dated at Columbus, Ohio this 9th day of March 1977.

JOHN D. LYTER

John D. Lyter, Clerk

APPROVED FOR ENTRY ROBERT M. DUNCAN

United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Gary L. Penick, et al.,	}	
<i>Plaintiffs,</i>		
v.		Case No.
Columbus Board of Education,	}	C-2-73-248
et al.,		
<i>Defendants.</i>		

MEMORANDUM AND ORDER
(Filed July 7, 1977)

Defendant Columbus Board of Education, citing the June 27, 1977, decision of the United States Supreme Court in the Dayton, Ohio, school desegregation case, *Dayton Board of Education v. Brinkman*, moves for leave to amend the proposed remedy plan which it has submitted pursuant to this Court's March 8, 1977, opinion and order, *Penick v. Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977). In that opinion, the Court traced the history of the Dayton, Ohio, school desegregation litigation. 429 F. Supp. at 264-66. The Court stated, "The concurring opinion of three justices in the *Austin [Independent School District v. United States]*, _____ U.S. _____ (1976)] case and the recent decision of the Supreme Court accepting review of the Dayton remedy plan are circumstances which may lead some to believe that the law concerning remedy in desegregation cases is in a state of flux." 429 F. Supp. at 266.

Pursuant to the Court's March 8 order, 429 F. Supp. at 268, the defendant school boards have submitted proposed plans for the desegregation of the Columbus schools. The Court has scheduled a hearing for the week of July 11, 1977, generally concerning the plans, and certainly to provide defendant boards of education an opportunity to meet their *Swann* burden concerning certain predominantly white schools which would remain identifiably white under the submitted plans. The *Swann* burden is as follows:

Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all of predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26 (1971).

Thereafter, on June 27, 1977, the Supreme Court of the United States rendered a decision in the Dayton case, *Dayton Board of Education v. Brinkman*, _____ U.S. _____ (1977). The Court is of the opinion that the litigants in the present case and the community whose attention and concern have been captured by this litigation are entitled to know whether the Dayton decision alters the law applicable to this proceeding. The Court will hear the arguments of the litigants concerning this pronouncement of the Supreme Court when the matter is properly before the Court. In the meantime, I have reached the reluctant

conclusion that the position taken by some litigants and counsel construing the Dayton decision as having a far-reaching impact upon this litigation should be addressed.

In the Dayton case, the Supreme Court held that the United States Court of Appeals for the Sixth Circuit erred when, without reversing the trial court's finding that the Dayton Board of Education had engaged in a "three part cumulative violation," the Court of Appeals required the Dayton trial court to impose a systemwide, statistical busing remedy. According to the Supreme Court, "instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." *Brinkman*, U.S. at

The Dayton litigation is not over. The Supreme Court sent the case back to the trial court with instructions that it make "more specific findings" concerning the Dayton plaintiffs' contention that the Board of Education there had engaged in numerous constitutional violations, not just three. U.S. at The Supreme Court also instructed the trial court to leave the present desegregation plan in operation for the coming school year, "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion." U.S. at

The Dayton decision stands for the proposition that an equitable remedy should not go beyond the scope of the wrong which it purports to redress. The Supreme Court stated in the Dayton decision that if defendant school officials are found to have engaged in violations of the Constitution, the lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently

constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." According to the Supreme Court, "The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Dayton Board of Education v. Brinkman*, U.S. at In my view, the hope that the Dayton case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried. Six years ago, the Supreme Court stated unanimously in a school desegregation case that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). See also the June 27, 1977, decision in the Detroit case, *Milliken v. Bradley*, U.S. (1977), where the Supreme Court referred to the "well-settled principle that the nature and scope of the remedy is to be determined by the violation."

On June 29, 1977, two days after the Dayton decision was rendered, the Supreme Court, with three justices dissenting, vacated and remanded the decisions of the courts of appeal in school desegregation cases involving Omaha, Nebraska, *United States v. School District of Omaha*, 541 F.2d 708 (8th Cir. 1976) and Milwaukee, Wisconsin, *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976). In two brief *per curiam* opinions, the Supreme Court cited *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, U.S. (1977), and *Dayton Board of Education v. Brinkman*, U.S. (1977). The Seventh and Eighth Circuit Courts of Appeal, and perhaps ultimately

the Supreme Court, will decide whether the cases cited by the Supreme Court have any impact upon the Omaha and Milwaukee litigation.

In the instant case there should be no confusion concerning the scope of defendants' liability. The Court specifically found in the March 8 opinion that "liability in this case concerns the Columbus school district as a whole." 429 F. Supp. at 266. The Court found that the Columbus Public Schools were officially segregated by race in 1954 when the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483, and further found that the Columbus Board of Education never actively set out to dismantle this dual system. 429 F. Supp. at 236, 260. Additionally, the Court discussed in detail a variety of post-1954 Board decisions and practices, such as creating and maintaining optional attendance zones and discontinuous attendance areas and choosing sites for new schools which had the natural, foreseeable and anticipated effect of enhancing rather than mitigating the racially separate schools which were purposefully established by the Board prior to 1954. 429 F. Supp. at 236-251. The Court also noted both recent and historical complaints to the Board by various segments of the Columbus community concerning both overtly segregative actions and lost integrative opportunities. 429 F. Supp. at 255-57. On this record, the Court held that "it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion." 429 F. Supp. at 261. Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. These were not the facts of the Dayton case.

Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility. This they did not do, 429 F. Supp. at 260.

The Court will certainly permit the defendant Columbus Board to submit any plan that amounts to a good faith effort to comply with the Court's March 8, 1977, order and the law of the United States. Upon reception of the plan it will be carefully considered.¹ This defendant is cautioned, however, that the Court has no real interest in any remedy plan which is more sweeping than necessary to correct the constitutional wrongs plaintiffs have suffered. Nor will the Court order implementation of a plan which fails to take into account the systemwide nature of the liability of the defendants. As I stated in the March 8 opinion, "The remedy should provide black school children with the *Brown I* promise of an integrated education, and

¹The Court notes that the defendant Columbus Board's motion for leave to file an amended plan was filed late in the afternoon July 1, 1977. On Tuesday, July 5, the Court began to draft this order. Obviously, it was necessary that the motion be acted on promptly, since hearings concerning remedial plans are to begin July 11. If the hearings are to be productive and beneficial, it is important that all litigants and the community not misunderstand the scope of the March 8 findings. Late in the afternoon of July 6 the Columbus defendants caused to be filed "a proposed amendment to the involuntary aspect of the pupil assignment component section of the desegregation plan of the Columbus Board of Education filed June 10, 1977." As of this day the Court has not had the opportunity to consider its merits. Nevertheless, it remains important that this order be entered so the Court's perception of the necessary extent of an appropriate remedial action not be the subject of needless uncertainty.

should at the same time take into account the scope and effect of the actions and omissions upon which the finding of liability is premised." 429 F. Supp. at 267.

The motion of defendant Columbus Board of Education for leave to amend its proposed desegregation plan is GRANTED.

ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Gary L. Penick, et al.,
Plaintiffs,

v.

Columbus Board of Education,
et al.,
Defendants.

Case No.

C-2-73-248

ORDER

[Filed July 29, 1977]

The Court is required to determine whether either of the proposed remedy plans submitted by defendants remedies the constitutional ills the Court found and set forth in the March 8, 1977, opinion and order, *Penick v. Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977). In preparing an order to perform this duty, the Court has again attempted to set forth clearly both its rulings and the reasons for them. Since March 8, school officials, the litigants, counsel, the community, and the Court have had this case and its far-reaching and dynamic importance at or near the top of their lists of concerns. It is extremely important that all concerned make the effort to become adequately informed about the remedy phase of this case.

By now it is well known that on June 27, 1977, the United States Supreme Court decided the case, *Dayton Board of Education v. Brinkman*, ____ U.S. ____ (1977). Defendants moved the Court to re-examine its liability

findings and to adjust any remedy order in light of the Dayton case. By an order dated July 7, 1977, and in overruling motions made in Court, the Court has indicated disagreement with defendants regarding the precedential impact of the recent Dayton decision. There is no need again to repeat what it stated in the July 7 order; suffice it to say that the Court on March 8, 1977, concluded that the entire Columbus Public School System was unconstitutionally and intentionally segregated. The law requires, then, that the remedy have the hope of desegregating the entire system. I am convinced that defendants' opposition to the Court's position is good faith opposition, but the Court says, also in good faith, that its position is to be complied with so long as it remains the law.

In the thinking of many citizens, desegregation of our schools is not worth the trouble of doing it. Some sincerely believe that a remedy for constitutional wrongs, in such a case as this, also abrogates constitutional rights. Arriving at such conclusions requires the rewriting of *Brown v. Board of Education*, 347 U.S. 483 (1954) and cases that followed, *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The United States Court of Appeals for the Sixth Circuit has not retreated from adherence to the letter and spirit of those landmark Supreme Court determinations, as is evidenced by its July 26, 1977, opinion in *NAACP v. Lansing Board of Education*, _____ F.2d _____ (1977), and neither will this Court.

I. DEFENDANTS' PROPOSED REMEDY PLANS

After four days of hearings and after examination of written comments of counsel, the Court believes that neither the plan submitted by the Columbus defendants nor the plan submitted by the State defendants should be

ordered implemented in its entirety. The Court has examined these plans to determine whether they "achieve the greatest possible degree of actual desegregation," which is the test employed by the Supreme Court in cases such as this, *Swann, supra*, 402 U.S. at 26:

The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.

For the reasons set forth in this section, the Court holds that the Columbus Board's amended and original submissions would not sufficiently desegregate the Columbus Public Schools. The Court further holds that although the State Board's submission represents a reasoned and gifted effort and passes constitutional scrutiny, it nevertheless presents problems in the area of pupil reassignments and in the area of organizational changes in the schools.

(a) July 8, 1977, Amended Plan of the Columbus Board

In response to the March 8 order of this Court, the Columbus Board of Education named a desegregation planning committee. That committee's first presentation to the Board was made in May 1977 and contemplated a median in each Columbus school of 32% black students. (32.9% of the students attending Columbus Public Schools are non-white.) Although a minority of Board members

preferred the 32% presentation and later submitted it to the Court as a "minority recommendation," the 32% presentation was rejected by a majority of the Board; after further direction from the Board, the planning committee developed the June 10, 1977, plan which used a median figure of 39% black students and left 22 one-race schools unaffected. After the Dayton decision was announced, the Columbus Board revised its original submission by filing an amended plan on July 8, 1977.

The July 8, 1977, amendments are the Columbus Board's response to the June 27 Dayton decision. The amendments highlight the disparity between the defendants' reading of the current requirements of the law and the Court's reading. The amended plan falls far short of providing a reasonable means of remedying the systemwide ills. Obviously, if one perceives the law as applied to the March 8 findings of fact and conclusions of law as requiring a rather narrow remedy which has as its purpose only the desegregation of 11 identifiably black schools, the system's ills, then yet unabated, will continue to cause distress to those whose *Brown I* promise will remain unfulfilled.

The July 8 amended plan lists 123 elementary schools in the system. The proposed pairings and clusterings contemplate closing 5 of these schools; using 1976-77 enrollments (without Columbus Plan) and using $32.5\% \pm 15\%$, 3 of these 5 are presently racially-identifiably white, 1 is black, and the fifth (Heimandale) is balanced (30.7%). Another 19 schools, now racially-identifiable, would be balanced under the amended plan; 7 of these are now identifiably black, while 12 are presently white. Two other schools would be affected: Second Avenue, already racially balanced at 18% black, would be paired with Garfield and with Hubbard's student body (Hubbard is scheduled for closing) and would become 34.6% black, while Wat-

kins, presently 83.5% black, would receive 13% of Moler's enrollment and would become 76.6% black.

All told, then, 5 elementaries would be closed; 19 elementaries presently out of balance would be balanced; 1 elementary now balanced would have its black enrollment increased but would remain within the unidentifiable range; 1 elementary now identifiably black would have its black enrollment decreased but would remain identifiably black; 97 elementaries would remain unchanged.

Of the 97 unaffected elementary schools, under the 1976-77 enrollment figures (without Columbus Plan) and using $32.5\% \pm 15\%$, 53 would be identifiably white, 28 would be black, and 16 would be balanced. There would actually be 29 black elementary schools under the amended plan, because Watkins Elementary, although one of the 26 schools affected by the proposal, would remain identifiably black under the plan.

The July 8 plan affects only 2 junior high schools: Barrett, which is presently identifiably white, and Champion, now black. Under the amended plan, Barrett would become 41.6% black, and Champion 39.9% black. Of the remaining 24 junior high schools, 10 would remain identifiably white, 7 would be black, and 7 would be balanced.

There are 4 junior-senior high schools and 14 senior high schools (excluding Ft. Hayes and Adult High School), none of which would be affected by the July 8 submission. Two of the junior-senior schools would remain black and two would remain white. Eight of the high schools would remain white, 3 black, and 3 balanced.

Thus, without Columbus Plan transfers, using 1976-77 enrollment data, and applying a $32.5\% \pm 15\%$ range, 29 elementary schools would remain identifiably black under the Columbus defendants' amended submission, 29 would remain identifiably black, 53 would remain white, 17 would

remain in racial balance, 19 would be brought into racial balance, and 5 would be closed. Seven junior highs would remain black, 10 would remain white, 7 would remain balanced, and 2 would be brought into balance. Two junior-senior high schools would remain black, and 2 white. Three senior high schools would remain black, 8 white and 3 balanced. Totals for all schools under this plan: 41 would remain identifiably black, 73 would remain white, 27 would remain balanced, 21 would be brought into racial balance, and 5 would be closed.

Viewing the Dayton case as they do, the Columbus defendants did not shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present or past discriminatory action on their part as required by *Swann, supra*, 402 U.S. at 26. The pupil reassignment component of the July 8 amended plan, then, is constitutionally unacceptable.

(b) June 10, 1977, Original Plan of the Columbus Board

Although the Columbus Board's submission is in fact the June 10 plan as amended on July 8, the litigants produced evidence and argument about the acceptability of the June 10 plan before its amendment, and for that reason the Court will speak to the plan in its earlier form.

The Columbus Board's June 10, 1977, submission (without amendment) leaves 22 schools racially identifiable. The brief of counsel for the Columbus defendants calls the Court's attention to the fact that there is no constitutional requirement that all schools be racially balanced. I am mindful that the order of March 8 related that "I believe that it may be possible to eradicate unlawful segregation from the Columbus school system root and branch without embarking upon a scheme which envisions that every school in the district should have the same

student racial breakdown as does the school district as a whole." 429 F. Supp. at 266.

Citing cases from other jurisdictions, counsel's brief also accurately reminds the Court that under certain circumstances, a remedy plan that leaves a number of one-race schools may not violate the Constitution. However, adequate justification for the retention of one-race schools must be supplied by the defendants. They have not done so. Defendant Dr. Joseph Davis explained the process by which the June 10 plan was developed:

Q. In determining what schools would be left out of the plan, what approach was taken by you and the staff?

A. We started with the elementary schools, Mr. Lucas, and originally, employing concept maps as opposed to maps representing concrete specific pairings or clusterings.

We demonstrated what could be accomplished through boundary changes and contiguous pairings and clusterings at the elementary level to eliminate racially identifiable schools.

That left us, as I recall, sir, we had 37 racially identifiable black schools to be rendered racially neutral.

...

Going through the concept maps, we started to render racially identifiable black schools neutral through contiguous attendance area, boundary changes, pairings and clusterings, and we got that number down from 37 to 24, as I recall.

Then, as I testified this morning, we — with the assistance of counsel, the planning team and counsel, identified those elementary schools that were specifically cited in the opinion and order of March 8, and in rendering those — and I think

they were 11 in number — in rendering those 11 racially neutral, it was necessary to employ some noncontiguous clustering, pairing. That reduced the number to 13.

We were trying to keep transportation at a minimum. Minimum in distance, minimum in time in transit. As we went through this process, we eventually eliminated the remaining 13 racially identifiable black schools through pairings and clusterings with what was in general or maybe what was wholly true, the closest racially identifiable white schools and neutral schools, which left us with some racially identifiable white schools that did not need to be involved in pairing or clustering to eliminate all racially identifiable black schools.

It was a process of moving out — kind of a ripple effect — moving out in concentric circles, roughly speaking.

One of the primary reasons which led the Columbus Board to reject the 32% presentation of its staff, discussed below, and to adopt the June 10 plan instead, was a concern that the 32% presentation would require students to be transported longer distances and therefore would require more time en route. Columbus defendants' Exhibit S, reproduced as an appendix to this opinion, indicates the differences in time and distance students would be required to travel under the May 1977 32% presentation and under the June 1977 39% plan.

The Court has admitted evidence of the planning efforts engaged in by the Columbus defendants' staff. The Court recognizes its obligation to accept a reasonable and effective board proposal for pupil reassignments if such a proposal is submitted. In order to determine the reasonableness of any proposal it is necessary to inspect alterna-

tives. This procedure has allowed the Court to test the defendants' submitted plans by examining the 32% presentation as another approach to the organization of a remedy. This sort of analysis is especially relevant since the same experienced staff persons prepared all of the Columbus defendants' remedy presentations.

The 32% presentation would desegregate all schools, would avoid claims that some but not all share the burden of a remedy, and would not leave 22 school areas to which white flight may be precipitated. Although the 32% presentation may require somewhat longer transportation than the June 10 plan, viewed in context this does not provide a basis to justify the continuing existence of the 22 one-race schools. When compared to the June 10 plan as submitted, the 32% presentation apparently requires the transportation of fewer students and may well be less expensive even though distance transported is slightly greater. No witness testified that the transportation under the first presentation (32%) would be detrimental to health or safety, or to the educational process.

After scrutinizing the basis for leaving 22 white schools under the June 10 plan, the Court finds that there has been no showing by defendants that the reasons for this aspect of this plan are genuinely non-discriminatory. The comparatively minor savings of travel time which the June 10 plan would allow do not justify retention of 22 white schools and acceptance of the problems such schools create as well as leave unsolved. The 32% presentation demonstrates that the June 10 plan's proposed omission of 22 identifiably white elementary schools from the remedy is not required by sound logistical or educational concerns. The pupil reassignment component of the original June 10 plan is constitutionally unacceptable.

(c) State Board's Plan

After hearing the testimony of the state defendants' expert witness, Dr. William Gordon, the Court finds that the pupil reassignment aspect does provide a plan that could be implemented which would provide a lawful remedy for plaintiffs. The state plan would leave 3 elementary schools and 1 high school on the western edge of the city racially identifiable. As I understand it, the decision to leave these 4 schools unaffected by the State Board's plan was based upon sound feasibility concerns which the planners encountered once they decided to structure a regional-based plan using high schools as a starting point. I hold the State Board's plan to be constitutional.

(d) Conclusion

In sum the Court rejects the pupil reassignment components of both the Columbus Board's amended July 8 plan and its original June 10 plan. However, the Court does note that these defendants have spent months of work (thousands of manhours) in responding to the March 8 order. The work of Columbus defendants' staff persons in pairing, clustering, boundary adjusting and establishing feeder patterns shows the strength of their efforts in certain areas.

The Court finds that the State Board's plan has the capability for student reassignments that will pass muster. The plan also may fairly be said to have some faults. In the effort to pair, cluster and alter boundaries and feeder patterns so that children from the same areas would remain together throughout their school experience, the State plan calls for some school buildings containing only two grades. In addition, the fashion in which some schools are related apparently calls for more transportation than

would be necessary under the 32% presentation and the Columbus defendants' plans.

The Columbus defendants' first staff presentation (32%) has the strengths mentioned hereinabove, and also passes muster. However, it has only been considered as a look at another alternative for the solution of the problem the Court faces. The presentation seemingly has not been thoroughly considered and documented by the total planning group. Although its numerical face is satisfactory, its feasibility is not a matter about which the Court can be certain.

II. PLANNING AND IMPLEMENTATION

After careful deliberations concerning both the pressing need for a remedy in this case and the time and logistical constraints facing the defendants, the Court has settled upon a two-stage implementation framework. A third stage, consisting of monitoring, may be necessary at some point in the future.

Phase I begins the day this order is filed. Renewed planning efforts governed by the principles and the time-frame set out below shall occur during Phase I. Implementation of certain preparatory programs detailed below shall also occur during this period; many of these Phase I programs will be continued during Phase II.

Phase II shall consist of implementation of pupil reassignments plus other necessary desegregation plan components. Reassignments of elementary pupils will commence when the schools are reopened after January 1, 1978, while reassignments of secondary pupils will commence when the schools open in the fall of 1978.

This phasing of implementation represents a needed compromise between the Court's earlier-stated goal of

September 1977 implementation and the Columbus Board's and State Board's proposals that implementation be phased over a period of two or three years.

(a) Phase I — Preparatory Efforts

To assure that Phase II of the remedy plan is implemented smoothly and effectively, it is necessary for defendants to take certain preparatory steps now and during the 1977-78 school year. In both their June 10 submission and their July 8 amended plan, the Columbus defendants recognize the need to provide students, parents, school personnel and the community at large with accurate information concerning the precise ramifications of the remedy phase of this litigation. These defendants also recognize the need to involve these various groups in the implementation of the remedy phase. The Court wholeheartedly agrees with this approach, and commends the Columbus defendants for the significant steps they have already taken to provide interested persons with such information and to encourage active participation and involvement by all concerned persons.

I recognize that it is difficult to disseminate information and encourage involvement when a precise remedy plan has yet to be approved by the Court. Yet, it is better in my judgment to work in an uncertain but developing framework than to approve a plan which may not be the best one available. Until the Court has approved a specific plan for Phase II, then, it is necessary during Phase I for all defendants to do the best they can to prepare the school system and those it serves for implementation.

The Court will set forth in the succeeding paragraphs certain programs which defendants are hereby required to implement during Phase I. Most of these programs were

included in the Columbus defendants' June 10 submission, and in most cases, no amendments to or deletions of these programs were made by the Columbus defendants' July 8 amended submissions. Each of these programs is in my judgment necessary to assure desegregation of the Columbus Public Schools. Implementation of certain programs or parts of programs may not be feasible until the details of Phase II become known; defendants under such circumstances will do what they can now to ease such implementation once remedy details are revealed.

During Phase I the Columbus defendants shall continue to strive for rumor control and shall continue to provide accurate information to all concerned persons in the community. Defendants will make full use of the expertise and facilities of the Public Information Office of the Columbus Public Schools. The "Community Orientation and Information Services" component of the Columbus Board's June 10 submission, at pages 188-193, includes public information, parent/student participation and community involvement aspects and represents an excellent initial framework.

It is also necessary during Phase I for the Columbus defendants to continue their efforts to orient students and professional staff to the desegregation process, as these defendants proposed at pages 167-70 and 182-85 of their June 10 submission. The Columbus defendants shall prepare and implement in every elementary school during the first semester of the 1977-78 school year curricular modifications designed to explain the desegregation process to these students and to answer their questions and concerns. During the 1977-78 school year, these defendants shall also take steps to prepare secondary school students for desegregation involvement, which steps may include

those set out at pages 167-170 of their June 10 submission. In both the elementary and secondary setting, orientation of staff as proposed at pages 184-85 of that submission is of course of paramount importance.

During Phase I the Columbus defendants shall also prepare and begin to implement a reading development program based upon need and "multi-cultural" curricular modifications along the lines they suggested at pages 165-66 and 171-72 of their June 10 submission. Other modifications of curriculum may well be required in the future to assure successful desegregation of the school district, as the Columbus defendants suggested at pages 170-71 of their June 10 submission.

Although I have referred to specific pages of the June 10 submission, it is not my intention to incorporate every word and phrase of each of these pages as part of the Phase I order. Instead, it is my intention to point out the areas which need Phase I attention, and to leave the Columbus defendants substantial discretion concerning the manner and scope of implementation of programs in this area. On or before August 17, 1977, these defendants shall inform the Court, and plaintiffs and the intervening defendants of the specific steps they intend to take to implement this part of this Phase I order. Should it appear that Phase I implementation is faltering, the Court will enter more specific orders than the present one.

(b) Phase I — Planning Efforts

There is work that remains to be done regarding pupil reassignment. The evidence illustrates that each of the remedy proposals regarding pupil reassignment discussed above has strengths and weaknesses. There is a need to examine all of them critically in an attempt to produce the

superior method of pupil reassignment. In doing this school officials (local and state) should take the lead in the work that remains to be done. Without intent to diminish the responsibility of the State defendants, the Court believes that the Columbus defendants, who are most familiar with the system and have a staff of persons who have worked on the plans submitted, have the capability to spearhead the effort to produce a pupil reassignment concept that will draw together the strengths of all the presentations and also comply with the Court's order that the entire system be desegregated.

Some of the defendants have made it abundantly clear that they firmly oppose the thrust of the Court's orders regarding the extent of pupil reassignment required by law. The Court urges these defendants, in the interest of the students, to fashion a solution which makes the best of what some perceive as an unfortunate situation. The Court hopes that the pupil reassignment plan will reflect a spirit of progress, provide evidence that open access to equal and lawful educational opportunity can be achieved, and ultimately become the basis for achieving harmony and trust within the community.

It is ordered that the following principles be observed in promulgating the *pupil reassignment* component of the remedy plan:

1. The plan must be capable of desegregating the entire Columbus school system. Either the State Board's plan or the 32% presentation could be used as a starting point, because pupil reassignments under these plans meet Court requirements. If defendants choose another alternative as a starting point, any resulting plan must legally desegregate the entire Columbus school system under the principles set out in this order.

2. The planners may use any techniques for pairing, clustering, feeder patterns, boundary changes, attendance zones, or others that they choose to accomplish the plan's objective.
3. The pupil reassignment of elementary (grades 1-6) school children is to be implemented when the schools reopen after January 1, 1978, and the pupil reassignment of secondary (grades 7-12) school children is to be implemented when schools open after September 1, 1978. Kindergarten students shall not be included in pupil reassignments.
4. The plan shall refer to the survey of transportation alternatives which defendants prepare as required hereinbelow, and shall indicate which transportation methods defendants propose to use and the estimated costs thereof.
5. Alternative schools and career centers in existence at the close of the 1976-77 school year may be maintained so long as they remain in racial balance. Columbus Plan transfers to such schools and centers may continue. Columbus Plan transfers to other than alternative schools or career centers (transfers solely to improve racial balance) shall not be included in the plan. Creation of new alternative schools or career centers may occur under the conditions set forth hereinbelow.
6. The plan produced shall be submitted to the Court on or before August 24, 1977.

The Court, believing that the Columbus and State defendants are best equipped to produce a plan according to these principles, orders the Columbus and State defendants to notify the Court on or before August 3, 1977, as to whether or not they will cooperate with each other and the Court in the preparation of the pupil reassignment plan according to the principles set forth above. The

Court, the special master, and the Court's staff are available for help in any reasonable manner the defendants may request. Moreover, the Court encourages the State defendants actively to contribute their expertise and other resources, and to cooperate with the Columbus defendants in this planning endeavor.

In the event the Columbus defendants do not notify the Court that they accept their obligation to prepare a pupil reassignment plan, this Court will then prepare such a plan. Obviously, such is the least desirable alternative, but the Court is firm in its intent to provide plaintiffs a remedy.

Serious questions arose at the remedy hearings concerning the transportation components of defendants' proposed remedial plans. These questions concern the number of buses required under the plans and certain costly components such as two-way radios on each bus, security personnel and paid monitors. For example, Dr. William M. Gordon compared the Columbus Board's plan with the State Board's plan:

On the next page, we compared the transportation costs, and again, I realize these are subject to some question, but we were concerned that we were so far off in our figures and that is what precipitated the whole document. So we noted that the City was buying 423 buses and only transporting 39,000 youngsters. We were buying 329 buses and transporting 37,000 youngsters and we were curious as to why the differences.

The Court finds that an intensive and detailed analysis of transportation requirements and alternatives is required to assist in achieving systemwide desegregation.

It is therefore necessary for the Columbus Board and the State Board to take immediate steps to prepare for

the transportation that will be required, whether or not defendants choose to prepare a new plan under the foregoing guidelines. The Columbus and State Boards shall forthwith investigate every reasonable avenue of obtaining transportation sufficient to implement systemwide desegregation. They shall investigate and document the availability or unavailability of school buses by purchase and by lease. They shall investigate and document the availability or unavailability of workable arrangements with the Central Ohio Transit Authority (COTA). They shall investigate and document the feasibility of several combinations of transportation including those referred to above as well as the feasibility of providing passes to secondary level students allowing them to use public transportation. Applying the criterion of healthful and safe transit, they shall explore thoroughly the need for monitors and other security measures such as special security officers and two-way radio systems. The transportation component may be based upon the time/distance criteria on page 136 of "Response of the Columbus Public School District to a Federal District Court Desegregation Order," June 10, 1977. The State defendants may be in a good position to assume a leadership role in the chore of investigating the availability of safe transportation. The Columbus Board and the State Board, separately or jointly, shall file with the Court on or before August 24, 1977, a detailed report of available transportation alternatives.

The Court is aware of the requirements of the Emergency School Aid Act, 20 U.S.C. § 1601, *et seq.* Nothing contained in this order shall require that the new plan be drawn in a fashion which would disqualify the defendants from eligibility for such funding.

(c) Faculty and Staff

Considerable evidence was introduced during the remedy hearings in this case relating to faculty and staff assignments. The Court has given careful consideration to all of this evidence together with a review of this Court's findings concerning faculty and staff made in the liability phase of this case. Several general conclusions can be drawn from this examination.

The present racial mix of faculty and staff in the Columbus Public School System is, at best, delicate. In the March 8 opinion, the Court noted that "the Columbus defendants were not at the time of trial 100% in conformity with the [Ohio Civil Rights Commission conciliation] agreement." 429 F. Supp. at 238. Although the Court did not find the noncompliance with the conciliation agreement to be a substantial factor, the Court discussed, and in part relied upon, the history of faculty racial segregation in making the liability findings in this case. The evidence produced at the present hearings indicates that a single teacher may often be the difference between compliance and noncompliance with the racial balance requirements of the conciliation agreement. The plaintiffs have argued that the median percentage of black faculty and staff agreed upon in the conciliation agreement is not appropriate. A reconsideration of the median percentage, as well as the allowable range of deviation, may be necessary in the future. In the March 8 opinion and order, the Court also noted that "the assignment of non-professional staff is racially suspect." 429 F. Supp. at 240 n.2.

It has become apparent that the implementation of a remedy in this case will necessarily impact upon the assignments of faculty and staff within the school system, and may require some faculty and staff adjustments. All of

the pupil reassignment plans presented thus far involve the restructuring of grade levels in various schools and the closing of a few schools. These changes will require that certain faculty and staff adjustments and reassignments be made.

The remedial powers of a court of equity must be exercised in a fair and reasonable manner. Although the Court cannot order the implementation of a desegregation plan which exceeds the scope of the violations found, the Court has broad and flexible equity powers to remedy the consequences of the constitutional violations found to exist. As the Supreme Court stated in *Milliken v. Bradley*, ____ U.S. ____, ____, 45 U.S.L.W. 4873, 4876 (1977) (*Milliken II*):

Montgomery County [*United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969)] therefore stands firmly for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in *Swann* we reaffirmed the principle laid down in *Green v. County School Board*, *supra*, that "existing policy and practice with respect to faculty, staff, transportation, extracurricular activities and facilities were among the most important indicia of a segregated system." 402 U.S., at 18. In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.

In *Montgomery County* the Supreme Court stated that faculty and staff desegregation is "a goal we have recognized to be an important aspect of the basic task of achieving a public school system wholly free from racial dis-

crimination." 395 U.S. 231-32. The importance of faculty and staff desegregation, and its impact upon the school system, cannot be overemphasized.

In this case, the Court has found a history of unlawful segregation in the hiring and assignment of faculty and staff. Although this segregation has been somewhat attenuated in recent years, the racial balance of faculty and staff in the Columbus schools remains delicate. The remedy plan implemented in this case must be equitable. It must not, therefore, aggravate or create some constitutional infirmities while solving others.

The duty to make the adjustments and reassignments of faculty and staff falls, in the first instance, on the defendants. In light of this Court's findings concerning faculty and staff, I do not believe that specific adjustments and reassignments are required to be included in the plan at this time. The Supreme Court has required, however, that a district court retain jurisdiction to insure that a desegregation plan is "operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved." *Raney v. Board of Education*, 391 U.S. 443, 449 (1968) (citations omitted). This Court's retention of jurisdiction will provide a forum where a remedy can be afforded if it is shown that court-ordered adjustments and assignments of faculty and staff are necessary for the remedy plan to operate effectively, or that the defendants have operated the remedy plan in a constitutionally impermissible fashion.

I believe that the defendants share this Court's concern relating to faculty and staff. In both the original June 10 proposal (at p. 142) and the amended July 8 proposal (at p. 45) the Columbus defendants pledge adherence to a policy of non-discriminatory hiring, and a commitment to improve the number and percentage of black professional

staff. These plans also promise the non-discriminatory assignment of administrators within the system. The position taken by the Columbus defendants in this regard is commendable. The implementation of this policy would, however, be greatly enhanced by a consideration of the excellent observations and recommendations contained in the proposal of the State defendants at pages 183-221. The Court specifically notes the recommendations made at page 196 of the State Board's proposal (portions omitted):

1. When vacancies occur in out-of-balance schools, replacements should be made with teachers who will improve the racial balance of the school. However, care must be taken not to cause an inordinate number of "beginning" teachers or "veteran" teachers.
2. Teachers in those schools [recommended for closing] should be reassigned in such a way to promote racial balance. Once again a conscious effort to maintain experience and training balances should be made.

Similar recommendations are made with respect to administrators at page 210 of the State Board's proposal. The recommendation that an "affirmative action" program be implemented with respect to the nonprofessional staff (p. 212) is also worthy of due consideration.

The Court is also aware that certain personnel decisions must include consideration of such factors as civil service regulations or collective bargaining agreements. The memorandum of agreement between the Columbus Board of Education and the Columbus Education Association appears to be a step in the right direction. The Court sincerely hopes that such efforts will continue and be expanded in the future, and that further litigation concerning faculty and staff can thereby be avoided.

(d) Alternative Schools, Career Centers, and School Closings

Both the original June 10 and amended July 8 plans submitted by the Columbus defendants continue and expand the use of alternative schools and career centers. Although the Court has found that such programs have no "probability of substantially curing the system's racial imbalance," 429 F. Supp. at 259, such programs have been found to be proper components of desegregation plans. Since the evidence in this case does not show that these programs will operate to desegregate the Columbus Public Schools, or that they are necessary for the success of a remedy plan, I do not believe that they are necessary elements of the Court-ordered remedy. In so finding, the Court in no way expresses any disapproval of the continuation and expansion of these programs. To the contrary, the Court believes that the operation of these programs along the guidelines outlined at pages 124-27 of the June 10 plan may well serve worthy educational interests. Such matters should be reserved for consideration by the local board of education. That board has determined that these programs are desirable, and the Court will neither interfere nor argue with that judgment. Although the expansion of such plans must be assigned a lower priority than the implementation of the Court-ordered remedy plan, these programs may (and hopefully will) be continued if financially feasible.

All of the submissions to date call for the closing of some schools. When a new plan is prepared by the defendants, and this plan includes school closings, the decision of which schools are to be closed will be left to the defendants. The considerations outlined at pages 13-14 of the June 10 plan appear to be entirely appropriate. The

Court may, however, review the proposed closings to insure that they do not negatively impact the effectiveness of the plan or its implementation.

III. CONCLUSION

Well knowing that many of the defendants and many in the Columbus community as a whole strongly object to implementation of any remedy plan in this case, the Court nevertheless feels bound to order a remedy implemented. As I read the law, including the Dayton decision, further delay in this case will only postpone the inevitable and fuel the hopes of those who hold that eventually this case and its ramifications will simply go away. In the past, the Supreme Court has indicated that once liability in a school desegregation case has been established, lower courts must order a timely remedy, without waiting until appeals have been exhausted. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). It is this mandate with which the defendants and this Court must comply.

To summarize, the Columbus and State Boards of Education are required to submit an August 3, 1977, indication of whether they will prepare the required new remedy plan and an August 24, 1977, report concerning transportation alternatives. The Columbus Board is also required to submit an August 17, 1977, report concerning Phase I preparatory efforts. If the boards decide to prepare a new plan, it shall be submitted on or before August 24, 1977.

While implementation of a remedy occurs here, I believe defendants should have an opportunity to make their arguments in the Court of Appeals. In the event the appellate courts do not agree with my reading of the applicable law, this Court will be quick to follow any requirements

they may provide. I hereby certify that this order and the memorandum and order filed on July 7, 1977, concerning the Dayton case, involve controlling questions of law as to which there are substantial grounds for difference of opinion and further certify that immediate appellate review of these decisions may materially advance the ultimate termination of this litigation.

It is so ORDERED.

ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

**DISTANCE TRANSPORTED
ELEMENTARY SCHOOLS**

<u>Distance Transported*</u>	<u>32% Presentation</u>	<u>39% Presentation</u>
Less than 2 miles	7	11
2-3 miles	15	14
3-4 miles	2	18
4-5 miles	5	30
5-6 miles	8	7
6-7 miles	20	
7-8 miles	15	
8-9 miles	6	
MEDIAN	6-7 Miles	3-4 Miles
RANGE	2-9 Miles	2-6 Miles

*Distances are calculated on a school site to school site basis with a factor of 1 mile = 1.2 miles.

**DISTANCE TRANSPORTED
JUNIOR HIGH SCHOOLS**

<u>Distance Transported*</u>	<u>32% Presentation</u>	<u>39% Presentation</u>
Less than 2 miles	32	31
2-3 miles	10	14
3-4 miles	3	6
4-5 miles	3	12
5-6 miles	5	9
6-7 miles	9	1
7-8 miles	3	1
8-9 miles	4	
MEDIAN	2-3 Miles	2-3 Miles
RANGE	2-9 Miles	2-8 Miles

*Distances are calculated on a school site to school site basis with a factor of 1 mile = 1.2 miles.

**DISTANCE TRANSPORTED
SENIOR HIGH SCHOOLS**

<u>Distance Transported*</u>	<u>32% Presentation</u>	<u>39% Presentation</u>
Less than 2 miles	15	19
2-3 miles	23	29
3-4 miles	8	11
4-5 miles	0	4
5-6 miles	7	3
6-7 miles	10	1
7-8 miles	4	4
8-9 miles	2	1
MEDIAN	2-3 Miles	2-3 Miles
RANGE	2-9 Miles	2-9 Miles

*Distances are calculated on a school site to school site basis with a factor of 1 mile = 1.2 miles.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Gary L. Penick, et al.,	}	Case No. C-2-73-248
<i>Plaintiffs,</i>		
v.		
Columbus Board of Education, et al.,		
<i>Defendants.</i>		

MEMORANDUM AND ORDER

[Filed October 4, 1977]

This matter is before the Court for consideration of the proposed desegregation remedy plan filed by defendants Columbus Board of Education and its superintendent on August 31, 1977.¹ The Court's first inquiry is whether the proposed plan promises to remedy the constitutional violations outlined in this Court's opinion and order, *Penick v. Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977), in accordance with the guidelines set forth in the Court's order of July 29, 1977. For the reasons set forth herein the Court finds the defendants' plan to be acceptable.

The Court also has before it a motion of the Columbus defendants to stay the implementation of *any* remedy in this action pending resolution of the appeals now pending before the United States Court of Appeals for the Sixth

¹The "August 31, 1977, submission" as used herein shall mean the August 31, 1977, submission as revised on September 26, 1977.

Circuit. The Court does not find this motion to be well taken for the reasons discussed below.

The Columbus defendants' August 31 submission contains a recommendation and request that the implementation of the elementary school reassignment component of the plan be delayed from January 1978 (as previously ordered by the Court on July 29, 1977) to September 1978. Pursuant to an order of September 16, 1977, the Court held an evidentiary hearing on this question. This order contains the Court's basis for acceding to the Columbus defendants' request.

I

Pursuant to the Court's order of July 29, 1977, the Columbus defendants caused to be filed on August 31, 1977, a proposed plan for the desegregation of the Columbus Public Schools. On the same day, August 31, defendants State Board of Education and State Superintendent of Public Instruction responded to the July 29 order by concurring in the pupil reassignment plan submitted by the Columbus defendants. On September 13, 1977, the original and intervening plaintiffs responded to the August 31 submission as follows (in part):

. . . the defendants have, in plaintiffs' opinion, adequately provided a constitutionally appropriate remedy to the past pupil assignment violations found by this Honorable Court.

Although the plaintiffs, by and through their counsel, may have selected different pairings and/or made assignments other than those identified by the defendants, these differences would be based upon policy and technical considerations not going to the legal question of the constitutional effectiveness [T]he defendants' submission to this Court as it pertains to

pupil reassignment meets the constitutional requirements for an adequate and effective remedy.

There being no objection to the pupil reassignment aspect of the submission of the Columbus defendants, or good cause shown why it should not be approved by the Court, the pupil reassignment component of the August 31, 1977, submission of the Columbus defendants is approved and adopted.

The Court's approval of this plan is specifically made subject to modifications or amendments as the Court may approve for good cause shown. The Court is sensitive to the complexity of developing and implementing a desegregation remedy and the possibilities for error or oversight in such a process. The plaintiffs and state defendants have both noted the possible need for some refinements to the August 31 plan. Some degree of flexibility should, therefore, be provided in the event that revisions of the plan become necessary and appropriate.

The Court is aware of the interest and concern demonstrated by the community in various provisions of the defendants' plan. The primary responsibility for pupil reassignment lies with the Columbus Board of Education; however, the Court believes that, within the confines of the law, the needs and sentiments of the community should be considered. Moreover, this Court is ill-equipped to evaluate the recommendations of concerned citizens and community groups. This is especially true with respect to proposals that relate to areas which this Court has already indicated it is reluctant to enter. The Court hopes, therefore, that the Columbus defendants will continue to consider input from the community. The Court *suggests* that the Columbus Board of Education establish a timetable and procedure for hearings to receive, consider and eval-

uate proposals and comments relating to the desegregation process from parents, students, teachers, community groups and others.

The Columbus defendants may file with the Court such requests for modifications or amendments to the plan as are approved by the Board of Education, together with a memorandum setting forth the reasons for the requests and their effect on the plan. Unless otherwise ordered by the Court, all other parties may respond within fifteen (15) days after the filing of any such request. The Court will consider only those requests, if any, demonstrated to be within the letter and the spirit of the Court's July 29 order.

II

In the August 31 submission the Columbus defendants have included proposals for a variety of costly goods and services. Although many of these items may be educationally desirable in the general sense, the Court is not convinced that all are reasonably related to and necessary for the implementation of a desegregation remedy in this case.

For example, under the category of needed personnel the Columbus defendants propose to employ 40 certificated "pupil personnel specialists" at an average salary of \$17,021.00 plus 17.056 per cent for fringe benefits, or \$19,924.00 each, at a total annual cost of \$769,960.00. The testimony at trial indicated that after reconsideration of the advisability of having monitors on each bus, the decision was made to employ personnel specialists rather than monitors. The 40 specialists would be available at certain schools to aid children in safely exiting the vehicles. Additionally, these persons would perform the function of visiting teachers. The school district currently employs

approximately 20 visiting teachers, down from a former total of around 40, the reduction having been mandated by a shrunken budget and some decline in total pupil enrollment.

Such personnel specialists listed as necessary for safe transportation are in addition to the proposals for two-way radios (\$365,505.00), extra telephone service and communicative equipment (\$203,300.00), and in-system security unit personnel (\$94,354.00). The Court does not wish to substitute its judgment for that of the defendants and presently sees no reason to order that such personnel specialists not be hired; however, if the primary reason for the amount of salary they are to receive is compensation for service as qualified visiting teachers, it appears unreasonable to charge all of their salary expense as necessary transportation expense. The Court does not find that these and other budget items are purposefully inflated, but the Court does question the need for and amount of some of the budgeted items as necessary to be included in an order in this case.

This Court is aware of and sensitive to the financial difficulties of the present day school district. The Court is also aware that these difficulties cannot be wholly attributed to court-ordered desegregation. The expenses of desegregation are substantial enough without including budget items which arguably have no direct relationship to the desegregation process. Budget items designed to address needs which existed before the March 8, 1977, finding of liability cannot in fairness be attributed to the remedy phase of this litigation. The community should not be misled about the costs of desegregation.

Therefore, the Columbus defendants must re-examine and update the anticipated budget for all phases of the plan as approved. The revised budget shall be submitted to the Court on or before November 9, 1977.

III

The remedy which defendants have proposed in submissions ordered by the Court includes the transportation of substantial numbers of pupils. The Columbus Board of Education has moved the Court to stay the implementation of *any* remedy plan pending exhaustion of all appeals in this case, and has further adopted formal resolutions asserting that because of "safety, financial and administrative considerations" which the Board says are attendant to the acquisition and utilization of used school buses, no pupil reassignment plan should be implemented until such time as the school district can acquire new buses.

The Columbus defendants' request for a blanket stay of all further remedy activities pending appeal simply cannot be granted on the present state of the law. I have considered the four-pronged test commonly applied by courts in ruling upon motions for stay pending appeal. *Long v. Robinson*, 432 F.2d 977-979 (4th Cir. 1970). As the Supreme Court of the United States has stated,

[T]he Court of Appeals should have denied *all* motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of *every* school district is to terminate dual school systems *at once* and to operate *now and hereafter* only unitary schools.

Alexander v. Holmes County Board of Education, 396 U.S. 19, 20 (1969) (emphasis supplied) (citations omitted). In no uncertain terms, *Alexander* requires prompt remedial action to eliminate unlawful segregation, whether appeals are pending or not. A blanket stay, for an indefinite time, of the realization by plaintiffs of their rights under the

Fourteenth Amendment to the United States Constitution is therefore inappropriate.

Defendants' request for a delay of elementary implementation is more troublesome. In the July 29 order, citing the need for "compromise between the Court's earlier-stated goal of September 1977 implementation and the Columbus Board's and State Board's proposals that implementation be phased over a period of two or three years," the Court adopted a schedule calling for elementary pupil reassignments in January 1978 and secondary pupil reassignments in September 1978. At the evidentiary hearing most recently held in this case, defendants were afforded an opportunity to show that elementary implementation during the second semester of the current school year would be unreasonable.

The Court has considered the arguments and evidence advanced by defendants concerning the claimed educational drawbacks attendant to a mid-year elementary implementation. The Court is of the opinion that any negative impact upon students' education would be negligible if a conscientious, thorough effort were made to achieve a smooth and responsible implementation.

The Columbus defendants have expressed a strong preference for purchasing new buses rather than purchasing used ones or leasing vehicles. The Court accedes to this preference as a matter of deference to a management decision of the Columbus Board of Education, but the Court cannot find on this record that used or leased vehicles are in any way detrimental to the safety of children. Any vehicle used to transport school children in Ohio must be inspected by the State Highway Patrol and certified to be safe.

The Court has doubts concerning the need for a complement of 210 additional vehicles for elementary imple-

mentation alone. The Columbus defendants' report indicates a need for 210, 65-passenger vehicles for elementary implementation in January, yet indicates a need for only 3 more such buses for combined elementary and secondary implementation in September. It would seem that a staggered starting schedule and wise use of the vehicles the Columbus Board already owns would have allowed implementation at the elementary level with substantially fewer additional vehicles.

In the July 29 order, the Court required defendants to submit detailed reports concerning the availability of new, used and leased buses. The reports which have been submitted in response to that order are in my judgment shallow, conclusory and only marginally responsive to the terms of the Court's order. Neither report seriously explores the availability of leased vehicles for a January implementation. Both reports assume, without adequate documentation, that no expedited arrangements with manufacturers and suppliers of new buses are feasible. The Court is not convinced that such vehicles are unavailable for January.² On the other hand, the evidence of record does not permit the conclusion that the new vehicles can

²A few phone calls to bus manufacturers and distributors, placed by the Special Master since the hearings, gives one the impression that the chances of obtaining approximately 200 new buses by the end of January 1978, if the bidding process were abbreviated, are much better than the defendants' reports would have one believe. Some of this optimism may, as the Columbus defendants' expert suggested, be attributable to the sellers' enthusiasm concerning a large sale. Because a prompt ruling by the Court was necessary, there was insufficient time to permit the preparation of a report by the Special Master and responses to such a report by the parties. The information gathered by the Special Master is available to the parties on request.

be available in January 1978 with the high degree of certainty needed to justify an order dependent on such availability.

The evidence presented at the latest hearings simply fails to answer many of the Court's questions. Although the plaintiffs voiced strenuous disagreement with the defendants' contentions, they failed to present evidence which the Court finds effectively rebuts the defendants' arguments. Although the sole witness called by the plaintiffs testified concerning the possible availability of approximately 150 buses by January 31, 1978, and an additional 50 buses by the end of February (if an order was placed by September 30, 1977), the Court does not find this testimony sufficient to establish the degree of certainty necessary for this Court to proceed with a January implementation.

Even though several witnesses testified that a January implementation is *possible*, these witnesses also expressed a need for thorough and far-reaching planning and preparation. Delaying implementation from January to September would undoubtedly provide sufficient time, including the summer months, for this work to be done. A January implementation, on the other hand, remains clouded with uncertainty.

Notwithstanding my belief that a January elementary implementation is in fact still possible, I recognize that adhering to that goal would place defendants under severe time constraints. There is no question that January implementation would place a much greater administrative burden upon the staff than would September.

The principal impediment to an effective elementary implementation in January appears to be time. The lateness of the hour is perhaps in some part attributable to

the caution with which the Court has proceeded during the remedy phase of this litigation. I am acutely aware of the broad impact of this litigation upon the community as a whole, and I do not apologize for proceeding with great caution. There was no unreasonable rush to judgment in this case, and there should be no unreasonable rush to remedy.

Throughout the entire course of this litigation the Court has attempted to act as quickly as is reasonably possible being mindful that the constitutional rights which this case concerns are of the highest priority, but it should be remembered that a January elementary implementation would directly affect only a portion of the students in the Columbus Public Schools, and would affect these grade school students only for half of the school year. When balanced against a more orderly and better planned fall implementation, one which is not encumbered by so many questions and expressions of doubt, the January implementation does not in my view merit the substantial risk of getting the desegregation process off on the wrong foot.

For these reasons, the request of the Columbus defendants that the reassignment of elementary school students be delayed from January 1978 to September 1978 will be granted. The reassignment of pupils at both the elementary and secondary level shall be implemented in September 1978.

IV

In order to ensure that the planning and preparation for September 1978 pupil reassignments has commenced and will continue, the Court will require that the Columbus defendants file reports periodically with the Court detailing the progress which has been made in specific areas.

The first such report shall be filed on or before November 9, 1977, and shall address the matters set out in the order below. The Court will specify by subsequent order the reporting dates and contents of additional reports required of defendants.

The Court also believes that a monitoring body may be necessary to oversee the defendants' planning and preparation as well as the actual implementation of the remedy plan. This matter will also be addressed in a subsequent order.

CONCLUSION

The Court is constrained to add that no one should interpret the Court's deference to the Columbus defendants' request for some delay in pupil reassignment as an indication that the Court is less than totally committed to a timely remedy for plaintiffs' constitutional losses. Such is not the case. The Court has tried to articulate hereinabove that the delay is unfortunate, but that not to delay is unreasonable.

Today's decision simply is not a victory for those who believe delay a sound tactic to escape remedying constitutional rights. The remedy phase of this litigation remains the law. Therefore, there shall be no deviation whatsoever from conscientious and thorough preparation of this remedy and its complete implementation on the date prescribed.

ORDER

1. The August 31, 1977, pupil reassignment submission of the Columbus defendants is approved and shall be implemented in September 1978, with such modifications as the Court may approve for good cause shown.

2. The motion of the Columbus defendants for a stay of all further remedy proceedings pending appeal is denied.

3. The request of the Columbus defendants for a delay of implementation of elementary student reassignments until September 1978 is granted. Pupil reassignments for elementary and secondary schools shall commence in September 1978. Phase I preparatory efforts discussed in the July 29, 1977, order of this Court shall continue for both elementary and secondary students.

4. The Columbus defendants shall re-examine their anticipated budget for all phases of the desegregation remedy and shall prepare a fully itemized anticipated budget.

5. On or before October 19, 1977, the Columbus defendants shall commence the bidding process under Ohio law for the acquisition of new school buses and related equipment necessary for a September 1978 implementation, shall notify the Court of the commencement of the process, and shall tender a schedule which details each of the major steps of that process and indicates the expected date for completion of each step.

The Columbus and State defendants shall file a written report with the Court on or before Wednesday, November 9, 1977. Such filing shall include:

- (a) a report of the re-examination of the anticipated budget ordered herein;
- (b) a detailed progress report on the implementation of Phase I and the defendants' proposal for Phase I efforts during the second semester of the 1977-78 school year;
- (c) notification that the bidding process for the acquisition of vehicles and related transportation

equipment has commenced, and the schedule and calendar for such process ordered hereinabove;

- (d) a progress report on the planning for specific pupil reassignments, employment and training of necessary personnel, reassignment of teaching and administrative staff, and needed relocation and alteration of physical facilities. This report shall include a proposed timetable for the completion of each such activity.

It is so ORDERED.

ROBERT M. DUNCAN

Robert M. Duncan, Judge
United States District Court

**UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Gary L. Penick, et al.,			Civil Action
	<i>Plaintiffs,</i>		File No. C-2-73-248
v.			JUDGMENT
Columbus Board of Education,			[Filed
et al.,			October 7, 1977]
	<i>Defendants.</i>		

This action came on for consideration before the Court, Honorable Robert M. Duncan, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED THAT 1. The August 31, 1977, pupil reassignment submission of the Columbus defendants is approved and shall be implemented in September 1978, with such modifications as the Court may approve for good cause shown. 2. The motion of the Columbus defendants for a stay of all further remedy proceedings pending appeal is denied. 3. The request of the Columbus defendants for a delay of implementation of elementary student reassignment until September 1978 is granted. Pupil reassignments for elementary and secondary schools shall commence in September 1978. Phase I preparatory efforts discussed in the July 29, 1977, order of this Court shall continue for both elementary and secondary students. 4. The Columbus defendants shall re-examine their anticipated budget for all phases of the desegregation remedy and shall prepare a fully itemized anticipated budget. 5. On or before October 19, 1977, the Columbus defendants shall commence the bidding process under Ohio law for the acquisition of new school buses and

related equipment necessary for a September 1978 implementation, shall notify the Court of the commencement of the process, and shall tender a schedule which details each of the major steps of that process and indicates the expected date for completion of each step. The Columbus and State defendants shall file a written report with the Court on or before Wednesday, November 9, 1977. Such filing shall include:

- (a) a report of the re-examination of the anticipated budget ordered herein;
- (b) a detailed progress report on the implementation of Phase I and the defendants' proposal for Phase I efforts during the second semester of the 1977-78 school year;
- (c) notification that the bidding process for the acquisition of vehicles and related transportation equipment has commenced, and the schedule and calendar for such process ordered hereinabove;
- (d) a progress report on the planning for specific pupil reassignments, employment and training of necessary personnel, reassignment of teaching and administrative staff, and needed relocation and alteration of physical facilities. This report shall include a proposed timetable for the completion of each such activity.

APPROVED FOR ENTRY

ROBERT M. DUNCAN
United States District Judge

Dated at Columbus, Ohio this 7 day of October, 1977.

John D. Lyter, Clerk

By J. Cessner

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GARY L. PENICK, et al.,

Plaintiffs-Appellees,

v.

COLUMBUS BOARD OF EDUCATION, et al.,

and

THE OHIO STATE BOARD OF EDUCATION, et al.,

Defendants-Appellants.

APPEAL from the
United States District
Court for the South-
ern District of Ohio,
Eastern Division

Decided and Filed July 14, 1978.

Before: EDWARDS, LIVELY and MERRITT, Circuit Judges.

EDWARDS, Circuit Judge. This is a case wherein the complaints charge racial discrimination in violation of the United States Constitution in the city school system of Columbus, the capital city of Ohio. After a 36-day trial, the District Judge found intentional de jure segregation and a dual school system separated by race in Columbus in 1954 when *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided. He found that the Columbus School Board had failed in its duty to desegregate the school system and, on the contrary, had intentionally continued segregation in the two decades fol-

lowing *Brown*. He held that the State Board of Education had the duty to order desegregation of the Columbus system, but had not done so, and, on the contrary, had continued financial support to the segregated system in violation of both Ohio law and the federal constitution. He ordered system-wide desegregation and certified the critical questions for appellate review.

After review of this 6,600 page record, we accept the District Judge's findings of fact as not clearly erroneous and affirm his judgments of law. As to the State Board only, we remand for further consideration.

I BACKGROUND

It was there from the beginning — the notion of equality before the law. The second sentence of the Declaration of Independence of the United States runs, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

There, from the very beginning also, was the notion of a written constitution as fundamental law. In 1787¹ our people committed the new nation to constitutional government to a greater degree than any other in the world. In adopting the Constitution of the United States, our ancestors made it the supreme law of the land² controlling the decisions of the

¹ The United States Constitution was adopted by the Constitutional Convention meeting in Philadelphia in 1787 and became effective when ratified by the ninth of the constituent states on June 21, 1788.

² The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST., art. VI, cl. 2.

President of the United States, the United States Congress, and the United States courts, as well as the governors, legislatures and courts of the several states. The United States Supreme Court has the duty to interpret the United States Constitution.³ All judges in the land, including, of course, this court, are bound to follow its interpretation.⁴

At the Philadelphia convention also, our ancestors wrote a considerable portion of the concept of equality into the Constitution of the new country. In Article IV, section 2, clause 1: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." Just four years later the people of the new country, through Congress and the state conventions, enacted Amendment V of the Bill of Rights, which contained another fundamental aspect of the general concept: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Although from the beginning the word "person" in the United States Constitution appeared to include slaves, the Constitution also contained specific recognition of the existence of slavery in a number of states. See U.S. Const. art. VI, § 2, cl. 3. When the great and bitter conflict over slavery developed, it found the courts holding that the constitutional principles cited above applied to the federal government, but not to the states which chose to sanction slavery. See *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

The Civil War, in which 550,000 men died, was fought in large measure over the slavery question. At its end Congress and the required number of states adopted the Thirteenth Amendment to abolish slavery. Two years later Congress had been made intensely aware that many Southern states were passing laws to continue the subjugation of former slaves by

³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

statutes aimed directly at them. It was then that the Fourteenth Amendment was born. Ratified in 1868, it read in applicable part:

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

The language of the last sentence of Section 1 was drafted by one of Ohio's most famous Representatives, Congressman John Bingham. It was designed by its author to prevent the states from adopting state laws which deprived former black slaves and their progeny of rights equal to those of white citizens.⁵

⁵ Bingham, speaking just before the vote in Congress on the Fourteenth Amendment:

The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.

CONG. GLOBE, 39th Cong., 1st Sess. 2542.

Bingham applied the principles of Article IV, section 2 and the due process clause of the Fifth Amendment to the states and added the prohibition against any law denying any person "the equal protection of the law."

The constitutional intention of 1868, as Bingham and his associates understood it (much as the United States Supreme Court does today), was not followed for many years. In the post-Reconstruction era black citizens in the Southern states (frequently in the Northern also) were denied access equal to that of whites to such fundamentals of "life, liberty and the pursuit of happiness" as votes, public accommodations, housing, jobs and schools. In 1896 this postslavery system of segregation by race was validated by the United States Supreme Court as to public accommodations on railroads on the theory that the accommodations provided were "separate but equal." *Plessy v. Ferguson*, 163 U.S. 537 (1896). By a six sentence dictum the opinion of the *Plessy* court seemed to apply the same rule to public schools.

For over a half century the *Plessy* dictum allowed separate public schools for blacks and whites to be established by state law or by school board authority without court interference. The record also demonstrated over and over that "separate" the schools were for black and white children, but "equal" they were not. In the 1930's and 1940's a series of cases brought before the United States Supreme Court the glaring inequities which existed between higher educational opportunities for whites and those for blacks. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

The Supreme Court in response ordered relief in every case and in *Sweatt v. Painter*, *supra*, it indicated that it reserved decision on the *Plessy* doctrine of separateness as applied to public schools.

The ultimate challenge came in five cases from separate sections of the country — Topeka, Kansas; New Castle County, Delaware; the District of Columbia; Prince Edward County, Virginia; and Clarendon County, South Carolina. During three years of argument and reargument by many of the finest lawyers in the land, the justices, most of whom had written or joined opinions which followed the *Plessy* doctrine, weighed the momentous issue. The decision finally came in a unanimous opinion written by Chief Justice Warren, *Brown v. Board of Education*, 347 U.S. 483 (1954). It held that public school separation by race imposed by law violated the United States Constitution's guarantee of "the equal protection of the laws." The date was May 17, 1954. This was 24 years ago.

II THE LAW APPLICABLE TO THIS CASE

The Supreme Court opinion in *Brown I*, noting that in 1868 public education was in its infancy, did not resolve the question of whether those who wrote and adopted the Fourteenth Amendment intended its application to public schools. Nor did it rely directly upon the inequalities which had characterized the separate black and white schools in the interim. It held that the general constitutional guarantee of "equal protection of the laws" must be applied to the system of public education which had developed in the interim between 1868 and 1954.

The language of the opinion was simple and direct. The opinion of the Court in *Brown v. Board of Education*, (henceforth *Brown I*, *supra*) said:

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

Id. at 492-93.

The opinion of the Court then proceeded to overrule *Plessy v. Ferguson*, *supra*. The dispositive sentences were:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Brown I, *supra* at 495.

Twelve years later, after great resistance to desegregation

and many delays in carrying out the Supreme Court's ruling, the Court handed down *Green v. County School Board*, 391 U.S. 430 (1968). The opinion by Justice Marshall said:

The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

Id. at 439 (emphasis in original).

Three years later, Chief Justice Burger (again for a unanimous Court) wrote in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971):

The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.

Id. at 15.

• • •

In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities were among the most important indicia of a segregated system. 391 U.S., at 435. Independent of student assignment, where it is possible to identify a "white school" or a "Negro school" simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.

Id. at 18.

In *Swann* the District Judge's opinion referred to a white/black ratio of 71-29%. As to this the opinion of the Court said:

If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that

approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

Id. at 25 (footnote omitted).

Chief Justice Burger then turned to the publicly disputed question of bus transportation as part of a desegregation plan:

The importance of bus transportation as a normal and accepted tool of education policy is readily discernible in this and the companion case, *Davis, supra*. The Charlotte school authorities did not purport to assign students on the basis of geographically drawn zones until 1965 and then they allowed almost unlimited transfer privileges. The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record.

Id. at 29-30 (footnote omitted).

The *Swann* opinion dealt more thoroughly than any other opinion of the Court with the method of proof of constitutional

violations and the Court's remedial powers when such violations were found. It will be quoted extensively later in this opinion. For the moment, we conclude this digest of *Swann* with two of Chief Justice Burger's most meaningful sentences:

As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.

Id. at 16.

Until the 1970's school desegregation cases were largely limited to Southern states. Then came a case where unconstitutional segregation had been found in the Park Hill district of Denver, Colorado. In *Keyes v. School District No. 1*, 413 U.S. 189 (1973), Justice Brennan wrote:

Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the practice of building a school — such as the Barrett Elementary School in this case — to a certain size and in a certain location, "with conscious knowledge that it would be a segregated school," 303 F. Supp., at 285, has a substantial reciprocal effect on the racial composition of other nearby schools.

Id. at 201-02 (footnote omitted).

• • •

In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions.

Id. at 203.

• • •

[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

Id. at 208.

The importance of intentional discrimination, as opposed to discriminatory impact from racially neutral causes, was further emphasized by the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976), where the Court, in an employment discrimination case, said:

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

Id. at 239 (emphasis in original).

Finally, for this brief review, in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), the Supreme Court re-emphasized the component of intentional discrimination which had been stressed in *Keyes* and the necessity for matching the scope of the remedy to the nature of the violation which had been outlined in *Swann*:

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington v. Davis, supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S., at 213.

Dayton, supra at 420.

We note that in the *Dayton* case Justice Rehnquist's opinion cites with approval every case except one which we have quoted above. Indeed, in the long history of the United States Supreme Court desegregation law which has been written since 1954, no case has purported to overrule or cast in doubt any of the prior precedents which began with *Brown v. Board of Education*.

III STATEMENT OF THIS CASE

Plaintiffs-appellants in this appeal are two groups of parents of children who filed complaints contending that their children (and all other children in the Columbus schools) had been deprived of their constitutional right to equal protection of the law by intentional racial segregation in the public schools of Columbus. Defendants-appellants are the Columbus Board of Education and the Ohio State Board of Education. Both defendants by pleadings and evidence at trial denied any intentional segregation in violation of the Constitution and claimed that any school segregation which existed at the time of the filing of the case was due to segregated housing patterns over which they had no control, or due to a "neighborhood" school policy which they claimed to be constitutionally permissible.

After a lengthy trial, United States District Judge Robert Duncan entered an Opinion and Order, dated March 8, 1977. *Penick v. Columbus Board of Education*, 429 F.Supp. 229 (S.D. Ohio 1977). The most succinct finding of fact in his lengthy analysis of the 6,600 pages of evidence is as follows:

[D]uring the 1975-76 school year, when this case was tried, 70.4% of all the students in the Columbus Public Schools attended schools which were 80-100% populated by either black or white students; 73.3% of the black administrators were assigned to schools with 70-100% black student bodies; and 95.7% of the 92 schools which were 80-100% white had no black administrators assigned to them.

Id. at 240.

The District Judge reviewed the history of Ohio's school laws and the Columbus School Board's administration of its schools from 1868 to 1954 when *Brown I* was decided. He found from the evidence that in 1954 the Columbus Board was maintaining five schools which had been built and operated as "black" schools. He found that, aside from one brief period, black stu-

dents had been intentionally segregated. He held that "in 1954 there was not a unitary school system in Columbus." 429 F. Supp. at 236.

In detailed review of the actions of the Columbus Board in the post-1954 period, the District Judge found that by building schools at locations which would guarantee their opening as "one-race schools," gerrymandering school districts on a racial basis, allowing optional assignment of white students to white schools and assigning black teachers and administrative personnel to black schools in the great majority of instances and white teachers and administrative personnel to white schools in the majority of instances, the Board had not followed a "racially neutral" policy, but to the contrary, had intentionally chosen alternatives which were predictably segregative and from which it was reasonable to infer segregative intent. As to the Columbus Board, Judge Duncan entered the following finding of segregative intent:

From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times, has approved optional attendance zones, discontinuous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hir-

ing and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion.

429 F.Supp. at 260-61.

In this same opinion the District Judge analyzed the legal responsibilities of the State Board of Education and found a failure to act when the State Board had a clear legal duty to act to prevent the creation and continuation of segregation in the Columbus schools. The District Judge found intentional violation of the Constitution on the part of the State defendants in the following paragraph:

The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

Id. at 263-64.

The District Judge thereupon entered an order permanently enjoining the Columbus Board of Education and the State Board from "creating, promoting, or maintaining unconstitutional racial segregation in any Columbus school facilities" and directing the Columbus Board of Education and the State Board "to formulate and submit to the Court proposed plans for the desegregation of the Columbus Public Schools" *Id.* at 268.

Before such plans were acted upon by the District Judge, the Supreme Court of the United States decided the case of *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). On the heels of that case, the Columbus Board of Education moved for leave to amend its previously proposed remedy plan and sought the court's reconsideration of the District Judge's

previous findings concerning constitutional violation. After reviewing the specific language employed by the opinion of the Court in the *Dayton* case and distinguishing the facts as he saw them in the Columbus case from the facts recited by the Supreme Court in relation to *Dayton*, the District Judge reiterated his findings of de jure and intentional systemwide segregation. Without approving any plan which had been submitted either by the Columbus Board or the State Board, but expressing a preference for the State Board plan, the District Judge outlined a series of principles for the parties to follow in desegregating the Columbus school system. The first sentence read: "The plan must be capable of desegregating the entire Columbus school system." He then certified the various orders to which we have referred as presenting controlling questions of law as to which there are substantial grounds for differences of opinion, and further certified that immediate appellate review might materially advance ultimate termination of the litigation. These appeals followed, with appellants contesting most of the findings and legal conclusions of the District Judge.

We review the findings of fact and conclusions of law of the District Judge in this case against the statements of law by the Supreme Court of the United States in the preceding section, which we believe control our decision.

IV THE COLUMBUS SCHOOLS BEFORE 1954

The first question which Judge Duncan dealt with in his opinion was "whether [the Columbus school system] was unitary (no unlawful racial segregation) or dual (unlawful racial separation)" in 1954 when the United States Supreme Court decided *Brown v. Board of Education*, *supra*, 429 F. Supp. at 234. He held that in 1954 the system was unlawful and dual. His careful analysis bears quotation:

Prior to 1871, the evidence indicates not only a complete separation of the races in the Columbus school

system, but also repeated demands by black citizens for adequate schools for black children.¹

In 1871 the Supreme Court of Ohio decided the case *State ex rel. Garnes v. McCann*, 21 Ohio St. 198. In that case, a black parent challenged an Ohio statute which "authorized and required" all the boards of education in the state "to establish, within their respective jurisdictions, one or more separate schools for colored children, when the whole number, by enumeration, exceeds twenty" The statute is quoted in the Supreme Court's opinion, 21 Ohio St. at 206. Recognizing that blacks in the post-Civil War era were entitled to protection under the Fourteenth Amendment to the United States Constitution, the Supreme Court of Ohio nevertheless held that the statute providing for separate schools for black children affronted neither the United States nor the Ohio Constitution. Thereafter, in 1878, the General Assembly of Ohio enacted House Bill No. 105, 75 Ohio L. 513, which provided that "where in their judgment it may be for the advantage of the district to do so, [local boards of education] may organize separate schools for colored children" This statute in turn was repealed in 1887, 84 Ohio L. 34. In passing on the state of the law effective in 1888, the Supreme Court of Ohio held that Boards of Education could not maintain separate schools for black and white students. *Board of Education v. State*, 45 Ohio St. 555 (1888).

It was 1878 before the first black person graduated from high school in Columbus. In that year all black children attended Loving School at the corner of Long and Third Streets, many passing closer white schools en route. In 1879 a very few blacks attended Second Avenue, Douglas and East Friend schools. However, with only these few exceptions, blacks attended Loving School.

¹ See, e.g., *Early Black History in the Columbus Public Schools*, by Myron T. Seifert, historian for the Columbus Public Schools, admitted at trial as plaintiffs' exhibit 351.

In 1881 by resolution the Columbus Board abolished separate schools for black children. Children were assigned to attend school districts where they dwelt. Miss Celia Davis, a black woman, taught at the racially mixed Medary school in 1897. Several other blacks taught in mixed schools during the period 1900-1907.

The Columbus Board of Education caused the Champion Avenue School to be built in 1909. The school, located in a predominantly black residential district, was staffed with all black teachers. In August, 1909, Charles W. Smith, a black parent, sued the Columbus Board of Education in the Common Pleas Court of Franklin County, alleging that the Board's action establishing Champion as a black school was illegal under Ohio law. The Court of Common Pleas heard evidence, and on March 11, 1911, dismissed the case. Mr. Smith appealed the dismissal, and on December 31, 1912, the Circuit Court of Franklin County in Case No. 3094 affirmed the trial court's action. On January 6, 1913, Dr. William O. Thompson, one of the members of the Columbus Board of Education, reported to the Board that the Circuit Court had "affirmed the opinion of Judge Rogers, and further held that the creation of a school district is a matter of the discretion of the Board of Education, and not a subject for judicial determination, and dismissed the appeal." Apparently the trend earlier established toward integration then halted in Columbus.

During the 1920's and early 1930's Champion remained a school populated by black students with predominantly black faculty, and a black principal. Although some secondary and elementary schools were attended by both races, all of the black teachers employed in the system were at Champion.

In 1938 Pilgrim Junior High, which had been a racially mixed school, was converted to an elementary school. Champion's then all-black elementary faculty was transferred to Pilgrim, and Champion became a junior high school with a black faculty and black students. The school attendance areas were gerrymandered so that white

students who lived very near Pilgrim School were permitted to attend Fair Avenue School, which was considerably more distant from their houses on Greenway and Taylor Avenues. White children who lived on those streets had attended Pilgrim before it was converted to an elementary school for black children.

In 1941 all black teachers in the system were employed at Mt. Vernon, Garfield, Pilgrim or Champion Schools, all predominantly black schools. By 1943 five schools were attended almost exclusively by black children, and the faculties of each were composed entirely of black teachers. In September of that year the entire professional staff of Felton School, composed of 13 teachers and a principal, was removed and replaced with 14 black persons. The same kind of 100% white to 100% black faculty transfer had occurred at the Mt. Vernon and Garfield schools in prior years. In September, 1943, the Vanguard League, a civil rights organization, complained to the Columbus Board about gerrymandering as follows:

A more striking example of such gerrymandering is Taylor and Woodland Avenues between Long Street and Greenway. Here we find the school districts skipping about as capriciously as a young child at play. The west side of Taylor Avenue (colored residents) is in Pilgrim elementary district and Champion for Junior High. The east side of Taylor (white families) is in Fair Avenue elementary district and Franklin for Junior High.

Both sides of Woodland Avenue between Long and Greenway are occupied by white families and are, therefore, in the Fair Avenue-Franklin district. Both sides of this same street between 340 and 500 are occupied by colored families and are in the Pilgrim-Champion, or "colored" school, district. White families occupy the residences between 500 and 940, and, as would be expected, the "white" school district of Shepard-Franklin applies.

When *Brown I* was decided in 1954, there were no black high school principals in Columbus. All black administrators were assigned to predominantly black schools. There were no white principals in predominantly black schools. Under the policy and practice of the Columbus defendants' predecessors, black student teachers were required to do their student teaching at predominantly black schools.

Giving full recognition to substantial racial mixing of both students and faculty in some schools, the Columbus school system cannot reasonably be said to have been a racially neutral system on May 17, 1954. The then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had originally intentionally caused and later perpetuated the racial isolation, in the east area of the district, of black children and faculty at Champion, Mt. Vernon, Garfield, Felton and Pilgrim. Thus, the Columbus Board of Education maintained what amounted to an enclave of separate, black schools on the near east side of Columbus, thereby depriving hundreds of black children an opportunity for an integrated educational experience. Defendants do not appear to assert that these results were an accommodation to the neighborhood school concept.

In the Court's view, in 1954 the Columbus defendants' predecessors had caused some black children to be educated in schools that were predominantly white; however, the Board also deliberately caused at least five schools to be overwhelmingly black schools, while drawing some attendance zones to allow white students to avoid these black schools. This separateness cannot be said to have been the result of racially neutral official acts. As a result, in 1954 there was not a unitary school system in Columbus.

429 F.Supp. at 234-36.

Our review of this record fully supports the District Judge's conclusion. We certainly cannot declare any of his findings

to be "clearly erroneous." Indeed, we do not find in appellants' briefs or oral arguments before our court any serious efforts to dispute the District Judge's findings of fact concerning pre-1954 segregation. While the Columbus school system's dual black-white character was not mandated by state law as of 1954, the record certainly shows intentional segregation by the Columbus Board. As of 1954 the Columbus School Board had "carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system." *Keyes v. School District No. 1*, *supra* at 201-02. This is the legal predicate for the District Judge's finding of a dual school system.

Under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for 24 years. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) [*Brown I*]; *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Davis v. School Dist. of City of Pontiac, Inc.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir.), *cert. denied*, 98 S.Ct. 635 (1977).

V THE COLUMBUS SCHOOLS AFTER 1954

(a) *Pupil Assignment*. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*, Chief Justice Burger, for a unanimous Court, spelled out the factors which identify a school as a "white school" or as a "Negro school." The two most important of these involve racial discrimination in the assignment of pupils and in the assignment of faculty. *Id.* at 18. In the same opinion, the Chief Justice approved the District Court's use of the 29-71% ratio of black to white children there involved as a "starting point" in determining both constitutional violation and remedy. *Id.* at 25:

Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

In the present case, the District Judge made similar use of black-white ratios in determining both "racially identifiable" schools and "one race" schools and in "shaping a remedy." His definition of terms is important to the understanding of his findings:

The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools. The Court has accepted the figures used by Dr. Gordon Foster concerning the Columbus Public Schools:

Year	Percentage Black Pupils in System	Statistical Variation	Range
1950-57	15 % (estimate)	+ 5%	10 % - 20 %
1957	20 % (estimate)	+ 10%	10 % - 30 %
1964 primary	25 % (estimate)	+ 15%	10 % - 40 %
1964 secondary	26.6%	+ 15%	11.6% - 41.6%
1975	32.5%	+ 15%	17.5% - 47.5%

Black School — A school having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black pupils — that is, a racially identifiable black school. See "racially identifiable."

White School — A school having a black student enrollment which is less than the applicable variance from the system-wide percentage of black pupils — that is, a racially identifiable white school.

One Race School — A school in which 90% or more of the students are of a single race.

429 F.Supp. at 268-69.

We consider the ratios used by the District Judge to have been properly employed under the standards of *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*.

In relation to pupil assignment, we have already noted that the District Judge found concerning the 1975-76 school year that over 70% of the students in the Columbus school system attended schools which were over 80% white or over 80% black.

As shown below, in the 1975-76 school year in Columbus, 85% of the elementary schools, 65% of the junior high schools, 67% of the senior high schools, 60% of the special schools, and 100% of the junior-senior high schools were racially identifiable as defined above.

*Analysis of Student Population Figures for 1975-76**

		<i>Racially Identifiable Schools</i>	
		<i>Black</i>	<i>White</i>
Elementary	(123 total)	35	69
Junior High	(26 total)	7	10
Senior High	(15 total)	4	6
Junior-Senior	(3 total)	2	1
Special	(5 total)	1	2

		<i>80% Black</i>	<i>80% White</i>
Elementary	(123 total)	25	71
Junior High	(26 total)	4	12
Senior High	(15 total)	2	7
Junior-Senior	(3 total)	0	1
Special	(5 total)	1	2

		<i>90% Black</i>	<i>90% White</i>
Elementary	(123 total)	16	55
Junior High	(26 total)	4	6
Senior High	(15 total)	1	3
Junior-Senior	(3 total)	0	0
Special	(5 total)	1	0

		<i>96% Black</i>	<i>96% White</i>
Elementary	(123 total)	10	34
Junior High	(26 total)	2	2
Senior High	(15 total)	1	1
Junior-Senior	(3 total)	0	0
Special	(5 total)	1	0

* These charts were prepared from information contained in Plaintiffs' Exhibit No. 11, which is included in the Appendix at I-1. Exhibit No. 11 has not been disputed by Appellants and has been cited in their brief, albeit for other purposes.

The following schools are in the 96% black group:

<i>Elementary</i>	<i>Junior High</i>
Beatty Park	Champion
Eastgate	Monroe
Fair	
Garfield	<i>Senior High</i>
Gladstone	East
Hamilton	
Lexington	<i>Special Schools</i>
Shepard	Bethune Center
Trevitt	
Windsor	

The following schools are in the 96% white group:

<i>Elementary</i>	Oakland Park
Alpine	Olde Orchard
Avondale	Salem
Binns	Scioto Trail
Cedarwood	Sharon
Clinton	Siebert
Dana	Southwood
Devonshire	Stockbridge
Forest Park	Valley Forge
Fornof	Valleyview
Georgian Heights	Walford
Gettysburg	West Broad
Glenmont	Winterset
Hubbard	
Huy	<i>Junior High</i>
Indian Springs	Buckeye
Kenwood	Woodward Park
Liberty	
Lindberg	
Maize	<i>Senior High</i>
Maybury	Whetstone
Northridge	

We recognize, of course, that racial separation based upon facts and circumstances beyond the control of school boards may constitute de facto segregation without necessarily representing violation of the Fourteenth Amendment. However, we have previously pointed out that the District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil assignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation.

Of course, this Northern school case is distinguished from the classic Southern school cases in two important respects: first, Ohio did not, after 1887, require dual school systems by state law; and second, some black students did go to school in Columbus in 1954 in largely white schools. Since, however, a substantial portion of black students, as shown by the District Judge's findings and as supported by the record, were intentionally segregated in 1954, we do not believe these two distinctions serve to invalidate the District Judge's findings of a de jure dual school system. See *United States v. Board of Commissioners of Indianapolis*, 474 F.2d 81, 82-85 (7th Cir.), cert. denied, 413 U.S. 920 (1973).

In *Keyes, supra*, the Court said:

Indeed, to say that a system has a "history of segregation" is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. *Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.*

Id. at 210 (emphasis added).

Clearly "a meaningful portion of the [Columbus] system [was] found to be intentionally segregated" by the District Judge. Clearly also the Columbus Board has not carried the "burden" *italicized* in the quotation above.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.

Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267 (1977) (emphasis added).

(b) *Segregation in School Year 1975-76.*

We now turn to an analysis of the District Judge's findings of unconstitutional segregation as of school year 1975-76.

Our basic problem is to determine whether the segregation in Columbus schools in the school year 1975-76 clearly shown in the section immediately above was intentionally and, hence, unconstitutionally created or whether, as claimed by the Columbus Board of Education, it resulted from neighborhood housing segregation which the Columbus Board of Education could not control, and the racially "neutral" Columbus Board policy of neighborhood schools. In this regard, after noting the substantial evidence of segregation in pupil, teacher and administrator assignments, we look next at the Columbus Board's school site choices and its construction program.

(c) *School Construction.* In our consideration of the District Judge's findings of fact and conclusions of law concerning

the Columbus Board's school construction programs between 1954 and 1975, we have in mind Chief Justice Burger's description of the importance of school construction and closings in school desegregation cases:

The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the

mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra* at 20-21.

In the years intervening between 1954 and the filing of the first complaint in this case in 1975, the parties agree that Columbus as a city grew enormously in boundaries (from 40 to over 173 square miles), and in public school population from 46,352 to 95,998. The result, of course, was a great amount of school construction. This factor offered consequent opportunities for the school board to make inroads upon the segregation (whether *de facto* or *de jure*) of black children and white children found by the District Judge to have existed in 1954.

The District Judge's analysis of the history of Columbus school construction has such relevance to the question of whether the 1975-76 school segregation was intentionally created that we quote it extensively:

The Columbus defendants have contended throughout that they have followed a neutral neighborhood school policy. In keeping with that policy, schools have generally been built in locations where the expanding and growing population demanded additional facilities. Of 103 schools constructed between 1950 and 1975, 87 opened with a racially identifiable student body according to the calculations of Dr. Foster. Of the 87 schools, three have been closed. These schools closed with racially identifiable student populations. Seventy-one of the 87 new schools remained racially identifiable at the time of trial.

It is necessary for the Court to consider those foreseeable effects of the construction practice which promote or preserve a segregated school system. It is

apparent to the Court, and presumably to the defendants, that schools which open with a racially identifiable student body tend to stay that way. The Court finds that in some instances initial site selection and boundary changes present integrative opportunities.

The evidence supports a finding that the Columbus defendants could have reasonably foreseen the probable racial composition of schools to be constructed on a given site. In some instances the Columbus defendants had actual knowledge of the likelihood that some schools would open and remain racially identifiable if built on the proposed sites. One such case was Gladstone Elementary School. See map 1 in the appendix to this opinion. Although Gladstone was apparently opened in 1965, the first statistics available concerning its racial composition concern the year 1966, when it had a student population which was 78% black. Gladstone's black enrollment has been in excess of 90% since 1967. Mr. Lumpkin, who later became the president of the Gladstone Parent Teacher Association, testified that prior to its construction he communicated to the Board of Education that Gladstone would predictably open as a predominantly black school. The 1960 census map shows that in that year the area in which Gladstone was eventually built was predominantly white. The 1970 census map indicates that this same area was predominantly black. This reflects the definite trend of an expanding black population northward into this area in the 1960's. This trend was fairly well advanced in 1966, given Gladstone Elementary's 78% black enrollment that year.

Gladstone was built between Hamilton Elementary and Duxberry Park Elementary with the greater portion of the Gladstone attendance zone being drawn from the southwestern portion of the former Duxberry zone. This section of Duxberry had a higher black density than did the northern and eastern sections. Thus, the black student population in Duxbury dropped from 40% in 1965 to 33%

in 1966. Linden Elementary, to the north of Hudson Street, remained virtually 100% white throughout the middle 1960's. The construction of Gladstone south of Hamilton and Duxberry served to contain the black student population in the area south of Hudson Street.

The need for greater school capacity in the general Duxberry area would have been logically accommodated by the construction of Gladstone north of its present location, nearer to Hudson Street. This would, of course, require some redrawing of boundary lines in order to accommodate the need for class space in Hamilton and Duxberry. If, however, the boundary lines had been drawn on a north-south pattern rather than an east-west pattern, as some suggested, the result would have been an integrative effect on Hamilton, Duxberry and the newly-constructed school.

The Court also finds that the site selection and attendance zone boundaries for Sixth Avenue Elementary resulted in a foreseeably blacker school. Sixth Avenue opened as a primary center (grades K-3) in 1961 and closed in 1973. During this entire period, Sixth Avenue was racially identifiable with a black student population of at least 85%.

The Sixth Avenue school was built in accordance with a recommendation contained in the 1958-59 study of the Public School Building Needs of Columbus, Ohio. Recommendation number 11 on page 58 of that document describes an area bounded by High Street on the west, Chittenden Avenue on the north, New York Central Railroad on the east, and Fifth Avenue on the south. Sixth Avenue elementary was built on the proposed site. The attendance zone for Sixth Avenue was as recommended, except that Fourth Street was its western boundary. This area can generally be described as the eastern portion of the Weinland Park Elementary attendance zone and the northeastern corner of the Second Avenue Elementary attendance zone. Both the 1960 and 1970 census maps (and the underlying statistical data)

show that these portions of the former Weinland Park and Second Avenue Elementary attendance zones had the highest percentage of black residents within the area. The census data shows that the population west of Fourth Street was largely 0 to 27.9% black with two or three blocks being in the 28 to 49.9% range. The east side of Fourth Street is generally in the 50 to 89.9% black range, with several blocks in the 90 to 100% black category. The Sixth Avenue attendance zone consists almost entirely of 50 to 100% black population. The black population in the area left within the attendance zones of Weinland and Second after Sixth opened is generally below 27.9%, with a few blocks in the 28% to 49.9% range.

In 1964, three years after Sixth Avenue opened and the first year for which racial statistics are available, Sixth Avenue had a black student enrollment of 91%. In that year Weinland Park and Second Avenue had black student populations of 30% and 28%, respectively. The boundary lines for these schools remained relatively unchanged until 1973, when Sixth Avenue closed. Sixth Avenue closed with a black enrollment of 94.6%. In that year Weinland Park and Second had black enrollments of 30.5% and 16.7%, respectively. In the 1974-75 school year following the closing of Sixth Avenue, the boundary lines for Weinland and Second were redrawn to resemble the 1960 attendance zones. With the closing of Sixth the black population of Weinland rose from 30.5% to 46.7% while Second Avenue rose from 16.7% to 20.7%. The Court finds that the construction site and attendance zone drawn for Sixth Avenue Elementary between 1961 and 1973 resulted in Sixth Avenue being the black school in the area while making Weinland Park and Second Avenue whiter.

The impact of building a new elementary school at the Sixth Avenue location and drawing the attendance zone boundaries where they were drawn was clearly foreseeable to the Columbus defendants. Some students living in the area east of Fourth Avenue, shown to be

predominantly black on both the 1960 and 1970 census maps, were compelled to walk to Sixth even though Weinland Park was closer to their homes. Even if the Court were to find compelling non-segregative reasons for the construction of this new school on its Sixth Avenue site, it is readily obvious from the census maps that the objectives of racial integration would have been better served, without abandoning the neighborhood school policy, by drawing the attendance zones east and west between High Street and the railroad tracks, rather than north and south along Fourth Street. The Columbus defendants have offered no explanation for the fashion in which Sixth Avenue was opened and maintained during this period.

The Court is well aware of the Board's obligation to provide class space as the need arises, whether it be in an area of expanding geographic growth, or within the inner-city area due to increasing population or the closing of obsolete structures. Given segregated residential patterns, not all schools can be built in an integrated setting. In such circumstances the selection of sites for new schools alone may not serve as a tool for integration. The intervening plaintiffs argue that the construction of a school in an area known to have been covered by racially restrictive covenants and subject to discriminatory real estate practices constitutes an impermissible participation by the school officials in racial discrimination. The Court does not infer segregative intent from the mere construction of schools in an area needing the facilities even though that area had been covered by racial covenants. Without the use of pairings, transportation, or other techniques, the racial imbalance in these schools could not have been cured by the siting of schools even had the Columbus defendants devoted their attention to the racial integration of the schools.

429 F.Supp. at 241-43.

The record of this trial supports these findings of fact by

the District Judge. They certainly cannot be said to be clearly erroneous. We also agree with the District Judge's analysis of the evidence, adding only two comments. First, the summary of the gross statistics as found by the District Judge shows that of 103 schools constructed between 1950 and 1975, 87 opened racially identifiable and that as of the time of trial, 71 of the 87 remained racially identifiable. In our view, this requires a very strong inference of intentional segregation. Second, this record actually requires no reliance upon inference, since, as indicated above, it contains repeated instances where the Columbus Board was warned of the segregative effect of proposed site choices, and was urged to consider alternatives which could have had an integrative effect. In these instances the Columbus Board chose the segregative sites. In this situation the District Judge was justified in relying in part on the history of the Columbus Board's site choices and construction program in finding deliberate and unconstitutional systemwide segregation.

During most of the history of the Columbus schools, the same patterns of segregation which we have just described in relation to pupil assignments to schools by race prevailed also in relation to teacher and administrator assignments.

All black teachers in the system were assigned to five schools recognized as black in 1954. When Champion was built, it opened with an all black faculty. When it was decided to make Champion a junior high school and send its overwhelmingly black elementary student body to Pilgrim, all of the white faculty at Pilgrim was transferred out and replaced with an all black faculty. Similarly obvious segregation of black teachers occurred as found by the District Judge in at least three other schools prior to 1954.

The District Judge, however, also found similar teacher assignments by race into the 1970's:

Between 1964 and 1973 the Columbus defendants generally maintained their prior practice of assigning black

teachers to those schools with substantial black student populations. As an example, as late as the 1972-73 school year, there were 250 black elementary teachers assigned to schools in which the student body was 80-100% black, which represented 63.3% of all of the black elementary teachers in the system. In the same school year, 34 elementary schools, all of which contained 80-100% white student bodies, had no black teachers assigned to them.

429 F.Supp. at 238.

Yet the District Judge entered no orders to desegregate the faculty or staff. The record clearly shows both when and why the Columbus Board ceased to assign teachers by race. As to teachers in the 1975-76 school years, the District Judge found:

The number of black teachers in each school almost compares to the ratio of black to white teachers in the total system. Suffice it to say that this has occurred only after the Ohio Civil Rights Commission's complaint and the consummation of a consent order before that Commission. Moreover the Court cannot find, as plaintiffs urge, that the Columbus defendants have failed to comply with the consent order⁷

Id. at 259-60.

Obviously it was no "neutral" neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974.

(d) *Gerrymandering, Pupil Options, Discontiguous Pupil Assignment Areas, Etc.* This record also shows instances of intentional employment of devices which allowed white students to avoid attendance at a primarily black school, or which required black students to attend a primarily black school in

⁷ Apparently this order and compliance therewith also apply to administrators.

place of a closer white school. These instances can properly be classified as isolated in the sense that they do not form any systemwide pattern. They are significant, however, in indicating that the Columbus Board's "neighborhood school concept" was not applied when application of the neighborhood concept would tend to promote integration rather than segregation.

As to these instances, the District Judge made some specific findings (which the Columbus Board barely disputes) which we cannot hold to be "clearly erroneous":

The opportunity for active integration did exist, however, without the use of transportation, in some parts of the city. Even greater integration could have been achieved with the use of pairings and limited transportation. This opportunity existed, and continues to exist in those areas of the city where the population shifts from one race to another. An examination of the census maps for the years 1950, 1960 and 1970 discloses a general pattern of high density (50 to 100%) black population in the center of the city fringed by areas of lesser, but still substantial, (10 to 50%) black population. The remainder of the city is predominantly white, although there are pockets of white population within the central city area, and pockets of black population in the outlying areas.

The Columbus defendants argue that housing in the City of Columbus is segregated as a result of private discrimination and other factors affecting residential development over which the school board has no control and little influence. The Columbus defendants maintain that they have adopted a racially neutral neighborhood school policy. They contend that the use of a neighborhood school policy in a city with segregated housing patterns results, through no fault of the school authorities, in racially imbalanced schools. Under the neighborhood school policy, the site selected for a new school limits

the attendance zone boundaries that can be drawn for that school. The evidence shows that in some instances the need for school facilities could have been met in a manner having an integrative rather than a segregative effect.

The Near-Bexley Option

East of the downtown area of Columbus, and entirely surrounded by the Columbus city limits, lies the City of Bexley, Ohio. East of Bexley, and also entirely surrounded by the Columbus city limits, is the City of Whitehall, Ohio. With the exception of one small area of Columbus which jumps across Alum Creek to the eastern side of the creek, the western boundary of Bexley follows the course of Alum Creek. The Columbus residential area to the west of Alum Creek was in 1960 and 1970, according to census data, heavily populated by blacks. For that area in those years, census tracts generally appear as either 50-89% black or 90-100% black. A different picture existed for the area to the east of Alum Creek, encompassing the City of Bexley and the small portion of Columbus which lies immediately east of the creek. According to census data, 99% of Bexley residents were white in 1960, and 99.3% were white in 1970. Census data further indicate that in 1960 there were 159 people residing in that area of Columbus which lies immediately east of Alum Creek; all of these people were white.

From the 1959-60 school year through the 1974-75 school year, the Columbus Board of Education established and maintained an optional attendance zone encompassing the area of Columbus which lies directly east of Alum Creek. Students living in that area were within the attendance areas of schools located to the west of Alum Creek, nearer the Columbus downtown area. This 1959-1975 option permitted these students to elect to attend Columbus city schools located to the east of the City of Bexley. For ease of reference, the

Court will refer to this option as the "Near-Bexley Option."

Absent the Near-Bexley Option, students living in the optional zone area would have been required to attend Fair Avenue Elementary (opened in 1890), Franklin Junior High School (opened in 1898) and East Senior High School (opened in 1922). The following statistics are applicable to these near-east side schools:

	1964	1969	1974
Fair Avenue Elem.			
% black students	92.0	95.0	96.7
% black faculty	83.3	37.1	23.3
Franklin Jr. H.S.			
% black students	85.8	96.3	93.7
% black faculty	32.6	34.6	45.8
East Sr. H.S.			
% black students	94.9	98.9	98.9
% black faculty	12.7	28.9	31.3

The schools on the receiving end of the option were Fairmoor Elementary (opened in 1950), Eastmoor Junior High School (opened in 1962) and Johnson Park Junior High School (opened in 1958), and Eastmoor Senior High School (opened in 1955). The following statistics are applicable to these schools:

	1964	1969	1974
Fairmoor Elem.			
% black students	0.1	0.9	4.6
% black faculty	0	4.0	18.2

Eastmoor Jr. H.S.

% black students	30.5	34.4	45.3
% black faculty	0	9.8	15.2

Johnson Park Jr. H.S.

% black students	0.3	2.9	26.7
% black faculty	0	2.0	12.7

Eastmoor Sr. H.S.

% black students	10.6	17.8	34.9
% black faculty	0	4.0	15.2

Eastmoor Junior High School was a receiving school for the Near-Bexley Option during the 1959-60, 1960-61, and 1963-64 through 1974-75 school years. Johnson Park was a receiving school for the option during only the 1961-62 and 1962-63 school years; there are no racial statistics available for Johnson Park Junior High School for these two years. The 1960 census data indicate that the Johnson Park attendance area was predominantly white at that time.

The Near-Bexley Option, then, concerned a small, white enclave on Columbus' predominantly black near-east side. The option area, although part of Columbus, had more in common, geographically and racially, with Bexley than with Columbus. In practical effect, the Near-Bexley Option permitted white students in the optional zone to escape attendance at black Fair Avenue Elementary, Franklin Junior and East Senior High Schools, and permitted them instead to attend white (or whiter) Fairmoor Elementary, Eastmoor Junior or Johnson Park Junior, and Eastmoor Senior High Schools. And, as an examination of maps 2, 3, and 4 in the appendix demonstrates, to exercise the option Columbus students had to traverse the City of Bexley to arrive at the option schools.

Nothing presented by the Columbus defendants at trial, at closing arguments, or in their briefs convinces the Court that the Near-Bexley Option was created or maintained for racially neutral reasons. The Court finds that the option was not created and maintained because of overcrowding or geographical barriers.

These defendants contend that the option involved only a few students. The July 10, 1972, minutes of the State Board of Education, at page 44, appear to indicate that in 1972, there were 25 public elementary school students and two public high school students residing in the optional zone. However, the fact that the option was created, and maintained by the Columbus Board of Education for some 16 school years, is of itself some evidence that the option was not merely a paper exercise.

The Court is not so concerned with the numbers of students who exercised or could have exercised this option, as it is with the light that the creation and maintenance of the option sheds upon the intent of the Columbus Board of Education. It is noteworthy that the July 10, 1972, minutes of the State Board of Education indicate awareness by the State Board that a proposed transfer of the Near-Bexley Option area to the Bexley school district "[r]aises the question of percentage of racial mix." (The proposed transfer was opposed by the Columbus Board of Education, and was denied by the State Board.) Quite frankly, the Near-Bexley Option appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools.

*Highland, West Mound and West Broad Elementary
Optional Zones and Boundary Changes*

Another area illustrative of action by the Board promoting racially segregated schools is on the west side of Columbus. Four elementary schools are involved: Burroughs, Highland, West Broad and West Mound. The

census data for the years 1950, 1960 and 1970 show an area of black population between West Broad Street and Sullivant Avenue bounded on the west by Eureka Avenue and on the east by the Columbus State Institute. This area is referred to locally as the Hilltop. The western portion of this area fell mostly in the 50% to 100% black range. The eastern portion, between Belvidere and the Columbus State Institute, was in the 0 to 9.9% black range in 1950 and has become increasingly blacker in later years. The 1970 census data shows this area to have several blocks in each of the ranges of 10 to 27.9%, 28 to 59.9% and 60 to 89.9% black.

Highland Elementary has served the majority of this area between 1950 and the present. During this period the Columbus defendants established two optional attendance zones within the Highland boundaries, and also changed the attendance zone boundaries of Highland. Although the opportunity existed for the integration of the four elementary schools in this area, the option zones and boundary changes tended to preserve and promote the racial imbalance of these schools.

One optional zone appeared in 1955 and continued through the 1956-57 school year. See map 5 in the appendix. In those years, and since 1939, the Highland attendance zone included an area north of West Broad Street to the Pennsylvania Railroad tracks bounded on the west by Eldon Avenue and on the east by the Columbus State Hospital. This portion of Highland north of Broad Street was composed in each of the census years, 1950, 1960 and 1970 of blocks in the 0 to 9.9% black range, as was the entire West Broad attendance zone. For the school years 1955-56 and 1956-57 that portion of Highland north of Broad was made into an optional attendance area with students having the option of attending the predominantly white West Broad or the predominantly black Highland.

Highland was 63 students over capacity in 1955, and

67 students over capacity in 1956. West Broad, however, was also over capacity in 1955 and 1956 by 115 and 113 students, respectively. An examination of the attendance zones in the West Broad Street area reveals that several required students to cross this street to reach their school. The Court concludes that the Highland-West Broad optional zone was not created to alleviate overcrowding or because of a geographic barrier. This optional zone allowed the white students north of Board Street to escape Highland and go to West Broad. The result was to contain blacks within Highland and to maintain West Broad as a predominantly white school.

In 1957 the boundary lines for Highland and West Broad were redrawn, eliminating the option zone and placing that area permanently within the West Broad attendance zone. Because West Broad's capacity problems were greater than those of Highland, a purpose of the boundary change could not have been to alleviate the overcrowding at Highland. Since the West Broad attendance zone dipped south of Broad Street west of the Highland zone, the Court concludes that West Broad Street was not considered a geographical barrier in the decision to redraw these boundaries.

In 1964, the first year in which the racial statistics for enrollment are available, Highland had a black student enrollment of 75%. West Broad Street was 100% white in 1964. The Court finds that the optional attendance zone and boundary changes between Highland and West Broad had a foreseeable and actual effect of promoting racial imbalance.

Another optional attendance zone was created within the Highland boundaries in 1955. This optional zone was in the southeastern corner of Highland and gave the students living there the option of attending either Highland or West Mound Street. See map 5 in the appendix. This option continued through the 1960-61 school year.

The census data for 1950 shows that the West Mound Street attendance zone was, with the exception of one block, within the range of 0 to 9.9% black. The remaining block was in the 10 to 27.9% black category. In 1960 the West Mound attendance area was still largely in the 0 to 9.9% black range with four blocks in the 10 to 27.9% category and one block in the 28 to 49.9% range. The option area east of Wrexham and south of Doren was in the 0 to 9.9% black range in the 1950 census. In the 1960 census the option area continued to be predominantly white with a small portion falling in the 10 to 27.9% black range.

The effect of the Highland-West Mound option was to allow those students living in the whiter portion of the Highland attendance zone to opt out of attendance at identifiably black Highland in favor of the whiter West Mound Street School. The defendants contend that this optional zone was created to alleviate overcrowding in Highland. During the option years Highland was over capacity and West Mound Street was under capacity ranging from four students below capacity in 1957 to 105 in 1960. The effect of the option on the overcrowding at Highland was the foreseeable result that the white students within the option zone would exercise the option to attend West Mound. Thus, even though an option zone may have eased the capacity problem, this particular option zone tended to make Highland blacker and West Mound whiter. In 1961 the option was terminated and the greater part of the option area was rezoned permanently to West Mound Street.

The intervening plaintiffs have shown that feasible alternatives were available and known to the Columbus defendants. One of these alternatives was to move the option area to the west, or make the boundary changes west of where they were made. This alternative would have allowed students from the blacker part of the Highland attendance area to attend West Mound, thus having an integrative effect on West Mound while easing the

overcrowding at Highland. Another alternative would require redrawing the attendance zones in this area for Highland, West Mound, West Broad, and Burroughs. Dr. Foster testified that the total capacity of these four schools was 3,060 at the time of trial and the enrollment was 2,773. The following statistics are applicable to these schools:

Burroughs	1964	1969	1974
% black students	16	14.6	12.5
% black faculty	0	3.1	18.5
Highland			
% black students	75	71.7	72.7
% black faculty	4.6	22.6	16.7
West Mound			
% black students	15	16.1	16.5
% black faculty	0	7.7	17.4
West Broad			
% black students	0	0.7	1.0
% black faculty	0	3.0	12.1

The racial balance at all four schools could have been enhanced by redrawing the attendance zones for these four schools through the Hilltop area. This could also be achieved by pairing. The Court finds each of these alternatives to be feasible and there has been no showing that they are unsound as a matter of academic administration. The Court concludes that the actions of the Columbus defendants had a substantial and continuing segregative impact upon these four west side schools.

*Moler Elementary Discontiguous
Attendance Area*

In the early and mid-1960's, the Columbus Board of Education was faced with overcrowded elementary schools in the southeastern area of the Columbus school district. Stockbridge Elementary, Alum Crest Elementary, Watkins Elementary and an addition to Stockbridge Elementary were opened in the southeastern area during this period. In the 1963-64 school year, the Board of Education assigned the eastern portion of the Watkins Elementary School attendance area to Moler Elementary School. This eastern portion of the Watkins area did not abut the Moler attendance area. See map 6 in the appendix. To arrive at Moler, students living in the discontiguous attendance area were transported through the Alum Crest attendance area. This discontiguous attendance area remained in effect through the 1975-76 school year, when this case was tried.

Census data for 1960 indicate that neither the Moler attendance area proper nor its discontiguous attendance area had a significant number of black residents. The same census showed that the Alum Crest attendance area did have a significant black population. The following statistics are applicable:

	1964	1969	1974
Alum Crest Elem.			
% black students	50	77	78.7
% black faculty	33.3	40	25
Moler Elem.			
% black students	0.2	8.7	50.1
% black faculty	0	10.5	11.8

Between September, 1966 and June, 1968, about 70 students, most of them white, were bused daily past Alum Crest Elementary from the discontiguous attendance area to Moler Elementary. The then-principal of Alum Crest watched the bus drive past the Alum Crest building on its way to and from Moler. At the time, the Columbus Board of Education was leasing 11 classrooms at Alum Crest to Franklin County. There was enough classroom space at Alum Crest to accommodate the students who were transported to Moler. When the principal inquired of a Columbus school administrator why this situation existed, he was given no reasonable explanation.

The Court can discern no other explanation than a racial one for the existence of the Moler discontiguous attendance area for the period 1963 through 1969.

*The Heimandale Discontiguous
Attendance Area*

The Fornof Elementary attendance area is in the southern part of the Columbus school district. To the east of the Fornof area, and adjacent to it, is the Heimandale Elementary attendance area. The 1950 census shows no appreciable black population in either attendance area. The 1960 census indicates that Fornof's area remained predominantly white, with all census tracts having less than 10% black residents. The Heimandale attendance area, on the other hand, reflects a substantial black population by 1960, with most of the area between 28% and 50% black, and some tracts as high as 90-100% black. The 1970 census data for both areas are similar to the 1960 data. In 1964, the first year for which such statistics are available, Fornof had 0.2% black students, and no black faculty members. In the same year, Heimandale had 40% black students and 40% black faculty.

For six school years, from 1957-58 through 1962-63, the Columbus Board of Education perpetuated a discon-

tiguous attendance area involving Heimandale and Fornof. Students living on three streets (Wilson, Bellview and Eagle Avenues) located near the center of the Heimandale attendance area were assigned to attend Fornof instead of Heimandale. Less than 10% of the persons living on these streets were black. There was no geographical or capacity justification for the Heimandale discontinuous attendance area. The existence of this area meant that students living on Wilson, Bellview or Eagle Avenue did not attend their neighborhood school, Heimandale, which had a significant number of black students, and did attend Fornof, which was a racially identifiable white school.

The Innis-Cassady Alternatives

In 1971, the Columbus school district absorbed the Mifflin school district. The area involved is north of the City of Bexley, between 13th Avenue and Morse Road. The Mifflin school district had been in poor financial straights; schools in the district were severely overcrowded. The Columbus Board of Education initially maintained the Mifflin district boundary as a school attendance area, but was required to assign some pupils to a nearby temporary facility while more permanent arrangements were being made.

The north-south length of the area involved is greater than the east-west breadth. Cassady Elementary School, opened as a Mifflin school in 1964, is located on Agler Road roughly midway between 13th Avenue and Morse Road. The residential area south of Agler Road was and is predominantly black, while the area north of Agler Road was and is predominantly white. Because Cassady Elementary was so overcrowded, the first school built with funds raised under the 1972 bond issue was Innis Road Elementary School, which was intended to alleviate the overcrowding at Cassady. Innis was built to the north and west of Cassady; it opened in 1975.

The Columbus Board of Education had announced in 1972 that improved racial balance of student enrollment was a factor which was relevant in site selection and boundary drawing. In 1975, prior to the September opening of Innis Road Elementary, the administrative staff of the Columbus Public Schools presented to the Columbus Board of Education two alternative attendance proposals concerning Innis and Cassady. Dr. John Ellis, Superintendent of the Columbus Public Schools, explained at trial why two options, rather than a single recommendation, were presented to the Board:

The basic reason was to see, as we attempt to wrestle with the very difficult issue of how can we insure we are doing everything that we can that is reasonable and appropriate and right to increase the approved integration within the Columbus School District. We are honestly attempting to achieve that end, and we looked at a couple of different alternatives in these cases to see whether or not we could come up with a better plan than — to see if there was a better approach, and as it turned out, both approaches had some problem with the standpoint of distances and transportation and crossing highways and preferences of people and a host of factors that go into the establishment of boundaries.

Dr. Ellis and Mr. Robert W. Carter, Executive Director of Administration, Columbus Public Schools, both testified at trial that in their respective opinions, the alternatives presented to the Board of Education concerning Innis and Cassady were both educationally sound. The administrative staff did not recommend one alternative over the other.

One alternative entailed dividing the old Mifflin district into two attendance areas, with a horizontal boundary line dividing an Innis attendance area to the north

from a Cassady attendance area to the south. The administrative staff and the Board of Education knew that adopting this alternative would mean that Cassady would draw its enrollment from the predominantly black southern portion of the old Mifflin district, while Innis would draw its enrollment from the predominantly white northern portion.

The other alternative entailed maintaining the old Mifflin district as the attendance area for both Cassady and Innis, with one school designated as a primary center (kindergarten through third grade) and the other as an intermediate school (grades four through six). The administrative staff and the Columbus Board of Education knew that adopting this alternative would mean that the black student enrollment in each school would be roughly equivalent to the white student enrollment.

The Columbus Board of Education chose the first alternative. It divided the old Mifflin district into two elementary attendance areas, one to the south for Cassady and one to the north for Innis. When Innis Road Elementary School opened for the 1975-76 school year, its student enrollment was 27.3% black. Cassady Elementary School during the same year had 89.3% black students.

During closing arguments, counsel for the Columbus Board of Education explained the Board's decision as follows:

The Board based its decision on the fact that it at the time decided to maintain the K-6 organization throughout the district and that the pairing of these schools, given the geographical location of these two areas, would have required a substantial amount of transportation to effect a pairing situation.

The Columbus defendants' proposed findings of fact run in a similar vein:

[T]he pairing of such schools would have required substantial transportation because of the large size of the combined areas. The Board voted not to pair the schools.

... The alternative proposal would have required substantial transportation because of the greater distances involved. The Columbus Board was also justified in its decision to maintain the K-6 organization that now exists throughout the system with the exception of Colerain, which is a primary and crippled children center. Other primary centers are no longer in existence. Sixth Avenue has been closed. The K-3 primary center at Hudson, which was assigned to Hamilton, was recently eliminated with an addition. The school system has never had a K-3 primary center without a K-6 home school

....

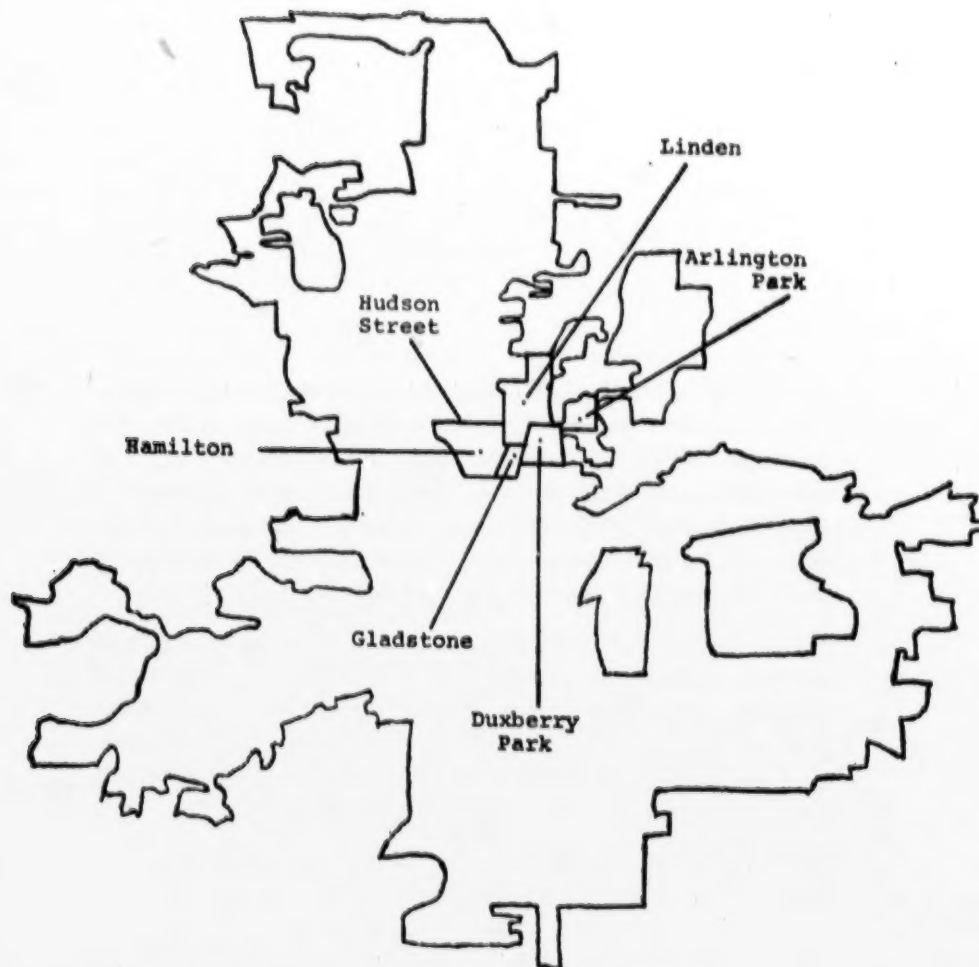
These defendants' own proposed findings amply demonstrate that when in the past a diversion from the K-6 structure served interests, such as overcrowding and special educational concerns, which were considered important by the Board, the Columbus Board of Education did not hesitate to abandon the K-6 structure in favor of primary centers and intermediate schools.

The Court can find no evidence in this record supporting defendants' argument that pairing Innis and Cassady would have necessitated "substantial transportation" of students. Dr. Ellis testified that *both* alternatives "had some problem with the standpoint of distances and transportation and crossing highways. . . ."

429 F.Supp. at 243-49.

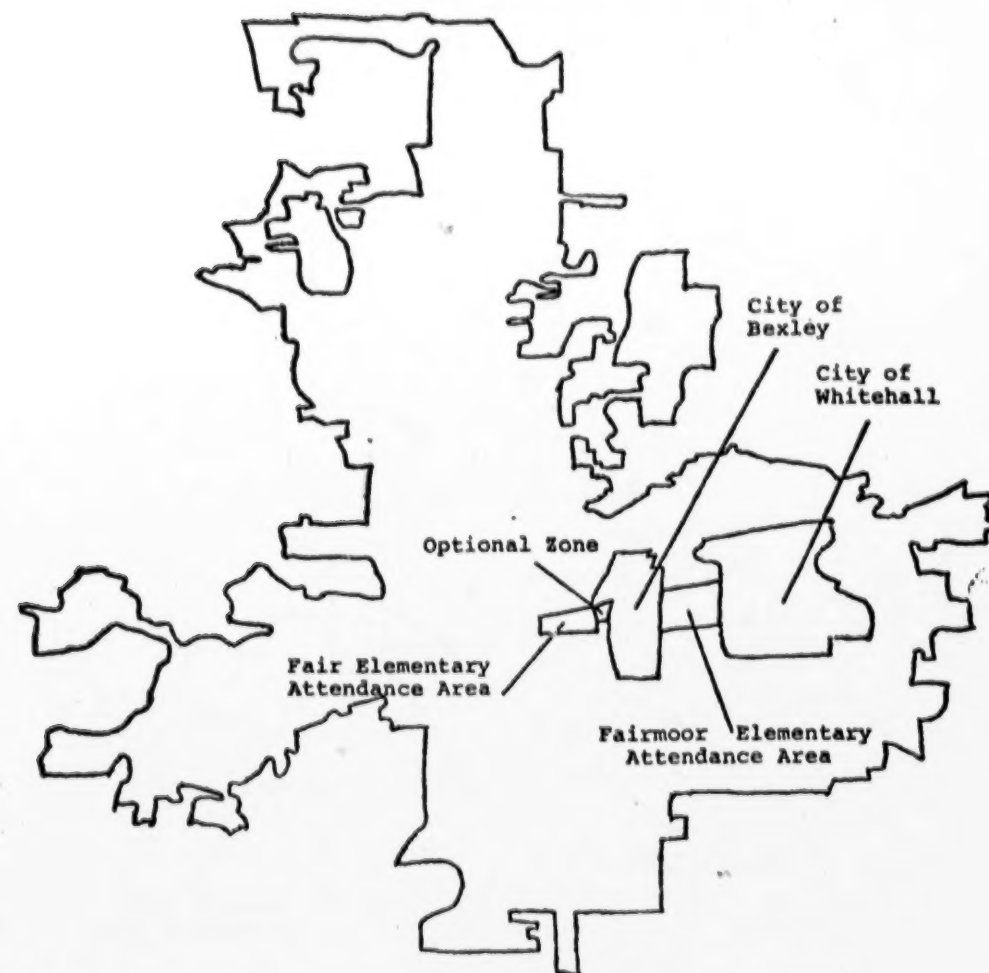
Gladstone, Duxberry Park, Linden,
Hamilton and Arlington Park
Elementary Schools

Map No. 1



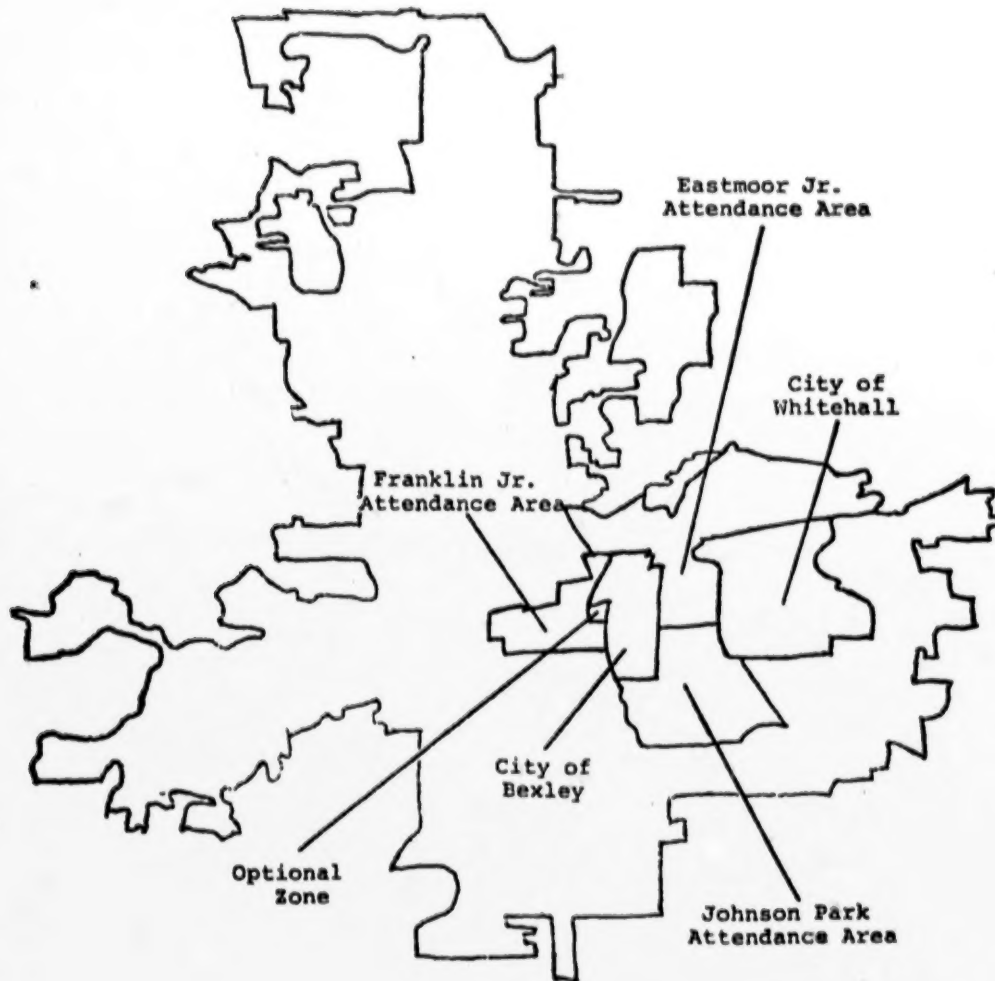
Near-Bexley Option - Elementary Schools

Map No. 2



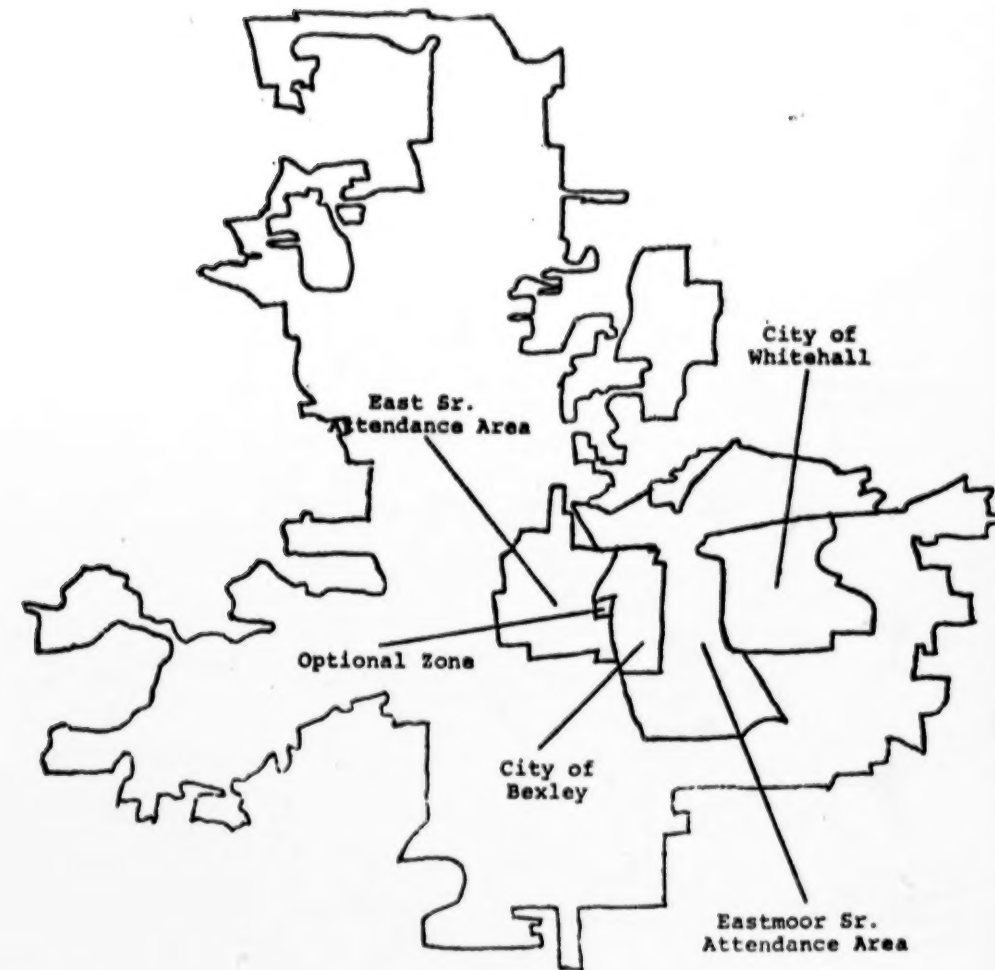
Near-Bexley Option — Junior High Schools

Map No. 3



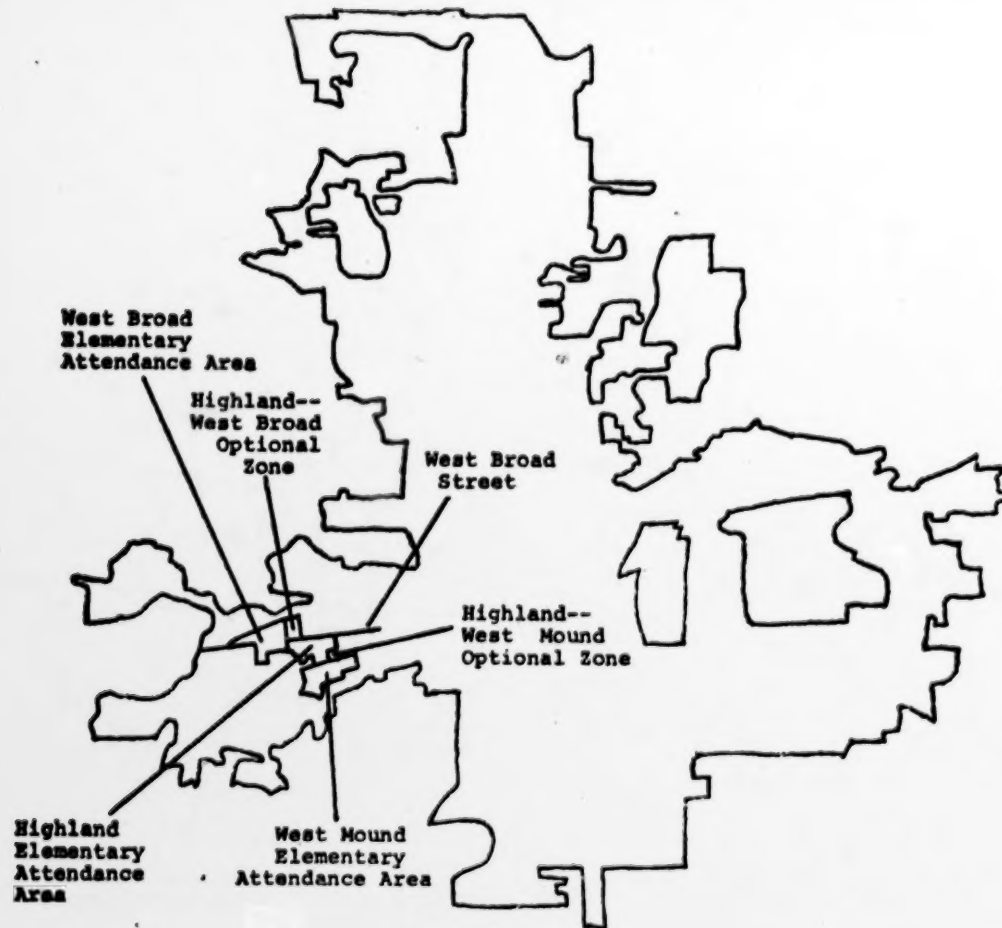
Near-Bexley Option — Senior High Schools

Map No. 4



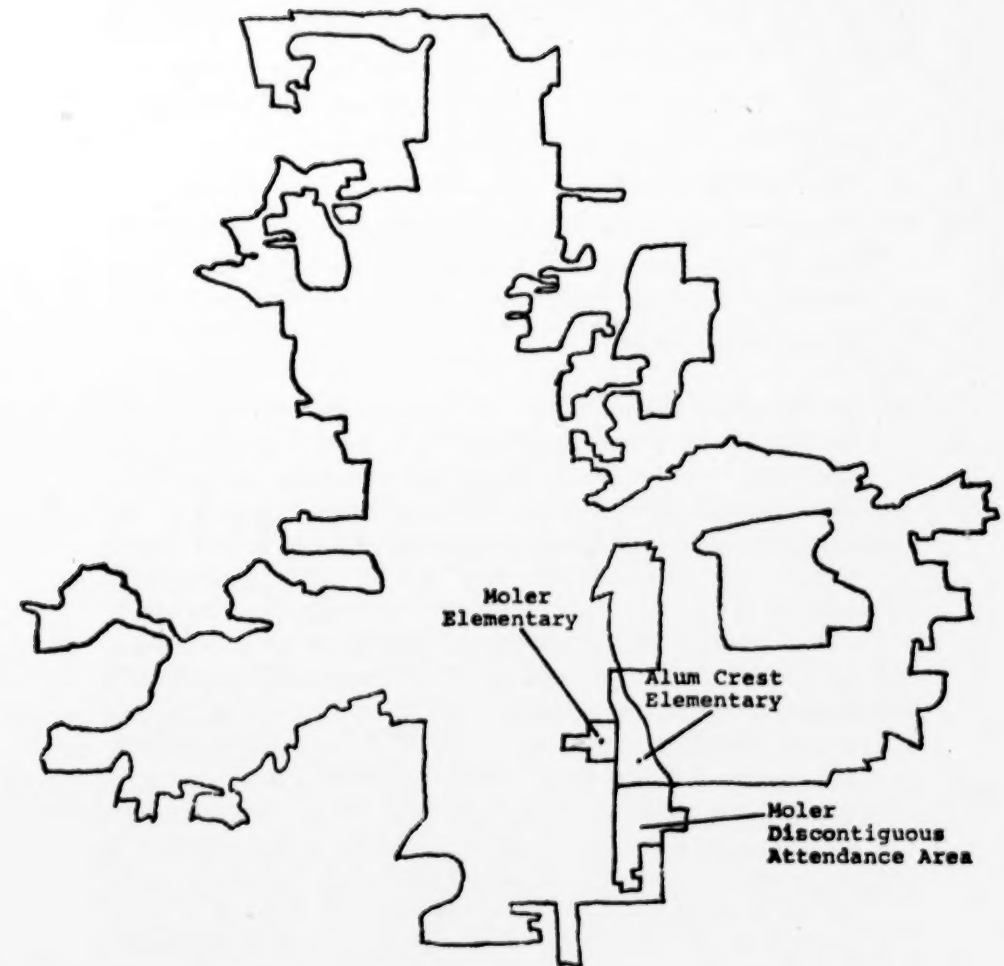
Highland, West Mound and West Broad
Elementary Optional Zones

Map No. 5



Moler Elementary Discontiguous
Attendance Area

Map No. 6



VI SYSTEMWIDE SEGREGATION AND SYSTEMWIDE IMPACT

The law cited at the beginning of this opinion, as stated by the Supreme Court in *Swann, supra*, *Keyes, supra*, and *Dayton, supra*, calls for systemwide desegregation when (and only when) the segregative practices found had a systemwide impact. The key phrases are:

As with any equity case, the nature of the violation determines the scope of the remedy.

Swann, supra at 16.

[P]roof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system.

Keyes, supra at 203.

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington v. Davis, supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S., at 213.

Dayton, supra at 420.

The three statements represent increasingly detailed concern that the equitable remedy should be fashioned to fit the actual Fourteenth Amendment violations which were found. The most deliberate and willful violation of the Constitution in one of over a hundred schools would therefore call for an order to take effective means to desegregate that school. The remedy might affect one or more nearby schools. The isolated single violation obviously would not call for a systemwide desegregation order.

It is clear to us that the phrases "incremental segregative effect" and "systemwide impact" employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation. *Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon its separate impact on the system. The question posed concerns the impact of the total amount of segregation found — after each separate practice or episode has added its "increment" to the whole. It was not just the last wave which breached the dike and caused the flood.

In the *Dayton* school case, the Supreme Court held that where the District Judge had only identified "three separate although relatively isolated instances of unconstitutional action on the part of petitioners" [*id.* at 413] . . . "the District Court's findings of constitutional violations did not, under our cases, suffice to justify the remedy imposed." *Id.* at 414. The Supreme Court carefully noted that this court had observed in its opinion that the record contained more evidence concerning segregation than the District Judge had found, but that neither the District Court nor this court had entered specific findings of fact on such alleged additional segregative practices. The Supreme Court then ordered the case remanded for further consideration and, if justified,

further evidentiary proceedings and further findings of fact by the District Court or the Circuit Court. The Supreme Court also left the systemwide desegregation order in effect.

We now turn to the consideration of the incremental segregative effect of the major constitutional violations found by the District Judge. School board policies of systemwide application necessarily have systemwide impact. 1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as "black" schools, as found by the District Judge, clearly had a "substantial" — indeed, a systemwide — impact. 2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so, of course, had systemwide impact. 3) So, too, did the Columbus Board's segregative school construction and siting policy as we have detailed it above. 4) So too did its student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the school year 1975-76. 5) The practice of assigning black teachers and administrators only or in large majority to black schools likewise represented a systemwide policy of segregation. This policy served until July 1974 to deprive black students of opportunities for contact with and learning from white teachers, and conversely to deprive white students of similar opportunities to meet, know and learn from black teachers. It also served as discriminatory, systemwide racial identification of schools.

As noted earlier in this opinion, we rely upon the detailed findings of the District Judge in relation to each of the constitutional violations cited in the paragraph above. As to each of these violations, we believe this record requires a finding that each policy or practice cited had (and was intended to have) a systemwide application and impact. Each such policy or practice also added an increment to the sum total of the constitutional violation found. Beyond doubt the sum total of these violations made the Columbus school system a segregated school system in violation of the Fourteenth

Amendment and thoroughly justified the District Judge in ordering a systemwide remedy. If the detailed findings in this paragraph tracking the language of the *Dayton* case cannot appropriately be implied from the District Judge's post-*Dayton* opinion (and we think they can and should be), we now enter these findings as the findings of this court, based upon the 6,600 pages of evidence in the record made before the District Court.

Appellants in this appeal seek a remand to the District Court on the basis of the Supreme Court's opinion in *Dayton, supra*. For reasons spelled out above, and the distinctions cited below, we reject this suggestion.

1) The Supreme Court in *Dayton*, on consideration of the District Court findings then entered, characterized the Dayton school system as one "where mandatory segregation by law of the races has long since ceased." The Columbus record, as found by the District Judge, presented a situation where a segregated school system existed in 1954, when *Brown I* was decided, and has been intentionally maintained as such by the Columbus School Board down to the date of trial of this case.

2) The Supreme Court in *Dayton* noted that the District Judge had found only three isolated constitutional violations. In our instant appeal, the District Judge found many more constitutional violations, with the major violations being ones which, as shown above, were systemwide in application and impact.

3) In the *Dayton* case a major reason for reversal was this court's reliance in requiring a systemwide remedy upon three violations which were not systemwide in character without making findings upon other violations contained in the record. In this case we rely specifically upon the systemwide constitutional violations found by the District Judge, and, to the degree arguably necessary, add findings of our own.

4) In the *Dayton* case, of course, neither the District Court nor this court had the opportunity to consider the standards furnished by the *Dayton* opinion. In this case the District Judge was asked to and did consider the *Dayton* standards and held that his prior opinion was in conformity therewith. We, of course, have likewise considered it in detail and agree that the systemwide violation found by the District Judge was in conformity with *Dayton* standards.⁸

VII THE STATE BOARD OF EDUCATION LIABILITY

The District Judge, in addition to finding the Columbus Board of Education liable for the unconstitutional segregation of the Columbus school system, also found similar liability as to the Ohio State Board of Education. His findings on this score were, however, quite different ones:

State Board of Education and Superintendent of Public Instruction

The Ohio Constitution clearly places the responsibility for public education upon the State of Ohio. Because local school boards initiate school levies for local voters' consideration, expend funds locally, and generally exercise administrative control over local schools, many people may well believe that such local boards of education have primary responsibility for the maintenance and operation of the public schools in Ohio. In fact, the state remains primarily responsible. This mandate has been our law since the adoption of the 1851 Ohio Constitution.⁹

⁹ OHIO CONST. art. I, § 7; art. II, § 26; art. VI, § 2 (1851).
OHIO CONST. art. VI, § 3 (1912).

⁸ We have considered but, for the reasons recited above, we do not agree with appellants' contention that a different result is mandated by the remand orders of the Supreme Court in *School District of Omaha v. United States*, 433 U.S. 677 (1977), and *Brennan v. Armstrong*, 433 U.S. 672 (1977).

The Sixth Circuit has commented on the obligation of the state administrative agency as follows:

Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools.

Brinkman v. Gilligan, 503 F.2d 684, 704 (6th Cir. 1974).

At no time have these state defendants *actively* moved to do anything to correct the racial imbalance in the Columbus schools. Nor did they act to make a determination as to whether black children were being deprived of their rights. The State Board and Superintendent assure that such matters as teacher qualifications, school building standards, curriculum requirements and annexations are lawfully administered. See R.C. 3301.07. The Court is of the opinion that the law of Ohio requires that the State Board of Education act to assure that school children in the various local school districts enjoy the full range of constitutional rights. The Board has not done this in Columbus even though it has received sufficient statistical evidence of student and faculty racial imbalance and is well aware of the existence of racially imbalanced schools in Columbus.⁶

⁶ Counsel for the State of Education argued as follows during closing arguments:

I am not pleading ignorance.

I am saying to the Court that the State Board has constructive knowledge of everything that is reported to the State Department of Education about the racial make-up of pupils and staff in the schools of Columbus. It has constructive knowledge. It is bound by that knowledge.

Now, it is not so much a matter of investigation, Your Honor. It is a question of whether or not, knowing that, the State Board and Department should have told Columbus to make certain specific changes, and if Columbus refused to change, should the State Board and Depart-

The State Board and the State Superintendent are Ohio's resident experts on school desegregation matters. They have the means to collect information, which they have done, to conduct hearings, to make findings, and to enforce orders based on their findings.⁷ In 1956 the

ment have threatened to withhold funds? Now, before they can do that, they have to have some reasonable basis to believe what they have constructive knowledge of is a violation of law.

... [W]hen we look at the recommendations that have been made to Columbus [by the State Board], all of this is a panoply of activity that has desegregation as its objective. Now, the plaintiffs claim that the State Board is totally uninterested in desegregation, that it has a policy of maintaining segregation, but I say that this is absurd and does not stand up under the evidence in this record.

The final question, a quasi question, is whether the State Board and Department could have done more. Could they have gone to Columbus and could they have demanded that certain things take place? Sure. We can all do more, but that is not the decisive legal issue. The question is not whether the State Board could have done more. The question is whether the State Board of Education had a policy of maintaining segregation, because that is what the majority of the *Keyes* decision talks about. Did it have segregative intent? The assessment of that question is important to the trier of facts.

... [T]he explanation for the State Board's failure to demand that Columbus take certain specific acts and corrective action is not due to a policy of maintaining segregation. It is due, instead, to the State Board's belief that the Columbus Board has certain powers that are given to it by the statutes of Ohio and that the Columbus Board and its Superintendent must be allowed to exercise those powers except where the exercise is in plain violation of the law. It had reason to believe that the Columbus Board was not in violation of the law, and that is the reason that it didn't demand the things that it demanded in Middletown, the things that it demanded in Toledo, the things that it demanded in North College Hill.

The State Board and the Department do not have a policy of maintaining segregation in the State of Ohio. They could do more, but they don't have a policy of maintaining segregation in this state, and their failure to do more is not the product of a segregative or segregationist state of mind.

⁷ R.C. § 3301.16 provides that the Board shall revoke the charter of any school district which fails to meet the mini-

Attorney General of Ohio advised that the State Board had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, to local districts which segregated pupils on the basis of race in violation of *Brown I*.⁸ The facts of this case offer no satisfactory reason for these state officials' failure to perform their duties as advised by the Attorney General. Mere "suggestions" to the Columbus Board were not enough. These defendants cannot be heard to say that they could not understand their obligations; the Attorney General made those clear.

Dr. Kenneth Connell, representing the Columbus Area Civil Rights Council, visited the offices of the state defendants in the spring of 1971 and requested that action be taken regarding the Columbus schools. No action was taken. As I understand the state defendants' argument, they claim that they would have investigated had Columbus school officials so requested. This position borders on the preposterous. It cannot reasonably be expected that those who violate the constitution will

mum standards. The Board may then dissolve the district and transfer its territory to one or more adjacent districts.

The State of Ohio provides financial assistance through the School Foundation Program to all qualifying, chartered districts in the state. The funds are provided by the legislature and are allocated by the Department of Education among the districts in accordance with the provisions of R.C. § 3317.01 *et seq.* The Board disburses substantial federal funds to districts which qualify under different federal programs. Before a district may receive any federal funds, it must submit assurances that it is in compliance with law.

• The Attorney General opined:

Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds

be anxious for an investigation in order that a remedy may be leveled against them.

The sheer multitude of appellate court decisions cited by the parties arising from school segregation cases all over this country from 1954 until this case was at issue, coupled with notice of the racial imbalance in the Columbus schools, would have led even the most socially optimistic to suspect that Ohio's second largest city might have some problem in that regard which required attention.

The state defendants are to be commended on the accumulation of data, advisory resumes and personnel to be used for desegregation. Dr. Robert Greer has worked long and hard in a leadership role in finding avenues designed to lead to equal educational opportunities. Information was provided to local districts, and rather gentle persuasion employed to encourage desegregation. But some firm action is needed when the horse won't drink the water. •

The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

429 F.Supp. at 262-64.

Thus, as we view the District Judge's findings (and this record clearly supports him), they rest primarily upon the failure of the State Board to order the Columbus Board to perform its constitutional duty to operate a school system which was not segregated by race.

The crucial consideration here concerns the powers and duties of the State Board. The parties agree that in 1956, as noted by the District Judge, the Attorney General interpreted this Ohio law as giving the State Board the power to

withhold state funds from any school board which was operating an unlawfully segregated school system. The parties also appear to agree that this opinion (written by the present Chief Justice of the Ohio Supreme Court) is law which controls the State Board.⁸

The State Board does not contend that it was unfamiliar with the history and present practices of the Columbus Board in operating the school system in the state capital city.

• The specific holdings of the opinion follow:

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The term "law" as used in Section 3317.14, Revised Code [presently codified at Ohio Rev. Code Ann. § 3307.01 (Page Supp. 1977)], forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Respectfully,

C. WILLIAM O'NEILL
Attorney General

1956 Op. Atty. Gen. Ohio 514, 520-21.

This record does not show any act on the part of the State Board which *required* the Columbus Board to pursue the segregative policies which the District Judge and this court have found. It also does not show any action that the State Board took affirmatively to desegregate the Columbus schools or even to use its statutory powers to investigate and make findings as to whether the Columbus schools were being operated within the law.

The State Board's primary contention on this appeal is that it had no prior knowledge that the segregation existing in the Columbus schools was *unlawful* since it did not know that said segregation was derived from intentionally segregative policies on the part of the Columbus School Board. The State Board also argues that the District Judge did not make findings concerning the "incremental segregative effect" (*Dayton, supra* at 420) of its actions upon the totality of segregation in Columbus.

While we believe that what we have quoted from the District Judge's opinion must be regarded as a general finding of intentional support of segregation by the State Board, it may well be argued that the *Dayton* opinion requires more detailed findings of fact pertaining to 1) the State Board's knowledge (if any) of the Columbus Board's intentional segregative practices, 2) the State Board's failure to protest or restrain them by withholding funds, 3) the State Board's continuance of support in the face of such knowledge, 4) the motivation of the State Board in failing to investigate the reasons for de facto segregation, and 5) the effect of findings if any, under 1, 2, 3 and 4 above, as suggested in *Dayton, supra* at 420.

For these reasons and with recognition that no practical delay in ending the unconstitutional practices which we have found above will result, we now remand these cases (as they pertain to the State Board only) for further consideration,

including at the option of the District Judge, the taking of additional testimony concerning factual issues enumerated above. See *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); see also *Rizzo v. Goode*, 423 U.S. 362, 376-77 (1976); *Monell v. Department of Social Services*, 46 USLW 4569, 4579 n. 58 (U.S. June 6, 1978); *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978).

VIII REMEDY

The arguments of both appellants pertaining to remedy attack the systemwide remedy ordered by the District Judge solely on the ground that no systemwide constitutional violation or violations should have been found as to each appellant, and hence, no systemwide remedy should have been ordered. This argument has been dealt with at length above and has been rejected. We do not find presented to us any systemwide alternative plan for desegregation. The plan, in fact, was either devised by or approved by both appellants, although, of course, under protest as to its systemwide nature.

Under these circumstances, the plan as adopted by the District Court is approved and the judgment of the District Court is affirmed in all respects, except for the remand of the case for consideration of and findings on the impact of the constitutional violation discussed in the preceding section pertaining to the liability of the Ohio State Board of Education.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 77-3365-66
77-3490-91
77-3553

GARY L. PENICK, et al.,
Plaintiffs-Appellees,

v.

COLUMBUS BOARD OF EDUCATION, et al., and
THE OHIO STATE BOARD OF EDUCATION, et al.,
Defendants-Appellants.

Before: EDWARDS, LIVELY and MERRITT, Circuit Judges.

JUDGMENT

[Filed July 14, 1978]

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in all respects except that those cases pertaining to The Ohio State Board of Education are remanded for further consideration as set forth in section VII of the opinion filed this date.

Each party to pay his own costs on these appeals.

ENTERED BY ORDER OF THE COURT.

JOHN P. HEHMAN

Clerk

77-3365, 77-3366, 77-3490
77-3491, 77-3553

Issued as Mandate: August 9, 1978 A True Copy.

Attest:

DOROTHY J. PHELAN

Deputy Clerk

COSTS: None

Filing fee ----- \$ -----

Printing ----- \$ -----

Total \$ -----

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Nos. 77-3365-66, 3490-91 & 3553

Gary L. Penick, et al.,
Plaintiffs-Appellees,
v.

Columbus Board of Education,
et al.,

and

The Ohio State Board of Educa-
tion, et al.

Defendants-Appellants.

ORDER

[Filed July 31, 1978]

Before: EDWARDS, LIVELY and MERRITT, Circuit Judges.

On receipt and consideration of a motion for stay of the mandate of this court and for stay of the judgment of the United States District Court for the Northern District of Ohio; and

In the absence of a showing of likelihood of success on appeal, and recognizing that, in any event, defendant-appellant will have ample time to apply for a writ of certiorari and a stay of judgment in the United States Supreme Court before the beginning of the 1978 school term,

Now, therefore, said motion for stay of mandate and stay of the judgment of the District Court is hereby denied.

Entered by order of the Court

JOHN P. HEHMAN

Clerk

SUPREME COURT OF THE UNITED STATES

No. A-134

Columbus Board of Education et al.,
Applicants,

v.

Gary L. Penick et al.

On Application for Stay.

[August 11, 1978]

MR. JUSTICE REHNQUIST.

The Columbus, Ohio, Board of Education and the Superintendent of the Columbus Public Schools request that I stay execution of the judgment and the mandate of the Court of Appeals for the Sixth Circuit in this case pending consideration by this Court of their petition for certiorari. The judgment at issue affirmed findings of systemwide violations of the Equal Protection Clause of the Fourteenth Amendment on the part of the Columbus Board of Education, and upheld an extensive school desegregation plan for the Columbus school system. The remedy will require reassignment of 42,000 students, alteration of the grade organization of almost every elementary school in the Columbus system, the closing of 33 schools, reassignment of teachers, staff and administrators, and the transportation of over 37,000 students. The 1978-1979 school year begins on September 7, and the applicants maintain that failure to stay immediately the judgment and mandate of the Court of Appeals will cause immeasurable and irreversible harm to the school system and the community. The respondents are individual plaintiffs and a plaintiff class consisting of all children attending Columbus public schools, together with their parents and guardians.

This stay application comes to me after extensive and complicated litigation. On March 8, 1977, the District Court for the Southern District of Ohio issued an opinion declaring the

Columbus school system unconstitutionally segregated and ordering the defendants to develop and submit proposals for a systemwide remedy. That decision predated this Court's opinions in three important school desegregation cases: *Dayton Board of Education v. Brinkman*, 433 U. S. 406 (1977); *Brennan v. Armstrong*, 433 U. S. 672 (1977); and *School District of Omaha v. United States*, 433 U. S. 667 (1977). In the lead case, *Dayton*, this Court held that when fashioning a remedy for constitutional violations by a school board, the court "must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." 433 U. S., at 420. The defendants moved that the District Court reconsider its violation findings and adjust its remedial order in light of our *Dayton* opinion. Upon such reconsideration, the District Court concluded that *Dayton* simply restated the established precept that the remedy must not exceed the scope of the violation. Since it had found a systemwide violation, the District Court deemed a systemwide remedy appropriate without the specific findings mandated by *Dayton* on the impact discrete segregative acts had on the racial composition of individual schools within the system. The Sixth Circuit affirmed. *Penick v. Columbus Board of Education*, Nos. 77-3365-3366, 3490-3491, and 3553 (July 14, 1978).

Prior to its submission to me, this application for stay was denied by MR. JUSTICE STEWART. While I am naturally reluctant to take action in this matter different from that taken by him, this case has come to me in a special context. Four days before the application for stay was filed in this Court, the Sixth Circuit issued its opinion in the *Dayton* remand, *Brinkman v. Gilligan (Dayton IV)*, No. 78-3060 (July 27, 1978). Pursuant to this Court's opinion in *Dayton*, the District Court for the Southern District of Ohio had held

a new evidentiary hearing on the scope of any constitutional violations by the Dayton school board and the appropriate remedy with regard to those violations. It had concluded that *Dayton* required a finding of segregative intent with respect to each violation and a remedy drawn to correct the incremental segregative impact of each violation. On that basis the District Court had found no constitutional violations and had dismissed the complaint. The Sixth Circuit reversed, characterizing as a "misunderstanding" the District Court's reading of our *Dayton* opinion. *Dayton IV*, *supra*, slip. op., at 4. It reinstated the systemwide remedy that it had originally affirmed in *Brinkman v. Gilligan (Dayton III)*, 539 F. 2d 1084 (1976), vacated and remanded, 433 U. S. 406 (1977).

Dayton IV and the instant case clearly indicate to me that the Sixth Circuit has misinterpreted the mandate of this Court's *Dayton* opinion. During the Term of the Court, I would refer the application for a stay in a case as significant as this one to the full Court. But that is impossible here. The opinions of the District Court and the Court of Appeals total almost 200 pages of some complexity. It would be impracticable for me to even informally circularize my colleagues, with an opportunity for meaningful analysis within the time necessary to act if the applicants are to be afforded any relief and the Columbus community's expectations adjusted for the coming school year.

I am of the opinion that the Sixth Circuit in this case evinced an unduly grudging application of *Dayton*. Simply the fact that three Justices of this Court might agree with me would not necessarily mean that the petition for certiorari would be granted. But this case cannot be considered without reference to the Sixth Circuit's opinion in *Dayton IV*. In both cases the Court of Appeals employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. *Penick v. Columbus Board of Education*, *supra*, slip op., at 36 (July 14, 1978). The Sixth Circuit is apparently of the opinion that presumptions, in combination with such isolated

violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. That is certainly not my reading of *Dayton* and appears inconsistent with this Court's decision to vacate and remand the Sixth Circuit's opinion in *Dayton III*. In my opinion, this questionable use of legal presumptions, combined with the fact that the Dayton and Columbus cases involve transportation of over 52,000 school children, would lead four Justices of this Court to vote to grant certiorari in at least one case and hold the other in abeyance until disposition of the first.

On the basis of the District Court's findings, some relief may be justified in this case under the principles laid down in *Dayton*. Two instances where the school system set up discontinuous attendance areas that resulted in white children being transported past predominantly black schools may be clear violations warranting relief. But the failure of the District Court and the Court of Appeals to make any findings on the incremental segregative effect of these violations make it impossible for me to tailor a stay to allow the applicants a more limited form of relief.

In their response, the plaintiffs/respondents also take an "all or nothing" approach and do not offer any suggestions as to how the mandate and judgment of the Court of Appeals can be stayed only in part consistent with the applicants' legal contentions. I therefore have no recourse but to grant or deny the stay of the mandate and judgment in its entirety.

The last inquiry in gauging the appropriateness of a stay is the balance of equities. If the stay is granted the respondent-children's opportunity for a more integrated educational experience is forestalled. How many children and how integrated an educational experience are impossible to discern because of the failure of the courts below to inquire how the complexion of the school system was affected by specific violations.

In contrast, the impact of the failure to grant a stay on the applicants is quite concrete. Extensive preparations toward

implementation of the desegregation plan have taken place, but an affidavit filed in this Court by the Superintendent of the Columbus Public Schools indicates that major activities remain for the four weeks before the new school term begins. These activities include inventory, packing, and moving of furniture, textbooks, equipment and supplies; completion of pupil reassignments, bus routes and schedules, and staff and administrative reassignments; construction of bus storage and maintenance facilities; hiring and training of new bus drivers; and notification to parents of pupil reassignments and bus information. Such activities cannot be easily reversed. Most important, on September 7 there will occur the personal dislocations that accompany the actual reassignment of 42,000 students, 37,000 of which will be transported by bus.

The Columbus school system has severe financial difficulties. It is estimated that for calendar year 1978 the system will have a cash deficit of \$9.5 million, \$7.3 million of which is calculated to be desegregation expenses. Under Ohio law school districts are not permitted to operate when cash balances fall to zero and it is now projected that the Columbus school system will be forced to close in mid-November of 1978. Financial exigency is not an excuse for failure to comply with a court order, but it is a relevant consideration in balancing the equities of a temporary stay.

Given the severe burdens that the school desegregation order will place on the Columbus school system and the Columbus community in general, and the likelihood that four Justices of this Court will vote to grant certiorari in this case, I have decided to grant the stay of the judgment and mandate of the Court of Appeals for the Sixth Circuit.

As this Court noted in *Dayton*, "local autonomy of school districts is a vital national tradition." 433 U. S. at 410. School desegregation orders are among the most sensitive encroachments on that tradition, not only because they affect the assignment of pupils and teachers, but also because they often restructure the system of education. In this case the desegregation order requires alteration of the grade organiza-

tion of virtually every elementary school in Columbus. As this Court emphasized in *Dayton*, judicial imposition on this established province of the community is only proper in the face of factual proof of constitutional violations and then only to the extent necessary to remedy the effect of those violations.

It is therefore ordered that the application for a stay of the judgments and mandates of the Court of Appeals for the Sixth Circuit and the District Court for the Southern District of Ohio be granted pending consideration of a timely petition for certiorari. The stay is to remain in effect until disposition of the petition for certiorari. If the petition is granted, the stay shall remain in effect until further order of this Court.

Supreme Court of the United States

No. A-134

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et.al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the responses filed thereto,

IT IS ORDERED that the mandates and the execution of enforcement of the judgments of the United States Court of Appeals for the Sixth Circuit in case Nos. 77-3365-66, 77-3490-91 and 77-3553 and the United States District Court for the Southern District of Ohio in case No C-2-73-248 are hereby stayed pending the timely filing of a petition for a writ of certiorari. If such a petition is timely filed, this stay is to remain in effect pending this Court's action on the petition. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court.

/s/ WILLIAM H. REHNQUIST

Associate Justice of the Supreme
Court of the United States

Dated this 11th day of August, 1978

Supreme Court of the United States

No. A-134, October Term, 1978

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et.al.

ORDER

On August 21, 1978, a motion to convene the Court for a Special Term to vacate the stay order heretofore entered by Mr. Justice William H. Rehnquist on August 11, 1978, in the above-entitled cause was received and filed with the Clerk's Office, and was distributed to the Court at my direction.

A majority of the Justices having responded and no affirmative votes having been received to convene a Special Term of the Court, the motion is denied.

/s/ WARREN E. BURGER

Chief Justice of the United States

Dated this 25th day of August, 1978.

No. 78-3060

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK BRINKMAN, et al.,
Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, et al.,
Defendants-Appellees.

APPEAL from the
United States District
Court for the South-
ern District of Ohio.

Decided and Filed July 27, 1978.

Before: PHILLIPS, Chief Judge, LIVELY, Circuit Judge, and
PECK, Senior Circuit Judge.

PHILLIPS, Chief Judge.

For the fourth time this court is called upon to review the protracted proceedings of this action brought by plaintiffs¹ to obtain relief from alleged unconstitutional segregation of the Dayton public schools resulting from actions by defendants.² Reference is made to the previous decisions of this

¹ Parents of children attending schools operated by the defendant Board of Education (hereinafter Board) filed this action on April 17, 1972 alleging that defendants were responsible for operating a racially segregated school system in violation of the fourteenth amendment and Federal civil rights statutes, 42 U.S.C. §§ 1981, 1983-88, 2000d.

² Defendants included the Dayton Board of Education, its superintendent and individual members, and the governor, attorney general, State Board of Education, and superintendent of public instruction of the State of Ohio. Appellants have not sought any relief against the State defendants on the present appeal. "Defendants," as used in this opinion, refers to the local defendants.

court for a detailed recitation of facts and issues. See *Brinkman v. Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (*Brinkman III*), *vacated and remanded sub nom., Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Brinkman v. Gilligan*, 518 F.2d 853 (6th Cir. 1975) (*Brinkman II*); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974) (*Brinkman I*).

In its initial opinion filed February 7, 1973, the district court found that racially imbalanced schools, optional attendance zones, and the rescission by the Dayton Board of Education (hereinafter Board) of three resolutions calling for racial and economic balance in each public school were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In *Brinkman I*, *supra*, 503 F.2d 684, this court affirmed the holding of the district court that the Dayton public schools were unlawfully segregated by race and also reviewed four school practices³ which allegedly maintained and expanded the segregated school system. This court determined that at that time it was unnecessary to consider whether these four practices should be included as part of the constitutional violation in view of the conclusion that the remedy ordered by the district court was inadequate "considering the scope of the cumulative violations." *Id.* at 704.

Following remand, this court again rejected the desegregation plan adopted by the district court on the grounds that the plan failed to eliminate the "basic pattern of one-race schools" and the "continuing effects of past segregation" throughout the Dayton school system. *Brinkman II*, *supra*, 518 F.2d at 857. We again remanded the case to the district court with the following instructions:

On remand we direct that the court adopt a systemwide

³ These practices are in the areas of faculty and staff assignment; school closing and site selection; grade structure and reorganization; and pupil transfers and transportation. The district court did not include any of these practices within its finding of a cumulative constitutional violation.

plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. *Id.* at 857.

After evidentiary hearings and the appointment of a master, the district court ordered the implementation of a systemwide desegregation plan for the 1976-77 school year subject to flexible guidelines.⁴

In *Brinkman III*, *supra*, 539 F.2d 1084, this court approved the systemwide plan which thus became operative for the 1976-77 school year. Subsequently, the Supreme Court vacated the judgment⁵ of this court and ordered that the case be remanded to the district court for further proceedings. *Dayton Board of Education v. Brinkman*, *supra*, 433 U.S. 406 (1977). The Supreme Court directed that the district court:

⁴ The plan required that the racial distribution of each school be brought within 15 percent of the black-white population ratio of Dayton which was 48 percent black and 52 percent white. In its order of December 29, 1975 the district court stated:

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

2. Students should be transported to the nearest available school.

3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

JA-I at 55. [Citations to the record are to the joint appendix (JA) and the volume of the appendix (e.g., -I) unless otherwise noted].

⁵ The Supreme Court, however, directed that the plan approved by this court in *Brinkman III* should remain in effect for the 1977-78 school year "subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion."

first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff.

• • •

If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. (citations omitted). 433 U.S. at 420.

On remand, the district court conducted evidentiary hearings November 1-4, 1977, and in its decision issued December 15, 1977, held that:

[T]here is a burden upon plaintiffs to establish by a preponderance of evidence *both a segregative intent and an incremental segregative effect in order to establish a violation* of the Equal Protection Clause of the Fourteenth Amendment. (emphasis added) JA-I at 104.

Pursuant to this misunderstanding⁶ of the Supreme Court's mandate, the district court individually examined each alleged constitutional violation both for segregative intent and incremental segregative effect. The district court concluded that plaintiffs had failed to meet this burden of proving a constitutional violation and dismissed the complaint. Following the filing of this appeal, this court on January 16, 1978 ordered defendants "to cause said system-wide desegregation plan to remain in effect pending appeal, or until further order of this court."

⁶ See note 36, *infra*, and accompanying text.

Appellants and the United States as amicus curiae (hereinafter collectively referred to as appellants) contend that various findings of fact and conclusions of law of the district court are both clearly erroneous and are based upon incorrect legal standards. They urge this court to address the legal and factual issues previously reserved in *Brinkman I*, *supra*, 503 F.2d 684 and to find that the alleged constitutional violations have a systemwide impact which requires reinstatement of the systemwide remedy approved by this court in *Brinkman III*, *supra*, 539 F.2d 1084. Appellants raise four principal assignment of error. First, they contend that the district court misinterpreted the legal relevance of the Board's conduct prior to the time of *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and that the district court's finding that "[a]t no time . . . did defendant maintain a dual system of education"⁷ was either based upon the application of incorrect legal standards or was a clearly erroneous factual finding. Appellants argue that as a result of these errors, the district court ignored the principle that if the Board was operating a dual school system at the time of *Brown I*, or at any time thereafter, it subsequently had an affirmative duty to eliminate the systemwide effects of its prior acts of segregation. Second, appellants argue that the district court erred in applying improper legal standards for determining segregative intent. They assert that the district court both failed to utilize the established burden-shifting principles in determining whether various practices were the product of segregative intent and disregarded the established legal standards for determining segregative intent. Third, appellants contend that the district court erred in failing to apply the presumption and burden-shifting principles concerning causation and the impact of unconstitutional conduct. Finally, appellants assert that the district court misallocated the burden of proof on the issue of the incremental segregative effect of the alleged constitu-

⁷ Order of March 10, 1975, JA-I at 38.

tional violations. They argue that the district court erred in holding that plaintiffs were required to demonstrate both the existence of racial discrimination and the specific effects of that discrimination.

Upon a review of the entire record, the arguments of counsel, and upon consideration of the legal and factual issues previously reserved by this court in *Brinkman I*, *supra*, 503 F.2d 684, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III*, *supra*, 539 F.2d 1084, should be reinstated. The record demonstrates conclusively that at the time of *Brown I*, defendants intentionally operated a dual school system and that subsequently, defendants never fulfilled their affirmative duty to eliminate the systemwide effects of their prior acts of segregation. To the extent that any findings of fact and conclusions of law of the district court are to the contrary, they are either clearly erroneous, Rule 52 FED. R. Civ. P., or are incorrect as a matter of law.

I. Pre-Brown violations

This court previously reviewed defendants' purported intentional segregative acts alleged to have occurred prior to 1954 and concluded that "the Dayton school system has been and is guilty of de jure segregation practices"⁸ which constituted a "basically dual system,"⁹ at the time of *Brown I*. Although we believe this finding to have been implicit in the previous decisions of this court, we now expressly hold that at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary¹⁰ is clearly erroneous,

⁸ *Brinkman II*, *supra*, 518 F.2d at 854.

⁹ *Brinkman I*, *supra*, 503 F.2d at 697.

¹⁰ See note 7, *supra* and accompanying text.

Rule 52, FED. R. CIV. P., and is based upon both a failure to attribute the proper legal significance to the evidence of pre-*Brown I* violations and upon various errors of law.

Our review of the record reveals that as of the 1951-52 school year — the last period prior to *Brown I* for which racial statistics were compiled — the Dayton school board pursued an overt policy of faculty segregation and, through a variety of measures, endeavored to segregate pupils on a racial basis. Defendants admitted that prior to 1951 the board forbade the assignment of black teachers to white or mixed classrooms "pursuant to an explicit segregation policy."¹¹ The district

¹¹ *Brinkman I*, *supra*, 503 F.2d at 697. Defendants admitted that:
9. Not until 1951 did the Board of Education adopt a policy of assigning any black citizen to teach in white or mixed classrooms.

See Answers to Plaintiffs' Request for Admissions filed by defendants Dayton Board of Education, Josephine Groff, James D. Hart and William E. Goodwin (hereinafter Board admissions), admission 9, JA-I at 128; Answers to Plaintiffs' Requests for Admissions filed by defendants Dr. Wayne M. Carle, Superintendent of Schools, and Jane Sterzer (hereinafter Carle admissions), admission 9, JA-I at 135. See generally Plaintiffs' Exhibits (hereinafter PX) 100 A-E, JA-V at 502-06; PX 29, JA-V at 484-85.

In 1951-52, the Board substituted the following new but equally unacceptable policy:

The school administration will make every effort to introduce some white teachers in schools in negro areas that are now staffed by negroes, but it will not attempt to force white teachers, against their will, into these positions.

The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.

PX 21, JA-V at 481.

Cf. *Cooper v. Aaron*, 358 U.S. 1 (1958) (community attitudes no justification for segregation).

Superintendent Carle admitted that:

11. About 1951 the Board announced a policy, again for the first time, of introducing white teachers in schools having Negro population; on November 30, 1954, only 8 full or part-time white teachers, or 0.6% of the 1409 white teachers were in these situations. Defendant French at that time as Superintendent attributed such lack of success to the reluctance of white teachers to teach in the black schools; moreover, it was then the District's policy and so remained until the late 1960s, not to assign or reassign white teachers to black schools against their will. Even into the late 1960's white teachers often were

court found that "until 1951 the Board's policy of hiring and assigning faculty was purposefully segregative."¹² A review of the record establishes to our satisfaction that the assignment of faculty was purposefully segregative;¹³ but contrary to the finding of the district court, we found in *Brinkman I, supra*, 503 F.2d at 697-98 that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." To the extent that the finding of the district court is contrary to the conclusion of this court, it is clearly erroneous.

The undisputed evidence reflects that during the 1951-52 school year, the faculty at the four 100 percent black schools (Garfield, Dunbar, Willard, and Wogamon) was 100 percent black whereas with one exception,¹⁴ the faculty at all other schools in the system was 100 percent white.¹⁵ Defendants further admitted that as of 1954, 91.4 percent of the 162 non-travelling black teachers were assigned to schools with all black student populations.¹⁶ Thus, at the time of *Brown I*, it was possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.

not hired or refused employment or were assigned to predominately white schools in the District because of the availability of teacher openings in the suburban, all white schools, the personal beliefs and behavior of white applicants, and the policies and practices of the District.

Carle admission 11, JA-I at 135. The Board also admitted the above statement in substantial part. See Board admission 11, JA-I at 128-29.

¹² Opinion of December 15, 1977, JA-I at 73.

¹³ See, e.g., testimony of Dr. Wayne Carle, quoted in *Brinkman I, supra*, 503 F.2d at 699.

¹⁴ The sole exception apparent from the record was one black teacher who was assigned during the 1951-52 school year to teach black students at a school with a 67.6 percent black enrollment — the highest black enrollment less than 100 percent. See PX 3, JA-I at 139; PX 100E, JA-V at 506; PX 130B, JA-V at 507.

¹⁵ See PX 100E, JA-V at 506; PX 130B, JA-V at 507.

¹⁶ See Board admission 10, JA-I at 128; Carle admission 10, JA-I at 135.

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971), the Supreme Court stated:

Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.¹⁷

The district court, however, failed to attribute the proper legal significance to the deliberate policy of faculty segregation adopted and applied by defendants.

The purposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices. The record reflects that in the 1951-52 school year, 77.6 percent of all students attended schools in which one race accounted for 90 percent or more of the students and 54.3 percent of the black students were assigned to the four schools that were 100 percent black.¹⁸ We recognize that racial imbalance in student attendance patterns is not in itself a constitutional violation. See *Dayton Board of Education v. Brinkman, supra*, 433 U.S. at 413, 417 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Keyes v. School District No. 1*, 413 U.S. 189, 198 (1973). However, such racial imbalance does assume increased significance in the historical context of repeated intentional segregative acts by the school board directed at the four schools which were 100 percent black in 1954. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). Defendants contend that such evidence of pre-*Brown I* constitutional violations is irrelevant, or, alternatively,

¹⁷ See *United States v. Board of School Commissioners of Indianapolis, Indiana*, 474 F.2d 81, 87 (7th Cir.), cert. denied, 413 U.S. 920 (1973).

¹⁸ See PX 2B, JA-V at 312; *Brinkman I, supra*, 503 F.2d at 694.

that the effects of any past intentional segregative actions have become attenuated in the ensuing years. These contentions are wholly without merit. First, with respect to evidence of pre-*Brown I* constitutional violations, the Supreme Court noted in *Keyes, supra*, 413 U.S. at 210-11 that:

We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'

Second, with respect to the question of attenuation, defendants have failed to meet their burden of proving that the effects of any past intentional actions have become attenuated. *Keyes, supra*, 413 U.S. at 211.

Garfield school was the site of intra-school racial segregation which began in 1912 and was ruled illegal by the Supreme Court of Ohio in *Board of Education of School District of City of Dayton v. State ex rel. Reese*, 114 Ohio St. 188, 151 N.E. 39 (1926).¹⁹ Defendant Wayne Carle, Superintendent of the Dayton schools, admitted, however, that racial segregation continued virtually unabated at Garfield after the *Reese* decision,²⁰ and that during the 1930s, white students who lived in the Garfield attendance area were permitted to transfer to predominantly white schools.²¹ As a result of the

¹⁹ Defendants admitted that:

1. In 1918 defendant Dayton Board assigned 4 black teachers to a frame two-story house which was converted to a school building for black students and which was located immediately behind the Garfield school, a brick building. All white children and all white teachers were assigned to the brick building; only black teachers and black students were assigned to the frame structure.

See Board admission 1, JA-I at 125; Carle admission 1, JA-I at 134.

²⁰ See Carle admission 2(b), (c), JA-I at 134.

²¹ See Carle admission 2(d), JA-I at 134.

actions of the Board, Garfield became all black in student enrollment in 1936 and, at approximately the same time, an all black faculty was assigned to the school.²² Thereafter, Garfield was maintained as an all black school.

The district court found that Dunbar high school intentionally had been established as a district-wide school for only black students with an all black faculty and a black principal.²³ The record reveals that black students throughout Dayton automatically were assigned or otherwise were induced to attend Dunbar and that, in many instances, black students crossed attendance boundaries to do so.²⁴ Defendants further admitted that until approximately 1947, Dunbar was not allowed to participate in the city athletic conference and consequently, Dunbar athletic teams played other all black high schools from other cities.²⁵ Defendants also admitted that until several months after the decision in *Brown I*, black children were transported by bus from an orphanage past white schools to Dunbar.²⁶ The district court found that this practice was "arguably . . . a purposeful segregative act."²⁷ To the extent that this finding implies that this practice was *not* purposefully segregative, it is clearly erroneous.

²² See PX 150I, JA-V at 524; JA-II 260-61, 329-31.

²³ Opinion of February 7, 1973, JA-I at 3; Opinion of December 15, 1977, JA-I at 88. See Board admission 7(a), JA-I at 127; Carle admission 7(a), JA-I at 135.

²⁴ See JA-II, 268, 478-79; JA-III, 547-49, 632-33.

²⁵ See Board admission 7(f), JA-I at 128; Carle admission 7(f), JA-I at 135.

²⁶ See Carle admission 7(d), JA-I at 125; Board admissions 7(d) 31A, JA-I at 127, 131. The Board has adopted conflicting positions with respect to the termination of this practice. In admission 7(d), *supra*, the Board states that "this policy terminated as of 1950." In admission 31A, however, the Board states that "this practice stopped in 1954." Other evidence in the record establishes without question that this practice was not discontinued until September 1954. See PX 28, JA-V at 483.

²⁷ Opinion of December 15, 1977, JA-I at 78.

Defendants assert that since attendance at Dunbar was voluntary, there is no justification for finding that the establishment and operation of the school constituted intentionally segregative acts. This argument misses the point entirely. First, until at least as late as 1952, the option of attending Dunbar was available only to blacks since, pursuant to school board policy, whites could not be taught by Dunbar's all black faculty. Second, the record reflects that many black children were automatically assigned or otherwise encouraged to attend Dunbar regardless of choice.²⁸ Finally, the record indicates that the "choice" of attending Dunbar, in many instances, may have been merely a less drastic alternative than attending other schools which practiced intra-school segregation and discrimination.²⁹

In this manner and through these procedures, the Board intentionally operated Dunbar as an all black school until it was closed as a high school in 1962. The operation of Dunbar clearly had the effect of keeping other high schools throughout the district predominantly white during those years.³⁰

²⁸ See JA-II at 479; JA-III at 547-49.

²⁹ See JA-II at 253, 284; testimony of Dr. Wayne Carle, Joint Appendix vol. 4, at 1518a-19a filed in *Brinkman I*, supra. The relevant colloquy between counsel and Dr. Carle is as follows:

Q. Dr. Carle, I think you perhaps misunderstood my question. I am talking about Dunbar in its earliest stage. There was testimony from black witnesses that they 'chose Dunbar,' and I asked you in the context of the pupil assignment practices whether or not such a choice is a free choice as if in the case of Roosevelt students were subject to discriminatory practices [sic].

A. I wouldn't rate it as a free choice since social pressures are so persuasive and subtle and young people so impressionable and peer influence so all-encompassing. That choice would be almost absent as I would understand it.

³⁰ The Supreme Court in *Keyes v. School District No. 1*, supra, 413 U.S. at 201, (1972) stated that:

A practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.

See JA-III at 634.

The record reflects that during the early 1940s, the student body of Wogamon elementary school became predominantly black in part because the Board permitted white students to transfer to predominantly white schools.³¹ In June 1945, Wogamon closed with an all white staff and reopened in September 1945 with an all black staff and a black principal.³² Wogamon subsequently became and presently is an all black school. Similarly, the record reflects that in the 1930s the Willard school became predominantly black due to increased black enrollment and the transfer of white students. The record indicates that in 1934, Willard school had a 50 percent black student body and a faculty which was 38 percent black. The following year, however, the student body became approximately 95 percent black with an all black faculty.³³ By 1947, Willard was 100 percent black in student enrollment and subsequently it has remained a one race school.

Additional evidence also establishes that prior to 1954, the Board pursued a policy of racial separation. Defendants admit that until approximately 1950, "separate facilities, including separate swimming pools and locker room facilities were maintained at Roosevelt [school] for black and white students."³⁴ In addition, during the late 1940s and early 1950s, defendants operated one race classrooms in officially one race housing projects which the district court found were "strictly segregated according to race."³⁵

Upon a review of this evidence, the relevant inquiry is whether at the time of *Brown I*, or any time thereafter, defendants were operating a dual school system in violation of

³¹ See Carle admission 4(a), JA-I at 134.

³² See PX 150I, JA-V at 524.

³³ *Id.*

³⁴ See Board admission 7A(a), JA-I at 128; Carle admission 7A(a), JA-I at 135.

³⁵ Opinion of December 15, 1977, JA-I at 67. See PX 143B, JA-V at 510-12; PX 161B, JA-V at 540; JA-I at 194-206.

the Equal Protection Clause of the fourteenth amendment. In *Keyes v. School District No. 1*, *supra*, 413 U.S. 189, the Supreme Court held that in order to establish a violation of the fourteenth amendment in school desegregation cases where no statutory dual system has ever existed, plaintiffs must demonstrate purposeful state imposed segregation in a substantial portion of the school system.³⁶

In *Brinkman II*, *supra*, 518 F.2d at 854, this court held that defendants had been guilty of *de jure* segregative practices. There is ample evidence to support the finding that at the time of *Brown I* defendants were carrying out "a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities."³⁷ As noted previously, at the time of *Br I*, approximately 54.3 percent of the black pupils in the Dayton school system were assigned to four schools that had all black faculties and student bodies. In *Keyes*, *supra*, 413 U.S. 189, the finding that the Denver school board was guilty of intentional segregative acts with respect to schools attended by only 37.69 percent of Denver's black students was sufficient to constitute the entire school district a dual system. The finding of the district court that defendants never had operated a dual school system³⁸ is clearly erroneous and is based upon misconceptions of the applicable law.

The district court erred both in failing to accord the proper legal significance to the facts extant at the time of *Brown I* and in failing to apply the appropriate presumption and burden-shifting principles of law. The district court failed to attribute the proper legal significance to the deliberate

³⁶ Contrary to this clear standard, the district court held that plaintiffs must establish both segregative intent and incremental segregative effect in order to establish a constitutional violation. See note 6, *supra*, and accompanying text.

³⁷ *Keyes v. School District No. 1*, *supra*, 413 U.S. at 201.

³⁸ See note 7, *supra*, and accompanying text.

policy of faculty segregation which, at the time of *Brown I*, made it possible to identify a "black school" in the Dayton system without reference to the racial composition of pupils.³⁹ The district court also failed to attribute the proper legal significance to the evidence that at the time of *Brown I*, Garfield, Willard, Wogamon and Dunbar schools were deliberately segregated or racially imbalanced due to the actions of defendants. These facts were sufficient to constitute a prima facie violation of the fourteenth amendment under the rule of *Swann*, *supra*, 402 U.S. at 18⁴⁰ and to shift the burden of proof to defendants. The district court also misconstrued the proper approach for determining discriminatory purpose and intent which may be inferred from objective circumstantial evidence⁴¹ and through the use of reasonable presumptions.⁴² This court stated in *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) that:

A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies. (citations omitted).

³⁹ See notes 16-17, *supra*, and accompanying text.

⁴⁰ See note 17, *supra*, and accompanying text.

⁴¹ See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-68 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42, 253 (1976).

⁴² See *Keyes v. School District No. 1*, 413 U.S. at 201-13; *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1046-47 (6th Cir.), *cert. denied* 434 U.S. 997 (1977); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

Accord, Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978); *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1047-48 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bronson v. Board of Education*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Hart v. Community School Board of Education*, 512 F.2d 37 (2d Cir. 1975). The evidence clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school system. The district court, moreover, failed to recognize the teaching of *Keyes, supra*, 413 U.S. at 208, that:

[A] finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.

The district court erred in failing to shift the burden of proof to defendants.

A review of the entire record indicates that defendants have not established that the character of the school system extant in 1954 was the result of racially neutral acts. We emphasize that defendants' intentional segregative practices cannot be

confined in one distinct area.⁴³ To the contrary, defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system. There is no doubt that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra*, 413 U.S. at 203, and that the effect of the operation of this dual school system was to maintain other schools in the district as predominantly white.⁴⁴

II. Post-Brown violations

The district court's error in failing to find that defendants were operating a dual school system at the time of *Brown I* resulted also in its failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination. In *Brinkman I, supra*, 503 F.2d at 704, this court stated:

Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities 'automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.' *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693.

Thus, for 24 years defendants have been under a constitutional duty to desegregate the Dayton public schools. See *Penick v. Columbus Board of Education*, — F.2d —, Nos.

⁴³ The Dayton school system is not divided into "separate, identifiable and unrelated units." *Keyes v. School District No. 1*, 413 U.S. at 203 (1972). Compare *Keyes*, in which defendants were found guilty of following a deliberate segregation policy at schools attended by 37.69 percent of Denver's black student population with the instant case in which defendants' purposeful segregative acts affected at least 54.3 percent of Dayton's black student population.

⁴⁴ See note 30, *supra*.

77-3365-66, 3490-91, 3553 (6th Cir. July 14, 1978) slip opinion at 21. The district court specifically found that "with one exception . . . no attempt was made to alter the racial characteristics of any of the schools" and that the one exception "was in fact a failure."⁴⁵ The district court, however, neither charged defendants with the affirmative duty to eliminate the effects of their discrimination nor did it place upon the Board the burden of proving that it had done so. The evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case. In addition, the record discloses post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I*.

A. Faculty and student assignment practices

In *Brinkman I*, *supra*, 503 F.2d at 697-98, this court found that defendants "effectively continued in practice the racial assignment of faculty through the 1970-71 school year."⁴⁶ This finding is supported by substantial evidence on the record.⁴⁷ The finding of the district court to the contrary⁴⁸ is clearly erroneous. Rule 52, FED. R. CIV. P. The district court also erred in failing to attribute the correct legal significance to the persistently discriminatory faculty assignment practices as a component of the Board's perpetuation of the dual system extant at the time of *Brown I*. Moreover, the district court

⁴⁵ Opinion of December 15, 1977, JA-I at 70, 76.

⁴⁶ For a detailed discussion of the Board's post-*Brown I* faculty assignment practices, see *Brinkman I*, *supra*, 503 F.2d at 697-700.

⁴⁷ See, e.g., JA-II 418; JA-III 644-45; PX 4, JA-V 316-17; PX 5A, JA-V 319; PX 5D, JA-V 320; PX 130C, JA-V 508; PX 130D, JA-V 509; board admissions 8, 12-18, JA-I 128-29; Carle admissions 8, 12-18, JA-I 135.

⁴⁸ Opinion of December 15, 1977, JA-I at 73.

again failed to recognize this proof of continuing purposeful segregative acts as an element of plaintiffs' prima facie case.⁴⁹ The effect of having established this prima facie case should have been to shift to the Board the burden of rebutting the presumption that other practices likewise were undertaken with segregative intent.

For example, in 1962 the Willard and Garfield schools, previously operated for blacks only, were closed and the all black Dunbar high school building was converted into McFarlane elementary school. Most of the children from the Willard and Garfield attendance areas simply were assigned to the McFarlane school which opened with an all black student body and an all black faculty. Some children from the Willard and Garfield areas also were assigned to the all black Miami Chapel and Irving elementary schools. Simultaneously, the new Dunbar high school opened with a virtually all black student body and faculty. Defendants should have been required to rebut the reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual school system extant at the time of *Brown I*.

This error was compounded by imposing upon plaintiffs the additional burden of proving specific causal relationships between the widespread faculty segregation practices and the substantial student segregation existing at the time of trial.

Nowhere in the record do defendants convincingly demonstrate that the systemwide student racial imbalance characteristic of the Dayton public school system since at least the time of *Brown I* likewise was not the product of segregative acts. *Keyes*, *supra*, 413 U.S. at 210. "[I]t is not enough . . .

⁴⁹ See note 17, *supra*, and accompanying text. Even at the time this action was instituted, it was possible to identify a "black school" in the Dayton school system without reference to the racial composition of the students.

that school authorities rely upon some allegedly logical, racially natural explanation." *Id.* Defendants here have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Id.* The Court in *Keyes* noted further that:

[I]f respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.

Id. at 211.

Defendants have failed to establish that their prior segregative acts did not create or contribute to the current segregated condition of the Dayton schools.

In *Brinkman I*, *supra*, 503 F.2d at 694-95, this court stated that:

Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 per cent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. "Virtual one race schools" refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.

In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils 42.7

per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

Every school which was 90 per cent or more black in 1951-52 or 1963-64 or 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

Nowhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts. As the Supreme Court noted in *Swann*, *supra*, 402 U.S. at 26, there is a presumption against schools that are "substantially disproportionate in their racial composition" in school systems with a history of segregation, as in Dayton.⁵⁰

The conclusion that the maintenance of persistent racial imbalance in the Dayton schools was not merely adventitious is bolstered by defendants' use of optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause.⁵¹ In 1973, the district court determined that some optional attendance zones had been created intentionally for racially segregative purposes and that the zones had demonstrable racial effects.⁵² These findings of fact

⁵⁰ In *Keyes*, *supra*, 413 U.S. at 211, the Supreme Court explicated the reasons supporting this presumption as follows:

[A] connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

⁵¹ See *Brinkman I*, *supra*, 503 F.2d at 695-96.

⁵² Opinion of February 7, 1973, JA-I at 5-6.

were affirmed by this court in *Brinkman I*, *supra*, 503 F.2d at 696, and are supported by substantial evidence. Nevertheless, following remand from the Supreme Court, the district court repudiated these findings, concluding that "[n]o evidence has been presented suggesting that attendance zones were redrawn to promote segregation"⁵³ and that the zones had no segregative effect.⁵⁴ In reaching these clearly erroneous findings of fact, the district court once again failed to recognize the optional zones as a perpetuation, rather than an elimination, of the existing dual system; failed to afford plaintiffs the burden-shifting benefits of their *prima facie* case; and failed to evaluate the evidence in light of tests for segregative intent enunciated by the Supreme Court, this court and other circuits in decisions cited in this opinion.

B. School construction and site selection

The evidence of record establishes that of 24 new schools constructed between 1950 and the time this action was instituted, 22 opened 90 percent or more black or white.⁵⁵ During the same period, 78 of the 86 additions of classroom space for which racial compositions are known were made to schools 90 percent or more one race.⁵⁶ Coupled with these practices were some instances of the coordinate racial assignment of professional staffs to these schools and additions on the basis of the racial composition of the pupils served by the schools.⁵⁷ This court noted in *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1056 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977) that "[s]chool construction which promotes

⁵³ Opinion of December 15, 1977, JA-I at 75.

⁵⁴ See generally JA-I at 81-91.

⁵⁵ See PX 4, JA-V 316-317; JA-III 562-63.

⁵⁶ JA-III at 649-50.

⁵⁷ See PX 4, JA-V 316-17; JA-III 644, 794-96; JA-IV 927-28.

racial imbalance or isolation is an important indicium of a *de jure* segregated school system." See *Oliver v. Michigan State Board of Education*, *supra*, 508 F.2d at 184. See generally *United States v. School District of Omaha*, 521 F.2d 530, 543-46 (8th Cir. 1975), *cert. denied*, 423 U.S. 946 (1976). In the face of this, the district court failed to infer purposeful segregation from this pattern of school construction which unmistakably increased or maintained racial isolation.⁵⁸ Again the district court failed to recognize that plaintiffs had established a *prima facie* constitutional violation which shifted the burden of proof to defendants. Instead, the district court concluded that plaintiffs had failed to show that defendants' site selection and construction practices "had a segregative purpose or . . . had an incremental segregative effect upon pupils, teachers, or staff."⁵⁹ These findings of fact are infected by legal error and are clearly erroneous. As detailed previously, the post-*Brown I* practices of racially motivated faculty assignments to new schools bespeaks a concomitant segregative intent in the location of new schools and additions. Nowhere in the record have defendants established that their school construction and site selection practices and the simultaneous racially motivated assignment of teachers were the product of racially neutral policies. Defendants have failed "to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes supra*, 413 U.S. at 210.

The district court's conclusion that defendants' school construction and site selection practices had no segregative effect

⁵⁸ We note that:

While it is true that a court may infer such an intent from the circumstances there is no authority for the proposition that such an intent must be inferred in all cases where segregated patterns exist in fact. The inference is permissible, not mandatory. (emphasis in original).

Higgins v. Board of Education, 508 F.2d 779, 793 (6th Cir. 1974).

⁵⁹ JA-I at 97.

likewise is clearly erroneous. Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices. As noted previous, at the time of the initial hearings in this case, approximately 80 percent of all classrooms in the Dayton school system were virtually one race. On the basis of the evidence of record, the conclusion is inescapable that defendants' school construction and site selection practices were segregative in effect.

C. Grade structure and reorganization

Appellants' principal objection in this area is to the establishment in the 1971-72 school year of a middle school system which allegedly had a segregative effect. In a report issued in 1971, the Ohio Department of Education characterized the middle school system as the apparent addition of

one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur.

PX 12, JA-V at 454.

The report further opined that:

Of the five sets of schools currently involved in the process of conversion to feeder and middle schools, the following seems to be occurring:

1. two sets of schools will be totally black;
2. racial isolation will actually be increased in one set of schools; and
3. only in the Dayton View area, which was previously integrated, could conversion to middle schools

possibly result in reduction of racial and economic isolation and insulation.

Id.

Unrebutted testimony concluded that the effect of the middle school system was to increase or maintain segregation rather than to eradicate it in accordance with defendants' affirmative duty to disestablish the dual system.⁶⁰ The district court found that the middle schools had both "a segregative effect and an integrative effect."⁶¹ Nevertheless, the district court concluded that plaintiffs had failed to establish segregative intent in the establishment of the middle schools. This finding is questionable in light of plaintiffs' convincing demonstration that the natural, probable, and foreseeable result of the establishment of the middle schools was an increase or perpetuation of segregation. The district court failed to recognize the middle school system as one of the areas in which defendants failed to disestablish Dayton's dual school system.

Upon consideration of the record, the conclusion is inescapable that, rather than eradicate the systemwide effects of the dual system extant at the time of *Brown I*, defendants' racially motivated policies with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton. Thus, defendants have utterly failed to comply with their ongoing 24 year obligation to desegregate the Dayton public schools, *Penick v. Columbus Board of Education*, *supra*, slip opinion at 21, and, in addition, have committed affirmative acts that have exacerbated the existing racial segregation. The remedy directed in this opinion is made neces-

⁶⁰ See JA-III at 646.

⁶¹ Opinion of December 15, 1977, JA-I at 77.

sary by: (1) the failure of defendants to disestablish the pre-1954 segregated school system; and (2) post-1954 acts of systemwide impact which have contributed affirmatively to the continuation of a segregated system.

III. Remedy

In *Dayton Board of Education v. Brinkman*, *supra*, 433 U.S. at 420, the Supreme Court stated that upon finding a constitutional violation:

[T]he District Court in the first instance, subject to review by the Court of Appeals, must determine how much *incremental segregative effect*, these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S. at 213.

(emphasis added).

Contrary to the conclusion of the district court,⁶² we are convinced that the term "incremental segregative effect" used by the Supreme Court in the *Brinkman* decision, was not intended to change the standards for fashioning remedies in school desegregation cases. *Penick v. Columbus Board of Education*, *supra*, slip opinion at 12, 58; *NAACP v. Lansing Board of Education*, — F.2d —, (No. 76-2005 6th Cir., Feb. 8, 1978), *cert. denied*, — U.S. —, 46 U.S.L.W. 3787, (June 27, 1978). The purpose of the remedy is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations. The word "incremental"

⁶² See JA-IV at 909; opinion of December 15, 1977, JA-I at 103.

merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is "incremental" in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.

The district court committed two errors in its approach to this inquiry. First, it individually examined each alleged constitutional violation as if it were an isolated occurrence and sought to determine the incremental segregative effect of that occurrence. In *Keyes*, *supra*, 413 U.S. at 200, the Court stated:

We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes 'an affirmative duty to effectuate a transition to a racially nondiscriminatory school system,' *Brown v. Board of Education*, 349 U. S. 294, 301 (1955) (*Brown II*), see also *Green v. County School Board*, 391 U. S. 430, 437-438 (1968), that is, to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).

The district court's act by act approach is no more valid than the school by school approach rejected in *Keyes*. As this court noted in *Penick*, *supra*, slip opinion at 58:

Dayton does not . . . require each of fifty segregative practices or episodes to be judged solely upon its sepa-

rate impact on the system. The question posed concerns the total amount of segregation found — after each separate practice or episode had added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood.

Secondly, the district court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination. Where plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations. See *Keyes, supra*, 413 U.S. at 211 n. 17. Nowhere in the record have defendants rebutted this presumption. Since the district court failed to apply the proper legal standards, we independently consider the incremental segregative effect of defendants' most egregious practices. In so doing, we are mindful that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes, supra*, 413 U.S. at 203. First, the dual school system extant at the time of *Brown I* embraced "a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities"⁶³ of the Dayton schools, and, thus, clearly had systemwide impact. See *Penick v. Columbus Board of Education, supra*, slip opinion at 59-60. Secondly, the post-1954 failure of defendants to desegregate the school system in contravention of their affirmative constitutional duty obviously had systemwide impact. *Id.* at 60-61. The impact of defendants' practices with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clear-

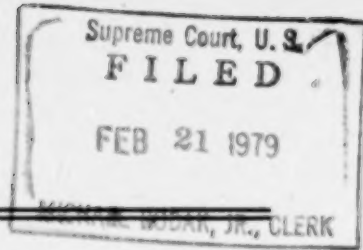
⁶³ See note 37, *supra*, and accompanying text.

ly was systemwide in that the actions perpetuated and increased public school segregation in Dayton.

We hold further that each of defendants' policies and practices detailed in this opinion added an increment to the sum total of the constitutional violations.

Finding that the constitutional violations before the court have a systemwide impact, *Brinkman, supra*, 433 U.S. at 420, we conclude that the systemwide desegregation plan approved by this court in *Brinkman III, supra*, 539 F.2d 1084, should be reinstated. This remedy is "tailored to undo the violations of plaintiffs' constitutional rights . . ." and is "designed to redress" the effect of the violations found. *NAACP v. Lansing Board of Education*, — F.2d —, *supra*, (No. 76-2005, 6th Cir. Feb. 8, 1978), *cert. denied*, — U.S. —, 46 U.S.L.W. 3787 (June 27, 1978). The decision of the district court is reversed. It is ordered that the desegregation plan approved by this court in *Brinkman III, supra*, 539 F.2d 1084, be and hereby is reinstated and shall remain in effect during the 1978-79 school year. Plaintiffs-appellants shall recover the costs of this appeal from the Dayton Board of Education. The case is remanded to the district court for further proceedings not inconsistent with this opinion.

APPENDIX



In The
Supreme Court of the United States
October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 11, 1978
CERTIORARI GRANTED JANUARY 8, 1979

VOLUME I

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June 21, 1973	Complaint
July 18, 1973	Answer of Defendants Columbus Board of Education, Tom Moyer, Paul Langdon, Virginia Prentice, Marilyn Redden, Wat- son Walker, David Hamlar, Marie Castle- man, and John Ellis, Superintendent of Columbus Public Schools
July 19, 1974	Amended Complaint
October 24, 1974	Second Amended Complaint
November 4, 1974	Answer of Defendants Columbus Board of Education, et al., to Plaintiffs' Second Amended Complaint
March 10, 1975	Complaint in Intervention — Class Action
March 10, 1975	Memorandum and Order (Granting Mo- tion to Intervene)
April 1, 1975	Answer of Defendants Columbus Board of Education, et al., to Complaint in Inter- vention
April 9, 1975	Order (Complaint May be Maintained as a Class Action)
March 8, 1977	Opinion and Order (Finding Systemwide Liability)
March 9, 1977	Judgment
March 18, 1977	Petition of Columbus Board of Education for Permission to Appeal pursuant to 28 U.S.C. §1292(b) (Sixth Circuit)

*As shown on Court Docket

<u>Date Filed*</u>	
April 7, 1977	Notice of Appeal
May 17, 1977	Order (Extending Date for Submission of Plans to June 14, 1977)
June 10, 1977	Proposed Desegregation Plan of Columbus Board of Education
June 14, 1977	Plan for Desegregation of Columbus Public Schools submitted by State Board of Education
June 29, 1977	Order granting Petition for Permission to Appeal of Appellants Columbus Board of Education, et al., and Ohio State Board of Education, et al. (Sixth Circuit, Case Nos. 77-3365 and 77-3366)
July 1, 1977	Motion for Leave to File Amended Plan
July 7, 1977	Memorandum and Order (granting leave to file amended plan)
July 8, 1977	Amended Proposed Desegregation Plan of Columbus Board of Education
July 11, 1977	Motion of The Ohio State Board of Education and Superintendent of Public Instruction for Supplemental Findings of Fact
July 11, 1977	Motion of Columbus Board of Education and Dr. Joseph L. Davis, Interim Superintendent of Columbus Public Schools, for Determination of Incremental Segregative Effect
July 29, 1977	Order (rejecting proposed remedy plans)

*As shown on Court Docket

<u>Date Filed*</u>	
August 5, 1977	Petition of Columbus Board of Education for Permission to Appeal pursuant to 28 U.S.C. §1292(b) (from District Court Order of July 29, 1977) (Sixth Circuit)
August 8, 1977	Order (granting extension of time to file remedy plan and transportation report)
August 17, 1977	August 17, 1977 Report Concerning Phase I Preparatory Efforts.
August 30, 1977	Order (approving Phase I Report and ordering implementation)
August 31, 1977	Response of the State Board of Education and Superintendent of Public Instruction to the District Court Order of July 29, 1977
August 31, 1977	Columbus Board of Education's Response to the Court's July 29, 1977 Order (Desegregation Plan and Transportation Report)
September 13, 1977	Plaintiffs' Response to the Proposed Desegregation Plan and Transportation Report of the Defendants Filed Pursuant to the Court's Order of July 29, 1977
September 16, 1977	Memorandum and Order (setting date for hearings on plan)
September 26, 1977	Revisions to pages 125-135 of Columbus Board of Education's Response to the Court's July 29, 1977 Order

*As shown on Court Docket

Date Filed*

October 3, 1977 Order granting Petition for Permission to Appeal of Defendants Columbus Board of Education, et al., and Ohio State Board of Education, et al., from District Court's July 29, 1977 Order (Sixth Circuit, Case Nos. 77-3490 and 77-3491)

October 4, 1977 Memorandum and Order (ordering implementation of systemwide desegregation plan)

October 7, 1977 Judgment

November 4, 1977 Notice of Appeal (Appeal docketed as Sixth Circuit Case No. 77-3553, November 11, 1977)

November 21, 1977 Order Granting Appellees' Motion to Consolidate Pending Appeals and to Extend Time (Sixth Circuit, Case Nos. 77-3365, -3366, -3490, -3491, -3553)

July 14, 1978 Judgment of United States Court of Appeals for the Sixth Circuit (affirming judgment of District Court in all respects except for the remand of cases pertaining to the Ohio State Board of Education for further reconsideration as in Section VII)

July 14, 1978 Opinion by Edwards, J. (Sixth Circuit)

August 9, 1978 Mandate issued (Sixth Circuit)

*As shown on Court Docket

In The United States District Court

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

GARY L. PENICK, ANTHONY PENICK, DONALD PENICK and RONALD PENICK, by their Mother and Next Friend, ZETTER PENICK, DONNA CATES, by her Mother and Next Friend, ROSE CATES, BEVERLY and WANDA CORNER, by their Mother and Next Friend, ROSETTA CORNER, ALEXES and KELLI SMITH, by their Mother and Next Friend, ETHEL M. SMITH, CHRISTIAN D. PALMER, by her Mother and Next Friend, JANET S. PALMER, LEROY and VALERIE HAIRSTON, by their Father and Next Friend, JOHN HAIRSTON, TRACY BROWN, by his Mother and Next Friend, NANCY G. BROWN and MARTIN FISHER, by his Mother and Next Friend, GOLDIE FISHER

- vs -

Plaintiffs

**CIVIL
ACTION
No.
73-248**

COLUMBUS BOARD OF EDUCATION and its individual members; TOM MOYER, PAUL LANGDON, VIRGINIA PRENTICE, MARILYN REDDEN, WATSON WALKER, DAVID HAMLAR, MARIE CASTLEMAN, JOHN ELLIS, Superintendent of the Columbus Public Schools, OHIO STATE BOARD OF EDUCATION, MARTIN ESSEX, Ohio Superintendent of Public Instruction, WILLIAM J. BROWN, Attorney General, State of Ohio and JOHN J. GILLIGAN, Governor, State of Ohio and Ex Officio member of the State Board of Education

Defendants

COMPLAINT

[Filed June 21, 1973]

I. JURISDICTION

1. The jurisdiction of this Court is invoked under 28 United States Code, Sections 1331(a), 1343(3&4). This is a suit seeking relief in equity under 42 United States Code, Sections 1983-1988 and Section 2000(d) to redress the deprivations under color of Ohio law, statute, custom and usage of rights, those privileges and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 2 of the Constitution of the State of Ohio. This action is also authorized by 42 United States Code, Section 1981, which provides that all persons within the jurisdiction of the United States shall have the same rights to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. Jurisdiction is further invoked under 28 United States Code, Section 2201 and 2202, this being a suit for declaratory judgment to declare the rights, duties and obligations between the Plaintiffs and the Defendant Board of Education and its members as a result of certain Resolutions passed by the Board.

II. PLAINTIFFS

2. The Plaintiffs, Gary L. Penick, Anthony Penick, Donald Penick, Ronald Penick, Donna Cates, Beverly Corner, Wanda Corner, Alexes Smith, Kelli Smith, Christian D. Palmer, Leroy Hairston, Valerie Hairston, Tracy Brown and Martin Fisher, are all parents or minor children thereof attending school in the public school system of the State of Ohio, in the City of Columbus, and are black and white citizens of the United States.

III. DEFENDANTS

3(a). The Defendant Columbus Board of Education, is organized and exists under and pursuant to the laws of

the State of Ohio and operates the public school system in the Columbus School District, subject to the direction and control of said Defendant.

(b). The Defendants, Tom Moyer, Paul Langdon, Marilyn Redden, Virginia Prentice, Watson Walker, David Hamlar and Marie Castleman, are all residents of Franklin County, Ohio and elected members of the Columbus Board of Education, Columbus, Ohio.

(c). Defendant, John Ellis, is a resident of Franklin County, and the duly appointed Superintendent of the Columbus School District, Columbus, Ohio.

(d). Defendant, Ohio State Board of Education, is a constitutional corporate body, charged with the primary responsibility of administering public school education in the School System of Ohio, including the Columbus School District.

(e). The Defendant, Martin Essex, is Superintendent of Public Instruction of the Department of Education of the State of Ohio and is the Chief Administrative Officer for public school education in the State of Ohio.

(f). Defendant, William J. Brown, is the Attorney General of the State of Ohio and is responsible for enforcing the Constitution and laws of the State of Ohio.

(g). Defendant, John J. Gilligan, is the Governor of the State of Ohio, and Ex Officio member of the State Board of Education.

IV. FACTS

4. For a number of years the Defendant School Board and its members has attempted to cope with racial imbalance in the Columbus School District and has sought numerous means to achieve quality integrated education, the data on racial imbalance being furnished by school appointed research groups, community based research facilities and private and independent research agencies such as the Columbus, Ohio Urban League. The Board has, by resolution sought to develop affirmative action to

achieve better racial distribution of pupils and quality education for all children. More than six years ago the Columbus Board of Education passed the following resolution:

"Be it further resolved that while solutions to racial imbalance are being sought, the Board of Education and the staff of the Columbus Public School continue to devote all of the necessary energies required for the development of a total quality education for every child attending a Columbus public school."

Resolution of March 21, 1967.

In 1968 the Board passed the following resolution:

"Be it further resolved that the Columbus Public Schools continue to offer and expand, within available resources, compensatory education programs while pursuing efforts to achieve better racial distribution of pupils."

Resolution dated June 18, 1968.

The Board was so concerned about the effect of its building program on racial imbalance that it passed two resolutions on June 18, 1968, resolving that new school construction or additions be delayed until open housing agreements could be secured in the Columbus District.

During the summer of 1972 the Board launched plans to raise the sum of 89.5 million dollars to create and construct educational facilities throughout the Columbus School District. However, the decision to place the School Bond Issue on the ballot failed when three of the Defendant School Board members, Watson Walker, David Hamler and Marie Castleman, prevented a unanimous vote for the Bond Issue. These members alleged that previous funds spent on building facilities had resulted in the increase of racial imbalance and consequent racial isolation of blacks in the Columbus School system. They further alleged that black children would be denied a just share in the building fund by reason of increasing trends of segregation in the

district and because of improper selection of future sites by the Board. These three members demanded that the Board pass a specific resolution guaranteeing quality, integrated education in return for their approval of the Bond Issue.

The Board, after considerable deliberation, passed the following resolution on July 18, 1972 as a major policy statement on integration:

"It shall be the goal and the policy of the Columbus Public Schools to prepare every student for life in an integrated society by giving each student the opportunity of integrated educational experiences. Such a goal does not imply the mandatory or forced transportation of students to achieve a racial balance in any or all schools. The Superintendent of Schools shall implement this policy by the development of proposals for the approval of the Board of Education. The first priority of the Superintendent shall be the development of a plan to provide the transportation necessary to give all students access to vocational and career facilities and all special programs or courses offered by the Columbus Public Schools."

V. CAUSE OF ACTION

5. It is the contention of the Plaintiffs that the resolution set forth in paragraph 4, as well as all other resolutions of the Board, recognizes the existence of racial imbalance in the Columbus School District, contrary to the legal mandate of the Supreme Court case, *Brown v. The Board of Education* and its progeny. The resolutions also recognize that the Board can become an instrument in the creation of racial patterns, as well as in the elimination of racial isolation. The Plaintiffs contend that the Resolutions set forth establish the responsibility of the Board to provide the opportunity of integrated educational experiences in compliance with the Equal Protection Clause of the Fourteenth Amendment and to eradicate segregative

trends through affirmative action. The Plaintiffs allege that careful planning in the use of the enormous fund created by the Bond Issue will be such affirmative action as can affect the patterns of equal use and equal access of these Plaintiffs to school facilities built through such public funds for years to come.

6. It is the further contention of the Plaintiffs that since the passage of the Bond Issue in the November, 1972 election, the Defendant School Board, in planning and carrying out its new construction and site selections plan, has failed to include therein any effective plans which will implement the Board's resolution set forth above. Plaintiffs further say that the Board majority, since the passage of the Bond Issue, has shown lack of good faith in carrying out its adopted resolutions for integrated educational experiences. Members of the Board have made statement denying the clear intent of the Resolution and objecting to any school board plan, having as its aim the integration of races. The Board has also shown lack of good faith by the following acts:

- A. REJECTING A PROPOSAL TO FORM A SPECIAL ADVISORY COMMITTEE ON SCHOOL SITE SELECTION.
- B. BY OPPOSING AN INNOCUOUS AND INEFFECTIVE PLAN TO TRANSPORT STUDENTS TO SPECIAL PROGRAMS, COMMONLY KNOWN AS "THE COLUMBUS PLAN".
- C. BY REFUSING TO FREELY NEGOTIATE WITH THE OHIO CIVIL RIGHTS COMMISSION FOR TEACHERS AND STAFF INTEGRATION.
- D. BY REFUSING TO ACCEPT A PORTION OF FIVE MILLION DOLLARS (\$5,000,000.00) IN H.E.W. FUNDS WHICH REQUIRED THE BOARD TO SUBMIT A PLAN FOR SCHOOL DESEGREGATION.

7. Plaintiffs say that rights, duties and obligations arose between these Plaintiffs and the Defendant Board of Education and its members as a result of the passage of the Resolution of July 18, 1972 and all other Resolutions pertaining to affirmative action for quality integrated education, and that resulting therefrom an honest dispute and justiciable controversy now exists between the parties as to the interpretation of said Resolution and as to whether or not it requires the Board to initiate and carry out any affirmative action to guarantee integrated educational experiences through the building program under the funds now available and being spent, or about to be spent out of the Bond Issue passed November 7, 1972. Plaintiffs say that the controversy between the parties involves substantial constitutional rights under the Thirteenth and Fourteenth Amendment and under Article 1, Section 2 of the Ohio Constitution and Bill of Rights.

VI. DEMAND FOR EQUITABLE RELIEF

Plaintiffs say that they have no adequate remedy at law to redress the abuse of their rights under the Federal Constitution, that the wrongs which would be inflicted upon these Plaintiffs would be a continuing one and that since permanent structures are about to be built with public funds, the damages to Plaintiffs' rights will be irreparable, and the relief sought here is essential to the preservation of the Plaintiffs' rights arising under federal law as well as the Bill of Rights of the State of Ohio.

PRAYER

WHEREFORE, Plaintiffs request the following relief:

1. A declaratory judgment, finding that there is racial imbalance in the Columbus School District.
2. A Judgment declaring the rights, duties and obligations created and existing by and between the Plaintiffs and the Defendant Board of Education as a result of the

Resolution of the Defendant Board and, specifically, as the resolution of July 18, 1972 affects the building program approved, after passage of the Resolution by the Board.

3. A mandatory injunction, requiring the Defendants to perform any acts required to effect any legal obligations found to exist by the Court.

4. The appointment of a Master by the Court to supervise the implementation of any order by the Court.

5. The advancement of this cause on the docket because it involves the alleged imminent spending of public funds in a manner contrary to federal law.

6. Such other and further relief as may be just and equitable, including attorney fees.

WILLIAM J. DAVIS
855 East Long Street
Columbus, Ohio 43203
Trial Attorney

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Associate Trial Attorney

◆

ANSWER OF DEFENDANTS
COLUMBUS BOARD OF EDUCATION, TOM MOYER,
PAUL LANGDON, VIRGINIA PRENTICE, MARILYN
REDDEN, WATSON WALKER, DAVID HAMLAR,
MARIE CASTLEMAN, AND JOHN ELLIS,
SUPERINTENDENT OF THE COLUMBUS
PUBLIC SCHOOLS

[Filed July 18, 1973]

[Caption Omitted in Printing]

First Defense

1. Defendants admit that Plaintiffs seek to bring this action under 28 U.S.C. §§ 1331(a), 1343(a) and (4),

2201 and 2202, 42 U.S.C. §§ 1981, 1983-1988 and 2000(d). Defendants deny that Plaintiffs have the right to bring an action under these sections or that a claim is stated thereunder and otherwise deny the allegations contained in Paragraph 1 of the Complaint.

2. For want of knowledge, Defendants deny the allegations contained in Paragraph 2 of the Complaint.

3. The Defendants admit that the powers and duties of the Defendants Columbus Board of Education, Ohio State Board of Education, Martin Essex, Superintendent of Public Instruction of the Ohio Department of Education, and William J. Brown, Attorney General of the State of Ohio, are provided for by the laws of the State of Ohio, but deny the other allegations of Paragraph 3(a), (d), (e) and (f) of the Complaint.

4. The Defendants admit the allegations of Paragraph 3(b), (c) and (g).

5. Defendants admit that on March 21, 1967, June 18, 1968 and July 18, 1972, resolutions were passed by the Columbus Board of Education and that part of those resolutions are quoted in Paragraph 4 of the Complaint.

Defendants deny that the remaining allegations of Paragraph 4 of the Complaint contain or present a complete or accurate history or background of the circumstances surrounding or the motivating factors causing adoption of the resolutions and therefore, denies all other allegations contained in Paragraph 4 not herein otherwise admitted to be true.

6. Defendants deny the allegations contained in Paragraphs 5, 6 and 7 of the Complaint.

7. Defendants deny each and every other allegation of the Complaint not herein otherwise expressly admitted to be true.

Second Defense

8. The Complaint fails to state a claim upon which relief can be granted against the Defendants and each of them.

Third Defense

9. The Plaintiffs are without standing before the court to maintain this action.

WHEREFORE, the Defendants ask that the Complaint be dismissed and that they go hence without day.

Respectfully submitted,

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PRENTICE, MARILYN
REDDEN, WATSON
WALKER, DAVID HAMLAR,
MARIE CASTLEMAN, AND
JOHN ELLIS,
SUPERINTENDENT OF THE
COLUMBUS PUBLIC
SCHOOLS

[Certificate of Service Omitted in Printing]

SECOND AMENDED COMPLAINT

[Filed October 22, 1974]

[Caption Omitted in Printing]

I. JURISDICTION

1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1221 (a), 1343 (3) and (4). The amount in controversy, exclusive of interests and costs, exceeds the sum or value of Ten Thousand Dollars (\$10,000.00). This is a suit in equity authorized by 42 U.S.C. Sections 1983-1988 and 2000 (d), to redress the deprivations under the color of Ohio Law, statute, custom, and/or usage of rights, privileges, and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States. Plaintiffs also seek a declaratory judgment, injunctive relief, and such further relief as is warranted pursuant to 28 U.S.C. Sections 2201-2202. This action is also authorized by 42 U.S.C. Sections 1981 and 1982, which provide that all persons within the jurisdiction of the United States shall have the same rights to the full and equal benefits of all laws in proceedings for the security of persons and property, and rights of acquisition thereof, as is enjoyed by white citizens. This action is also brought under the Fair Housing Law of 1968 as amended, 42 U.S.C. Section 3601, et seq.

II. PARTIES

2. The Plaintiffs, Gary L. Penick, Anthony Penick, Donald Penick, Zetter Penick, Donna Cates, Rose Cates, Beverly Corner, Wanda Corner, Rosetta Corner, Alexes Smith, Kelli Smith, Ethel M. Smith, Christian D. Palmer, Janet S. Palmer, Leroy Hairston, Valerie Hairston, John Hairston, Tracy Brown, Nancy G. Brown, Martin Fisher and Goldie Fisher, are all parents or minor children thereof attending school in the public school system of the

State of Ohio, in the City of Columbus, and are black and white citizens of the United States.

3. The defendants, The Board of Education of the City of Columbus; organized and existing in Franklin County, Ohio, under and pursuant to the laws of the State of Ohio and operating the public school system of Columbus, Ohio, subject to the direction and control of said defendant.

4. The defendants, Tom Moyer, Paul Langdon, Marilyn Redden, Virginia Prentice, Watson Walker, David Hamlar and Marie Castleman, are all residents of Franklin County, Ohio and elected members of the Columbus Board of Education, Columbus, Ohio.

5. The defendant, John Ellis is a resident of Franklin County and the duly appointed Superintendent of the Columbus School District, Columbus, Ohio.

6. The defendant, James A. Schaefer is a resident of Franklin County and the duly elected Franklin County Recorder, and records and retains in his custody all Deeds of real estate in Franklin County, Ohio.

7. The defendant, The Ohio State Board of Education, located in Columbus, Ohio, is a constitutionally incorporated body charged with the primary responsibility of administering public education in the public school systems of Ohio, including the Columbus Public School District and its total school community.

8. The defendant, Martin W. Essex, a Franklin County resident is Superintendent of the Public Instruction of the Department of Education of the State of Ohio, and is chief administrative officer for public education in the State of Ohio.

9. The defendant, William J. Brown, Franklin County resident and the Attorney General of the State of Ohio, who is responsible for enforcing the laws and constitution of the State of Ohio.

10. The defendant, John J. Gilligan, Governor of the State of Ohio, is a Franklin County resident and an ex officio member of the State Board of Education.

III. CLASS ACTION

1. Plaintiff minor children, by their parents and next of friends, pursuant to Rule 23, and more specifically 23 (a) (2), 23 (b) (1) (b), and 23 (B) (2) of the Federal Rules of Civil Procedure, bring this action on their own behalf and on behalf of all persons similarly situated. The class which plaintiffs represent consists of:

(a) All those children within the Columbus Public School District, or eligible to attend schools within said school district, who by virtue of the actions, acquiescences, and omissions of the Board of Education and other defendants herein, will be attending segregated or substantially segregated schools on the grounds of their race and who will be forced to receive an unequal educational opportunity during the 1974-75 school term; and

(b) All those school children who are within the Columbus Public School district or eligible to attend school within said school district, who by virtue of the policies, actions, acquiescences, and omissions of the Board of Education and other defendants herein, will be and have been attending segregated schools or substantially segregated schools on grounds of their race, and who will be and have been receiving an unequal educational opportunity.

12. There are questions of fact and law common to all members of the class represented by plaintiffs, namely:

(a) Whether in fact, members of said class, by virtue of the actions of defendants complained of herein, will be attending segregated or substantially segregated schools, and will be forced to receive an unequal educational opportunity and, further, whether in law such actions of the defendants are unconstitutional and void;

(b) Whether in fact, members of said class, by virtue of the actions, acquiescences, or omissions of the defendants complained of herein, will be and have been attending segregated or substantially segregated schools and will be and have been receiving an unequal educational opportunity; and further, whether in law such actions, acquiescences, and omissions of the defendants herein are unconstitutional and void; and,

(c) Whether defendants acting under color of law, regulation, custom or usage, have caused or permitted plaintiffs to be deprived of rights, privileges, and immunities secured by the Constitution and Laws of the United States.

13. The claims of the individual minor plaintiffs are representative and typical of the class, in that each plaintiff reflects and illustrates one or more of the various types of deprivation complained of herein.

14. Said individual minor plaintiffs will fairly and adequately represent and protect the interest of the class, in that said plaintiffs in the class share common objectives and purposes in presenting the issues framed herein, in seeking a declaration of their constitutional rights, and in seeking equitable relief to prevent the injuries complained of, and their attorneys are qualified and able to conduct this litigation.

15. The prosecution of separate actions by individual members of the class would as a practical matter be dispositive of the interest of other members not parties to the adjudications, and would substantially impair their ability to protect their interest. The parties opposing the class, that is, the defendants herein have acted and have also refused to act on grounds generally applicable to the class as more fully appears herein; and the final injunctive and declaratory relief sought herein will apply to the class as a whole.

16. Questions of law or fact common to members of the class predominate over any questions affecting or

relating only to individual members of the class; and proceeding by way of this class action is superior to any other alternative means available, if any, for the fair and efficient adjudication of the controversy, and the granting of adequate relief, thus, the only alternative would be the prosecution of separate suits related to each school within the District, but no adequate relief could be formulated for the constitutional defects of the school system as a whole under such a piece meal approach, nor would the differences between schools be sufficient enough to justify such a multitude of suits.

IV. STATEMENT OF FACTS

17. This is a proceeding for a declaratory judgment, preliminary and permanent injunctions enjoining the defendants from continuing their policy, practice, custom and usage of operating the public schools in Columbus, Ohio, and where applicable, its total school community, in a manner which has the purpose and effect of pursuing policies of containment, perpetuating racial segregation in the public schools; to restrain defendants from all further school construction with certain exceptions, until such time as a constitutional plan for the operation of the Columbus Public Schools has been approved and new construction re-evaluated as a part thereof; to restrain the Franklin County Recorder, and those under his direction, from accepting, recording, publishing and/or disseminating unlawful, discriminatory deeds of property transfer or restrictive agreements entered into by the defendant School Board, and for such other relief as herein-after more fully appears below.

18. This is also an action wherein injunctive relief against the Columbus Board defendant, to restrain them from the further misspending and dispersal of funds from an Eighty Nine and One-Half Million Dollar (\$89,500,000.00) School Building Bond Issue that was

approved by the voters of the Columbus School District on November 7, 1972. Said defendants are proceeding "with all deliberate speed" to get as much of their building program under way before the Court can act to resolve the issues presented here, thereby resulting in the segregative aspects of this program being set in concrete. In return for the vital minority support needed for the passage of this Building Levy in 1972, defendant School Board Members passed a resolution on July 18, 1972, stating that it shall be their goal and policy to prepare every student for life in an integrated society. The Black community had shown just how necessary their support was for passage of a School Building Levy by voting down the two previous Bond Issues for that purpose on May 4, 1971 and September 16, 1969. A majority of defendant Board Members have subsequently shown lack of good faith concerning the commitments that they made in return for said Black support that was delivered to them.

V. CAUSE OF ACTION

19. From the year 1829 until the repeal of the so-called "Black Laws", the common or public schools in Ohio and in the City of Columbus were segregated by law and thereafter the Columbus School Board, up to and including the present day, pursued policies, actions and committed acts hereinafter set forth which have resulted in continued and perpetual racially identifiable schools so that up to and including the date of filing of the original complaint herein, the defendants and their predecessors maintained 29 racially identifiable "Negro Schools" and 29 racially identifiable "White Schools" in the Columbus School District. In addition the defendant School Board has built or authorized additions to 24 schools which were built to serve black population and which were racially identifiable as Negro Schools at the

time of the erection of the schools or the additions thereto; the defendant School Board and its predecessors has also built 57 racially identifiable White Schools by use of housing patterns and attendance zones which would guarantee a substantially white student attendance in the said 57 schools.

20. Until 1973 and prior to the filing of the original complaint herein, the defendant Columbus School Board deliberately and knowingly segregated teachers and other faculty members on the basis of race. However, in 1973 a consent decree was arranged with the Ohio Civil Rights Commission and said defendant agreed to a pattern of faculty re-assignment in accordance with constitutional requirements. However, said defendants still segregate their principals, assistant principals and cadets on the basis of how the student bodies of the respective schools are racially identifiable.

VI. COUNT ONE

21. Plaintiff's complaint against the State defendant herein, namely the Ohio State Board of Education, Martin Essex, the Ohio Superintendent of Public Education, William J. Brown, Attorney General and John J. Gilligan, the Governor of said State, is the said State defendants acting through the defendant School Board of Columbus, its individual members and predecessors, have engaged in acts, practices, customs, and usages which have had the natural, probable, foreseeable, and actual effect of incorporating and maintaining racial segregation and discrimination in the Columbus School System in violation of the rights of the plaintiffs and their class not to be segregated on the basis of race in public schools.

22. The State defendant's action on their own and through the defendant Columbus School Board and its predecessors have deprived or assisted in depriving the

plaintiffs of their constitutional rights by committing, inter alia, the following acts:

(a) Permitting student assignment patterns with racially restricted patterns for many years as well as setting up School District Boundaries to enhance racial imbalance and segregation and unlawfully allowing segregated schools to exist since 1887.

(b) By allocation, appropriation and distribution of education funds to a local school district to wit, the Columbus School District, which was not in compliance with and had not conformed to Federal and State Laws.

(c) The defendant State School Board has refused to perform its duty under Ohio and Federal Laws with respect to the right of these plaintiffs and except, in the field of safety and health, has provided no machinery to monitor the broad authority delegated to the Defendant Columbus School Board.

(d) The defendant Attorney General has failed and refused to enforce the laws of the State of Ohio and the United States Constitution which protect the rights of the plaintiffs to equal access to the public school system, and the defendant Attorney General has failed to implement his own decisions and a Written Decision of his predecessor dated July 9, 1956, directed to defendant State Board.

(e) The State defendants have failed and refused to develop an affirmative action program to protect the constitutional rights of these plaintiffs.

VII. COUNT TWO

23. The defendant Columbus School Board, its members and their predecessors have, over the years, and are at present, deliberately and purposefully attempting to create, foster and maintain racial segregation within the school district by superimposing the so-called "Neighborhood School Concept" upon a racially segregated residential pattern with full knowledge that this so-called

concept would result in racial segregation in the Columbus Public School, reflective of said segregated residential patterns, and said defendants continue to maintain such a "neighborhood school" policy with the intent, purpose, and effect of creating, fostering, and maintaining school segregation along racial lines.

24. The defendant School Board with funds from an Eighty-Nine and One-half Million Dollar (\$89,500,000.00) School Bond Issue has proceeded ahead with plans for substantial building of school facilities in the suburban extremities of the white residential areas, these areas being the farthest from the Black residential area, and they are also using said funds for substantial building on, or adjacent to, the sites of their present racially identifiable Negro schools and by these acts they are contributing to a very long tradition and custom of segregated public schools in Columbus which would be preserved for future generations.

25. The defendant Columbus School Board and its members have utilized optional attendance zones to allow "White flight" from their "Negro Schools" and even to provide for "White flight" from schools which may be described as racially imbalanced. Said policy is causing further segregation and racial imbalance and plaintiffs say that, as certain schools in the Columbus School District have undergone transition to gradually increasing proportions of Negro pupil population, the defendants have pursued an attendance policy with respect to the areas of attendance and school boundaries, which has had the purpose, intent and effect of creating further racial segregation of pupils within the district.

26. The defendant Columbus School Board well know and recognize that they have not implemented the U. S. Supreme Court decisions following Brown vs The Board in 1954, and nevertheless, save for a token so-called "Freedom of Choice" program, and token faculty deseg-

regation, they have made no effort whatsoever to comply with these decisions, further evidencing a deliberate, purposeful intent on the part of the defendants to practice and pursue a policy of maintaining and perpetuating segregation in the public schools and the Board has refused to accept or follow the suggestions of reasonable and operable plans submitted to them by the Columbus Branch of the NAACP, (1966), The Columbus Urban League, (1967), and an Ohio State University Study financed and solicited by the defendant School Board itself (1969).

27. Plaintiffs say that the defendant Columbus School Board, in flagrant violation of the Constitution and in violation of the Fair Housing Law and of 42 U.S.C. 1986, said defendant has conspired with the Franklin County Recorder to place said Deeds on public record and said defendants have located schools under their administration and are locating schools in areas serving schools in which racial restrictive covenants cover the property adjacent to said schools.

28. Plaintiff allege that there are numerous other acts on the part of the defendant Columbus School Board, its members and the defendant John Ellis, Superintendent of the Columbus School Board indicating that said defendants have failed and refused to take all necessary steps to correct the effects of their policies, practices, customs and usages of racial discrimination in the operation of public school in the City of Columbus School community and to assure that such policies, customs, practices, and usages, now and hereafter conform to the requirements of the Thirteenth and Fourteenth Amendments.

VIII. COUNT THREE

29. Plaintiffs complaint against the defendant James A. Schaefer, Franklin County Recorder, is that he and those acting under his direction, and his predecessors, have continued to unlawfully record Deeds to property

purchased by the defendant School Board with public funds and that said Deeds have contained racially restricted covenants and that said covenants serve as instruments of racial discrimination and further enforce the defendant Columbus School Board's policy of unlawful segregation of blacks in racially identifiable schools.

30. Plaintiffs content that a continuation of such unlawful acts involves the State in private discrimination as well as public discrimination so as to violate the Thirteenth Amendment and 42 U.S.C. Section 1982 and that the Recorder's Office is such an essential part of the real estate market, before and after sale of property, that the recording of the aforementioned described instruments, the acceptance of them for recording, the display of them for official public view, and the inspection, copying and reproduction of them upon request, gives these covenants a legitimacy and effectiveness in the eyes of a layman which they do not have at law. Plaintiffs contend that the Title Abstract and recital of these covenants in title insurance policies obtained from such copies are further reproduction of the official records within the prohibition of 42 U.S.C. Section 3604 (c).

IX. EQUITY

31. The actions, omissions, and improper acquiescence of defendants recited above have violated the rights of plaintiffs and members of their class to freedom of association, freedom from the vestiges of slavery, right to due process and equal protection of the laws guaranteed by the First, Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and laws passed by Congress to implement these Amendments.

32. Plaintiffs and other members of their class have made numerous demands on defendants to end the racial segregation described herein, but to no avail. Plaintiffs and all others similarly situated and affected, on whose

action this was brought, are suffering irreparable injury and will continue to suffer irreparable injury, by reason of the patterns and practices complained of herein. Plaintiffs have no plain adequate remedy to redress the wrongs complained of herein other than this action for declaratory and injunctive relief. Any other remedy to which plaintiffs could be remitted would be attended by such uncertainties as to deny substantial relief and would cause further irreparable injury. The aid of this Court is sought in assuring the citizens of Columbus and in particular the Black public school children of the City of Columbus, and Columbus School District their basic rights as American Citizens set forth above.

X. PRAYER FOR RELIEF

33. WHEREFORE, plaintiffs, on their own behalf and on behalf of those similarly situated, pray that this Court will advance this case on the Docket, cause this case to be in every way expedited, hear this case at the earliest practicable date, and upon such hearing will:

1. Enjoin and restrain preliminarily during the pendency of this action, and permanently thereafter, the Columbus Board defendants and their successors from all further school construction, with the exceptions to be designated, until such time as a Constitutional Plan for operation of the Columbus Public Schools has been approved and new construction re-evaluated as a part thereof.

2. Adjudge and decree, pursuant to 28 U.S.C. Section 2201, that the actions of the defendants complained of herein are unconstitutional and void, as depriving plaintiffs and those similarly situated, due process and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States, of their right to freedom of association, in contravention of the First and Fourteenth Amendments, and of their right to be free from the vestiges of slavery, in contravention of the

Thirteenth Amendment to the Constitution of the United States.

3. Enter a decree enjoining the Columbus Board, defendants, and each of them, their agents, attorneys, assistants, successors, employees, and all persons acting in concert or cooperation with them or at their direction and under their control:

(a) From directly or indirectly continuing, maintaining, requiring, promoting, or encouraging, through their rules, regulations, resolutions, policies, directives, customs, practices, or usages, the segregation and separation by race of the pupils within said public schools.

(b) From any further creation, alteration, or enforcement of any boundaries for any school attendance area that is intended to or does in fact, discriminate on the basis of race.

(c) From any further creation or enforcement of optional attendance zones or permissive policies providing for "white flight" from racially identifiable Negro schools.

(d) From the pursuit of any further policy regarding the assignment of faculty and staff which is intended to or does in fact assign less experienced or less qualified faculty or staff to schools which are predominately Negro or in areas of low income.

(e) For continuing any policy, practice, custom, regulation, rule, or usage, not specified above, which is intended to or has the effect, directly or indirectly, or furthering, promoting, reviving, creating, maintaining, renewing, extending, entrenching, or perpetuating racial segregation in the public schools.

4. Order the State defendants to prepare and file with this Court, within a time which is both reasonable and certain, and which would allow sufficient time for implementation of such program at the

mid-point of the 1974-75 school term, a comprehensive plan for desegregation in the Columbus School community as a whole, and for each school therein which will effectively:

(a) Remove the traditional segregation and separation by race and social class within and among such schools ROOT AND BRANCH (*Green vs County School Board*, 391 U. S. 294; 75 S. Ct. 753);

(b) End the containment, restricting and/or confinement of the majority of Negro School children to racially identifiable schools, primarily found in the neighborhoods comprising Columbus's inner-city Ghettos;

(c) Remove any existing disparity in the resources allocated to such schools;

(d) Afford and ensure to every school child, regardless of race and regardless of the school which such child attends, an equal opportunity to attend schools which, from the standpoint of facilities, faculty and staff, are in fact equal or as nearly so as is practical and feasible under the circumstances;

(e) Afford and ensure to every school child, regardless of the school such child attends, an equal educational opportunity in fact; and,

(f) Insure a continuation of the desegregated state once it is brought about; and avoid resegregation, through the use of periodic re-adjustments of attendance areas to deal with population shifts, in order that the benefits of equal educational opportunity will not be temporary or transitory.

5. Enter a decree enjoining the State Defendants as well as the Columbus Board defendant, their agents, attorneys, successors, assistants, employees, and all persons acting in concert or cooperation with them or at their direction and under their control,

from approving budgets, making available state and local funds, approving employment and construction contracts, approving school sites, school plans, school additions, and approving policies, curriculum, and programs, which either are designed to or have the effect of maintaining, perpetuating, supporting, or re-introducing racial segregation and containment in the Columbus School community; said plan to be effective no later than the mid-point of the 1974-75 school term.

6. Enter a decree enjoining the defendant Franklin County Recorder, his employees, agents, assistants, attorneys, successors, and all persons acting in concert or cooperation with him or at his/their direction and under his/their control, in order that a broad policy of containment will no longer be served:

(a) From hereafter accepting and recording, in any of the County records, any racially-restrictive covenants in Deeds to land purchased by the defendant School Board.

(b) From hereafter accepting and recording, in any of the County records, any of the "post 1948 variety" of restrictive covenants or restrictive agreements; which while not making any specific mention or prohibition on grounds of race, religion, or ethnic ancestry, or worded so that they serve that same discriminatory purpose.

7. Order said Franklin County Recorder, his employees, agents, assistants, attorneys, successors, and all persons acting in concert with them, or at his/their direction or under his/their control, to place the following stamp on each of the restrictive covenants to be designated: "RACIALLY RESTRICTIVE COVENANTS, AND THOSE WHICH SERVE THAT PURPOSE, ARE NOW PROHIBITED BY LAW. See Misc. Vol. ..., P. ..., " the latter designating the Miscellaneous volume where the Order of this Court shall be recorded.

8. Order said Franklin County Recorder, his employees, agents, assistants, attorneys, successors, and all persons acting in concert with them, or at his/their direction or under his/their control, to place this same stamp on any copies or reproductions henceforth made of any of the aforementioned varieties of restrictive agreements or covenants, that are not already so stamped.

9. That the Court fashion such remedies as may be appropriate pursuant to 42 U.S.C. Section 1988, where no such remedies presently exist.

10. That plaintiff recover their costs, attorneys' fees, out-of-pocket expenses, and such other relief as may appear to the Court just and proper.

[Subscription and Certificate of Service Omitted
in Printing]

ANSWER OF DEFENDANTS

**COLUMBUS BOARD OF EDUCATION, TOM MOYER,
PAUL LANGDON, VIRGINIA PRENTICE, MARILYN
REDDEN, WATSON WALKER, DAVID HAMLAR,
MARIE CASTLEMAN, AND JOHN ELLIS,
SUPERINTENDENT OF THE COLUMBUS
PUBLIC SCHOOLS,
TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

[Filed November 4, 1974]

[Caption. Omitted in Printing]

First Defense

1. Defendants admit that Plaintiffs seek to bring this action under 28 U.S.C. §§ 1221(a), 1343(3) and (4), 2201 and 2202, 42 U.S.C. §§ 1981-1988, 2000(d), and 3601, et seq. Defendants deny that Plaintiffs have the right to bring an action under these sections or that a claim is stated thereunder, aver that there is no 28 U.S.C. § 1221(a) as alleged, and otherwise deny the allegations contained in Paragraph 1 of the Second Amended Complaint.

2. For want of knowledge, Defendants deny the allegations contained in Paragraph 2 of the Second Amended Complaint.

3. Defendants admit the allegations of Paragraph 3, 4 and 5 of the Second Amended Complaint.

4. Defendants deny the allegations contained in Paragraph 6 of the Second Amended Complaint.

5. Defendants admit that the powers and duties of the Defendants Ohio State Board of Education, Martin Essex, Superintendent of Public Instruction of the Ohio Department of Education, and William J. Brown, Attorney General of the State of Ohio, are provided for by the laws of the State of Ohio, but deny the other allegations of Paragraphs 7, 8 and 9 of the Second Amended Complaint.

6. Defendants admit the allegations of Paragraph 10 of the Second Amended Complaint.

7. Defendants admit that Plaintiffs purport to bring this action as a class action, but deny all other allegations contained in Paragraphs 11, 12, 13, 14, 15 and 16 of the Second Amended Complaint.

8. Defendants deny the allegations contained in Paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of the Second Amended Complaint.

9. Defendants deny each and every other allegation of the Second Amended Complaint not herein expressly admitted to be true.

Second Defense

10. The Second Amended Complaint fails to state a claim upon which relief can be granted against the Defendants and each of them.

Third Defense

11. The Plaintiffs are without standing before the court to maintain this action.

Fourth Defense

12. The Defendants Tom Moyer, Paul Langdon, Virginia Prentice, Marilyn Redden, Watson Walker, David Hamlar, Marie Castleman, and John Ellis are not proper parties in this action.

WHEREFORE, the Defendants ask that the Second Amended Complaint be dismissed and that they go hence without day.

[Subscription and Certificate of Service
Omitted in Printing]

COMPLAINT IN INTERVENTION — CLASS ACTION

[Filed March 10, 1975]

[Caption Omitted in Printing]

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331(a), 1343(3) and (4), this being a suit in equity authorized by 42 U.S.C. §§ 1983-1988 and 2000(d), to redress the deprivation under the color of Ohio law, statute, custom and/or usage of rights, privileges and immunities guaranteed by the Thirteenth and Fourteenth Amendments to the Constitution of the United States; by 42 U.S.C. § 1981 which provides that all persons within the jurisdiction of the United States shall have the same rights to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and by 42 U.S.C. 1982 which provides that all persons within the jurisdiction of the United States shall have the same rights as white citizens to purchase real property.

2. Plaintiffs in Intervention are all parents or minor children thereof, attending school in the public school system of the State of Ohio and in the City of Columbus. They are all citizens of the United States and bring this action each in their own behalf and on behalf of their minor children and on behalf of all persons similarly situated.

3. This is a class action brought by the intervening plaintiffs on behalf of themselves and all others similarly situated, pursuant to the provisions of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Members of the class may be defined as follows: all children (approximately 98,000) who attend public schools within the Columbus Public School District and their parents or guardians. Members of the class are too numerous to bring before the Court, but are similarly affected by the action or inaction of the defendants in maintaining a dual discriminatory system of public education in Columbus and share common questions of fact and law with the named plaintiffs, namely whether the defendants acting under color of law, regulation, custom or usage have caused or permitted plaintiffs in intervention to be deprived of rights, privileges and immunities secured by the Constitution and Laws of the United States and the State of Ohio.

A common relief is sought and the intervening plaintiffs adequately represent the interest of the class since the parties defendant have acted or refused or neglected to act on grounds generally applicable to the class, thereby making injunctive relief appropriate with respect to the class as a whole.

4. The defendants, The Board of Education of the City of Columbus, organized and existing in Franklin County, Ohio, under and pursuant to the laws of the State of Ohio and operating the public school system of Columbus, Ohio, subject to the direction and control of said defendants.

5. The defendants, Tom Moyer, Paul Langdon, Marilyn Redden, Virginia Prentice, Watson Walker, David Hamler and Marie Castleman, are all residents of Franklin County, Ohio, and elected members of the Columbus Board of Education, Columbus, Ohio.

6. Defendant, John Ellis, is a resident of Franklin County and the duly appointed Superintendent of the Columbus School District, Columbus, Ohio.

7. Defendant, James A. Schaefer, is a resident of Franklin County and the duly elected Franklin County Recorder, and records and retains in his custody all Deeds of Real Estate in Franklin County, Ohio.

8. The defendant, The Ohio State Board of Education, located in Columbus, Ohio, is a constitutionally incorporated body charged with the primary responsibility of administering public education in the public school systems of Ohio, including the Columbus Public School District and its total school community.

9. The defendant, Martin W. Essex, a Franklin County resident, is Superintendent of Public Instruction of the Department of Education of the State of Ohio, and is Chief Administrative Officer for public education in the State of Ohio.

10. The defendant, William J. Brown, Franklin County resident and the Attorney General of the State of Ohio, is responsible for enforcing the Laws and Constitution of the State of Ohio.

11. The defendant, James Rhodes, Governor of the State of Ohio, is a Franklin County resident.

12. All defendants herein are used individually and in their official capacities. Relief is also sought against defendants' agents, attorneys, assistants, successors, employees, and all persons acting in concert or cooperation with them, or at their direction or under their control.

13. This is a proceeding for a preliminary and a permanent injunction enjoining the defendants from continuing their policy, practice, custom and usage of constructing and operating the public schools in Columbus, Ohio in a manner which has the purpose and effect of perpetuating racial and economic segregation in the public schools and for such other relief as hereinafter more fully appears. The State Board of Education and other defendants by their actions and inactions have effected racial segregation and discrimination in the operation of the Columbus public schools in violation of the rights secured to plaintiffs by

the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 2 of the Constitution of Ohio.

14. The defendants and their predecessors acting through sub-units of state governments have engaged in acts, practices, customs and usages which have had the natural, probable, foreseeable and actual effect of incorporating public and private residential racial segregation and discrimination into the Columbus school system in violation of the rights of plaintiffs in intervention under the Thirteenth and Fourteenth Amendments to the Constitution of the United States.

15. Through its various instrumentalities, including but not limited to zoning boards, planning commissions and departments, licensing agencies, state-approved realtor organizations, public housing and urban renewal authorities, the defendants herein, and others, by various methods, including but not limited to State laws or local ordinances prescribing minimum lot sizes and the construction of publicly-assisted housing facilities, the location of parks and highways, and pursuant to a policy of racial discrimination, the State and other defendants have established a pattern, practice, custom and usage of racial residential segregation of blacks to prescribed residential areas in the City of Columbus and have superimposed pupil assignment, school construction and zoning with the natural probable foreseeable and actual effect of requiring the black and white plaintiffs in intervention to attend racially segregated schools.

16. Through its various instrumentalities, but not limited to zoning boards, planning commissions and departments, licensing agencies, state-approved realtor organizations, public housing, urban renewal authorities and school boards, the defendants herein, and others, have exploited the plaintiffs through a situation created by governmental and socio-economic forces tainted by racial residential segregation with the effect of requiring the black and white

plaintiffs in intervention to attend racially segregated schools in the City of Columbus.

17. In the operation of the Columbus school system, the defendants have seized upon and taken advantage of the opportunity created by racial residential segregation to contain the black plaintiffs in intervention to certain racially segregated schools by their policies and practices of drawing school attendance boundaries, pupil assignment practices, school construction, additions and financing with the result that the patterns created by racial residential segregation have been re-enforced in such a manner as to aggravate the existing racially discriminatory actions, both public and private discriminatory policies, customs, practices and usages and have resulted in a dual public school system in Columbus composed of predominately minority group schools and predominately white schools.

18. The Columbus Board of Education and the State defendants have conducted and had presented to them numerous studies for the purpose of determining the best method of eliminating the pattern of racial segregation in the public schools in the Columbus area. They have failed to act despite the knowledge that the effect of such inaction would be greater segregation.

19. The Columbus Board of Education and the State defendants have approved a pattern of school construction within the perimeter of the City of Columbus which has resulted in the establishment of school complexes having an overwhelming white enrollment, which provides a school house for white students to the exclusion of black students and facilitates the maintenance of the pattern of racial separation in the public schools of the City of Columbus. At the same time, the Columbus Board of Education and the State defendants have continued their policy of school construction and additions which have resulted in the containment of the black population to racially identifiable black schools. Said policies extend to the assignment of principals, assistant principals and cadets in ac-

cordance with the racial identifiability of the Columbus public schools.

20. In at least two instances the State Board of Education has acted to require consolidation of school districts in Ohio to eliminate racial segregation between the districts as well as to equalize educational resources available to citizens of the consolidated districts. The State defendants have a policy of merging and consolidating schools and school districts to better educational opportunity for school children. The State defendants acting through subunits of state government including the local defendants and their predecessors and otherwise, have engaged in acts, practices, customs and usages which have had the natural, probable, foreseeable, and actual effect of incorporating into school systems serving the Columbus area, the private residential racial segregation and discrimination in violation of the rights of plaintiffs not to be segregated on the basis of race in public schools or school districts.

21. The State defendants acting through their predecessors and otherwise have allocated and permitted to be allocated educational resources in a manner that has had the natural, probable, foreseeable and actual effects in the Columbus area of:

(a) Discriminating in the provision of school facilities and other educational resources on the basis of race against children attending the public schools within the city of Columbus;

(b) Establishing and maintaining the pattern of racially separate schools and school systems in violation of the rights secured to plaintiffs and their class under the Fourteenth Amendment to the United States Constitution and the Constitution and Laws of the State of Ohio.

22. The defendants' present method of operating separate school attendance boundaries in the Columbus school system with the discriminatory effects described herein is not required for the fulfillment of any valid state educa-

tional objective nor any compelling state interest which could not be equally or better served by a different set of boundaries which did not incorporate racial segregation.

23. Although educationally sound, feasible, and practical, alternative methods of school organizations are reasonably available to the defendants and the implementation of such alternatives would fulfill the defendants' educational objectives, the defendants have failed to select such alternatives resulting in aggravating racial segregation and inequitable allocation of educational resources.

24. Throughout the Columbus school system during the 1974-75 school year, of 168 programs at all levels, there are 16 Senior High Schools, 26 Junior High Schools and 124 Elementary Schools.

The total enrollment for the Columbus School System is 98,016, of these there are 22,436 in Senior High School, 21,795 in Junior High School and 53,334 in the Elementary School.

Senior High School

25. Within the Senior High School there are 22,436 students of which there are 7,539 (34%) black and 14,824 non-black students, including 6 American Indians, 42 Asian Americans and 25 Spanish surname students. Over half (57%) or 4,317 of the total black senior high school population of 7,359 are assigned to the 5 schools which have 60-99% black enrollment, while 80% or 12,111 of the total non-black population is assigned to schools having 60-99% non-black enrollment. There are 6 predominately white schools having a total enrollment of 10,526 and of this only 703 or 6% are black.

Junior High School

26. Within the Junior High School there are 26 school programs. Of these, 5 are racially identifiable black (60-99%), and 21 racially identifiable white schools (60-99%).

Of the total black junior high school enrollment of 6,446, 48% or 3,100 of the students are assigned to the 5 racially identifiable black schools.

Elementary School

27. Within the 124 elementary schools, there are 35 racially identifiable black and 89 racially identifiable white schools. Twenty-five being 80-99% black; 10 being 50-80% black; 11 being 25-50% black; 78 being 1-25% black. Of the total elementary school population of 53,344, 30% or 16,333 of the enrollment is black. Of this black population, (78% or 12,841) attend the 35 schools which are 60-99% black. The remaining 41% (6,721) attend the 89 majority non-black schools.

28. On all three educational levels of the Columbus, Ohio School System, approximately half of the total black population is assigned to schools which are 60-99% black. Fifty-five (55%) per cent in the senior high schools in 5 out of 16 schools; 48% of the junior high schools in 5 out of 26 schools; and 78% of the elementary school in 35 out of 124, in a school system with a total black enrollment of 30%.

29. Of the total number of school programs, on all levels, 81 of the 168 schools have 90% or more non-black enrollment. Thirty-two (32) schools have an 80-99% black enrollment in a school system with a total black enrollment of 30%.

30. Until 1973, the Columbus Board of Education segregated faculty members on the basis of race. In 1973, a Consent Decree was arranged with the Ohio Civil Rights Commission, after the case at bar was filed. The Consent Decree fixed certain Constitutional requirements of faculty desegregation. However, the defendants still segregate principals, assistants, and cadets on the basis of race consistent with job assignments in the respective racially segregated schools. The effects of the racial identification of

schools imposed by such purposeful faculty segregation have not been dissipated.

31. The intervening plaintiffs allege that the defendants herein acting under color of the laws of the State of Ohio have pursued and are presently pursuing a policy, custom, practice and usage of operating, managing and controlling the Columbus public school system in a manner that has the purpose and effect of perpetuating a segregated public school system. Such racially discriminatory policies and practices have included assigning students, designing attendance zones for elementary, junior, and senior high schools, establishing feeder patterns to secondary schools, planning future public educational facilities, constructing new schools, and utilizing and building upon the existing racially discriminatory patterns in both public and private housing on the basis of the race and color of the children who are eligible to attend said schools.

32. The defendants have failed and refused to take all necessary steps to correct the effects of their policies, practices and customs and usages of racial discrimination in the operation of public schools in the City of Columbus in order to assure that such policies, customs, practices, and usages, now and hereafter, conform to the requirements of the Thirteenth and Fourteenth Amendments to the Constitution of the United States. The intervening plaintiffs and all those similarly situated and affected on whose behalf this action was brought, are suffering irreparable injury and will continue to suffer an irreparable injury by reason of the patterns and practices complained of herein. The intervening plaintiffs have no plain, adequate or complete remedy to redress the wrongs complained of herein other than this action for preliminary and injunctive relief. Any other remedy to which these plaintiffs could be remitted would be attended by such uncertainties as to deny substantial relief and would

cause further irreparable injury. The aid of this Court is sought in assuring the citizens of Columbus and in particular the black and economically deprived public school children of the City of Columbus and the Columbus metropolitan area, equal protection and due process of law under the Fifth, Thirteenth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, THE INTERVENING PLAINTIFFS RESPECTFULLY PRAY that upon the filing of the Complaint, the Court grant a preliminary and permanent injunction:

- (a) Requiring defendants, their agents and other persons acting in concert with them to develop and implement a "system wide" plan of desegregation which will provide for the elimination of the pattern of racial segregation in the Columbus public school system at the beginning of the 1975-1976 school year.
- (b) Restraining defendants from all further school construction until such time as a constitutional plan for the operation of the Columbus public schools has been approved and new construction plans re-evaluated as a part thereof.
- (c) Requiring defendants to assign for the 1975-1976 school year, principals, faculty and other school personnel to each school in the system in accordance with the ratio of white and black principals, faculty and other school personnel throughout the system where such ratio does not already exist.
- (d) Order the State defendants to prepare and file with the Court a plan for desegregation of the Columbus public schools.
- (e) Advance this cause on the docket and order speedy hearing of this action according to law and upon such hearing, issue preliminary and permanent decrees enjoining the defendants, their agents, attorneys and successors from continuing to utilize any policies, customs, practices and usages described

herein which have the purpose or effect of leaving intact or establishing racially identifiable schools.

(f) Enter a decree enjoining the State defendants as well as local defendants, their agents, attorneys and successors from approving budgets, making available state and local funds, approving employment and construction contracts, approving school sites, school plans, school additions and approving policies, curriculum and programs which either are designed to or have the effect of maintaining, perpetuating or supporting racial segregation and containment in the Columbus public school system.

(g) Award intervening plaintiffs fees to their attorneys for services rendered and to be rendered by them in this cause and allow plaintiffs all out-of-pocket expenses of this action and such other relief as may appear to the Court to be equitable and just.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

MEMORANDUM AND ORDER

[Filed March 10, 1975]

[Caption Omitted in Printing]

Applicants are before the Court with a motion to intervene as party plaintiffs in this class action suit against the Columbus School Board and various state and local officials for alleged discriminatory policies and practices in the operation of the city's public school system.

The applicants base their motion on two grounds. First, they seek to intervene as of right pursuant to Rule 24(a)(2), Fed. R. Civ. P. This Rule provides that upon timely application anyone shall be permitted to intervene

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the

action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

To intervene as of right, therefore, the application must (1) be timely, (2) show an interest in the subject matter of the action, (3) show that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect his interest, and, finally, (4) show that the interest is not adequately represented by an existing party.

The threshold question in any motion to intervene is that of timeliness. In their respective memoranda filed in opposition to this motion the original parties cite the fact that this lawsuit was originally filed on June 21, 1973, some twenty months ago. The amount of time which has elapsed since the original complaint was filed, however, is not the sole factor to be considered when determining the timeliness of a motion to intervene. (See *NAACP v. New York*, 413 U.S. 345, 366 (1973) wherein the Supreme Court reiterated this idea and further stated that "timeliness is to be determined from all the circumstances.") Intervention is proper where the substantial litigation of the issues has not begun when the motion to intervene is filed. Under such circumstances, intervention has even been allowed several years after the commencement of suit. See 3B *Moore's Federal Practice*, ¶ 24.13[1]. In the instant case the Court has allowed the filing of two amended complaints, the last of which was filed as recently as October 24, 1974. In such circumstances I do not feel that this motion to intervene can be said to be untimely; no substantial litigation on the issue raised herein has in fact occurred.

Plaintiffs herein purport to represent a class consisting of all children who are or will be attending school within the Columbus Public School District. Applicants for intervention purport to represent all children who attend

schools within the Columbus Public School District. Thus, except for the different individually-named plaintiffs of each, both seek to represent the same class. Further, both plaintiffs and applicants seek to protect similar if not identical interests. As a practical matter, therefore, disposition of this case will affect the applicants' ability to protect their asserted interests.

Thus, the only determination remaining to be made concerns the adequacy of the representation by plaintiffs' counsel. As the rule set out above states, intervention shall be allowed *unless* the applicants' interests are adequately represented by existing parties. Judge, now Justice, Blackmun once said that inadequacy of representation could be shown "by proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervenor, or by the failure of the representative in the fulfillment of his duty." *Stadin v. Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied* 373 U.S. 915 (1963). It is argued herein that representation is adequate if there has been no collusion between the class representative and the opposing party or if the representative is not alleging an interest adverse to the applicant or, finally, if the representative will not fail in the fulfillment of his duty to the class. However, it is one thing to say that inadequacy of representation has been shown by establishing one of these circumstances; it is quite another to find representation adequate unless one of these is present. In the instant case the would-be intervenors claim that "the approaches taken and issues raised, therefore, by the original plaintiffs are different than the approaches and issues adopted by the applicants for intervention." In such a situation, they contend the Court should be influenced "by the extent of the applicant's interest and in part by the contribution he can make to the Court's understanding of the case in light of his knowledge and concern." Support for this contention is found in *Trbovich v. United Mine Workers of America*,

404 U.S. 528 (1971). In *Trbovich* Mr. Justice Marshall, speaking for the Court, noted:

The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal. (Citation omitted.)

Trbovich, *supra* at 538.

Finally, this Court is mindful of, and is in agreement with, the view expressed by some commentators that the overall effect of the recent changes to Rules 23 and 24 is to grant members of a Rule 23(b)(2) class, as we have here, a more liberal right to intervene in the original class action. See 3B *Moore's Federal Practice*, ¶ 23.90[2]. For the above reasons I find that intervention as of right should be granted these applicants.

Even assuming *arguendo*, however, that the applicants may not intervene as of right, they have also moved for permissive intervention pursuant to Rule 24(b)(2), Fed. R. Civ. P., and I find that this motion should be granted. Rule 24(b)(2) states that upon timely application anyone may be permitted to intervene in an action

when an applicant's claim or defense and the main action have a question of law or fact in common.

A motion under this rule is directed to the sound discretion of the Court. In exercising this discretion the Court is only required by the rule to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. There appears to be no dispute among the various parties that the requisite element of commonality of fact and law is present; the only question is whether undue delay or prejudice will result. Certainly it can be said that additional parties always require at least some additional time. But to find this determinative is to do away with permissive intervention. In the instant case I find no factor present which would lead

to the conclusion that adjudication will be delayed or prejudiced. This is not a case where the issues have begun to be litigated in court or where the issues have already been decided adversely to the applicants. Although the Court presumes that discovery is ongoing at the present time, applicants' counsel, who appear to be highly skilled in this area of the law, should have no problem familiarizing themselves with the progress of the case to date. Because there would appear to be little likelihood of delay and prejudice and because intervention in class actions such as this should be liberally construed, see *Hall v. Warthon Bag Corporation*, 251 F. Supp. 184 (M.D. Tenn. 1966), I find that applicants herein should be allowed intervention in this matter.

For the reasons set forth above, the motion to intervene is GRANTED.

It is so ORDERED.

ROBERT M. DUNCAN, Judge
United States District Court

ANSWER OF DEFENDANTS
COLUMBUS BOARD OF EDUCATION, TOM MOYER,
PAUL LANGDON, VIRGINIA PRENTICE, MARILYN
REDDEN, WATSON WALKER, DAVID HAMLAR,
MARIE CASTLEMAN, AND JOHN ELLIS,
SUPERINTENDENT OF THE COLUMBUS
PUBLIC SCHOOLS,
TO COMPLAINT IN INTERVENTION

[Filed April 1, 1975]

[Caption Omitted in Printing]

First Defense

1. Defendants admit that plaintiffs seek to bring this action under 28 U.S.C. §§ 1331(a), 1343(3) and 1343(4), and 42 U.S.C. §§ 1981-1988, 2000(d). Defendants deny

that plaintiffs have the right to bring an action under these sections or that a claim is stated thereunder, and otherwise deny the allegations contained in Paragraph 1 of the Complaint in Intervention.

2. For want of knowledge, defendants deny the allegations contained in Paragraph 2 of the Complaint in Intervention.

3. Defendants admit that plaintiffs purport to bring this action as a class action, but deny all other allegations contained in Paragraph 3 of the Complaint in Intervention.

4. Defendants admit the allegations of Paragraph 4 of the Complaint in Intervention.

5. Defendants deny that Tom Moyer is presently an elected member of the Columbus Board of Education, and admit the remaining allegations contained in Paragraph 5 of the Complaint in Intervention.

6. Defendants admit the allegations contained in Paragraph 6 of the Complaint in Intervention.

7. Defendants deny the allegations contained in Paragraph 7 of the Complaint in Intervention.

8. Defendants admit that the powers and duties of the defendants Ohio State Board of Education, Martin Essex, Superintendent of Public Instruction of the Ohio Department of Education, and William J. Brown, Attorney General of the State of Ohio, are provided for by the laws of the State of Ohio, but deny the other allegations of Paragraphs 8, 9 and 10 of the Complaint in Intervention.

9. Defendants admit the allegations of Paragraph 11 of the Complaint in Intervention.

10. Defendants admit that the defendants are sued individually and in their official capacities, deny that such is proper, and deny all other allegations contained in Paragraph 12 of the Complaint in Intervention.

11. Defendants admit that plaintiffs are seeking preliminary and permanent injunctive relief, but deny their right to do so or that a claim has been made therefor and

the other allegations of Paragraph 13 of the Complaint in Intervention.

12. Defendants deny the allegations contained in Paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Complaint in Intervention.

13. Defendants admit that the figures alleged in Paragraph 24 of the Complaint in Intervention are approximately accurate and correct, but deny the exactness of said allegations.

14. Defendants deny the allegations contained in Paragraphs 25, 26, 27, 28, 29, 30, 31 and 32 of the Complaint in Intervention.

15. Defendants deny each and every other allegation of the Complaint in Intervention not herein expressly admitted to be true.

Second Defense

16. The Complaint in Intervention fails to state a claim upon which relief can be granted against the defendants and each of them.

Third Defense

17. The plaintiffs-intervenors are without standing before the Court to maintain this action.

Fourth Defense

18. The defendants Tom Moyer, Paul Langdon, Virginia Prentice, Marilyn Redden, Watson Walker, David Hamlar, Marie Castleman, and John Ellis, are not proper parties in this action.

WHEREFORE, the defendants ask that the Complaint in Intervention be dismissed at the cost of the plaintiffs-intervenors.

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ORDER

[Filed April 9, 1975]

[Caption Omitted in Printing]

This matter came on before the Court on plaintiffs' Motion that their Complaint be maintained as a class action and the Court being fully advised in the premises finds that no objections have been made to said Motion. The Court further finds that the plaintiffs are representative of the class which seeks relief herein, said class consisting of all children attending public schools in the Columbus Ohio School District together with their parents or guardians. The Court also finds that there are questions of law and fact common to the class and that the claims of the plaintiffs will fairly and adequately protect the interests of all the members of the class.

The Court further finds that this action is maintained under Federal Rule of Civil Procedure 23, (1) and (2), and that notice to other members of the class represented by the plaintiff is therefore not mandatory; however, the Court also finds that this action has been given widespread publicity by the local news media during the period which this suit has been pending.

Upon consideration the Court determines the Motion of the plaintiffs to be meritorious and, the request that this suit be maintained as a class action is hereby granted.

It is so ORDERED.

ROBERT M. DUNCAN, JUDGE
United States District Court

Nos. 77-8315-16

United States Court of Appeals**FOR THE SIXTH CIRCUIT**

GARY L. PENICK, et al.,
Plaintiffs-Appellees,

vs.

COLUMBUS BOARD OF
EDUCATION, et al.,
Defendants-Appellants.

COLUMBUS BOARD OF
EDUCATION,
Intervenor-Appellee.

COLUMBUS EDUCATION
ASSOCIATION,
Proposed Intervenor-Appellant.

ORDER
[Filed June 29, 1977]

Before: EDWARDS, CELEBREZZE and PECK,
Circuit Judges.

Defendants Columbus Board of Education, et al., and Ohio State Board of Education, et al., petition this court for leave to appeal under 38 U.S.C. § 1292(b) (1970), asserting that certain findings and orders of the United States District Court entered in the above-styled cause involve a controlling question of law as to which there is a substantial difference of opinion and that an immediate appeal may materially advance the ultimate termination of litigation. The District Judge has *sua sponte* certified his belief that such a controlling question of law exists.

In his opinion the District Judge entered the following findings pertaining to the Columbus Board of Education:

From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus

Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times, has approved optional attendance zones, discontinuous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion.

Concerning the Ohio State Board of Education and its Superintendent, the District Judge found:

The failure of these state defendants to act, with full knowledge of the results of such failure, provides a factual basis for the inference that they intended to accept the Columbus defendants' acts, and thus shared their intent to segregate in violation of a constitutional duty to do otherwise.

The District Court thereupon permanently enjoined the defendants from "discriminating on the basis of race in the operation of the Columbus Public Schools," and directed defendants to formulate plans for desegregation of

the Columbus Public Schools and enjoined new school construction, absent prior approval of the court.

Leave to appeal from the findings which held defendants responsible for unconstitutional segregation at the Columbus Public Schools and ordered desegregation thereof and orders of the District Court is hereby granted. In the public interest, the case will be advanced for hearing on this court's calendar as soon as briefing is completed.

Entered by order of the Court
John P. Hehman, Clerk

By GRACE KELLER

Grace Keller, Chief Deputy

**MOTION OF THE OHIO STATE BOARD OF
EDUCATION AND SUPERINTENDENT OF
PUBLIC INSTRUCTION FOR SUPPLEMENTAL
FINDINGS OF FACT.**

[Filed July 11, 1977]

[Caption Omitted in Printing]

These state defendants respectfully request the Court to supplement the findings of fact previously made in its Memorandum and Order of March 8, 1977. The reason for this motion is given in the accompanying brief.

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BRIEF

On June 27, 1977 the Supreme Court announced its decision in *Dayton Board of Education v. Brinkman*, . . . U.S. . . (1977). We will not attempt any detailed description of that opinion or the procedural history which preceded it since we are sure that the court is fully informed. Suffice it to say that it provides important clarification with respect to the remedies that may now be formulated in school desegregation cases. Inasmuch as we are now in the phase of the present case where a remedy for Columbus must be developed, it is important that we proceed in accordance with the Supreme Court's most recently declared requirements. Writing for a unanimous court Mr. Justice Rehnquist said:

The duty of both the District Court and Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court . . . must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress

that difference, and only if there has been a system-wide impact may there be a systemwide remedy.

Slip opinion, 13-14.

The difficulty of this task was recognized explicitly:

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

Id., 14.

The state defendants respectfully request this Court to supplement the findings of fact previously made in its Memorandum and Order of March 8, 1977 in order to define "how much incremental segregative effect [the defendants'] violations had on the racial distribution of the [Columbus] school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Dayton, supra*.

The need for supplementary findings of fact stems from this Court's limited description of the present effects of the violations which the Court found, together with the absence of any finding comparing the present racial distribution of the student population with what it would have been if such violations had not occurred. This difference is absolutely critical to the formulation of any remedy for, "The remedy must be designed to redress that difference. . . ." *Dayton, supra*.

Two days after Dayton was decided the Supreme Court confirmed the critical importance of the language noted above in *School District of Omaha v. United States*, . . . U.S. . . (June 29, 1977). The Court granted certiorari and then vacated the decision of the Eighth Circuit Court

of Appeals which had affirmed the remedy order for Omaha. In remanding that case for consideration in the light of *Village of Arlington Heights* and *Dayton*, the Supreme Court observed that neither the Court of Appeals nor the District Court "addressed itself to the inquiry required by our opinion in . . . *Dayton* . . . in which we said:

'If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy.' Slip op., 13-14."

School District of Omaha, supra, 2.

The Supreme Court decided Milwaukee's petition for certiorari on the same basis in *Brennan v. Armstrong*, . . . U.S. . . (June 29, 1977). The District Court in Milwaukee had found the local defendants liable and had certified the case for interlocutory appeal, as this Court has done. The Court of Appeals for the Seventh Circuit affirmed the District Court's findings on liability. The school board petitioned for certiorari. The Supreme Court granted it, vacated the judgment of the Court of Appeals and remanded for consideration in the light of *Village of Arlington Heights* and *Dayton*. Once again the Supreme Court observed that neither lower court had "addressed itself to the inquiry mandated by our opinion in . . . *Dayton* . . . in which we said:

'If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial

distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy.' Slip op., at 13-14."

Brennan v. Armstrong, supra, 1.

The findings of fact in this Court's Memorandum and Order of March 8, 1977 do not address the inquiry mandated by *Dayton*, *Omaha* and *Brennan v. Armstrong*. Those findings are therefore insufficient to permit the formulation of an appropriate remedy. We respectfully suggest that a remedy cannot be fashioned in accordance with current constitutional requirements until this Court first defines the incremental segregative effects which the violations had on the racial distribution of the Columbus school population as presently constituted, comparing that distribution to what it would have been had such constitutional violations not occurred.

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**MOTION OF COLUMBUS BOARD OF EDUCATION
AND DR. JOSEPH L. DAVIS, INTERIM SUPERIN-
TENDENT OF COLUMBUS PUBLIC SCHOOLS,
FOR DETERMINATION OF INCREMENTAL
SEGREGATIVE EFFECTS**

[Filed July 11, 1977]

[Caption Omitted in Printing]

Defendants Columbus Board of Education and Dr. Joseph L. Davis, Interim Superintendent of Columbus Public Schools, respectfully move the Court to determine how much incremental segregative effect the constitutional

violations found in its March 8, 1977 Opinion and Order had on the racial distribution of the Columbus school population as presently constituted in each elementary, junior and senior high school, when that distribution is compared to what the racial composition of the Columbus school population would have been in the absence of such constitutional violations in each elementary, junior and senior high school in the system.

MEMORANDUM IN SUPPORT

On June 27, 1977 the Supreme Court announced its decision in *Dayton Board of Education v. Brinkman*, — U.S. — (1977). The Court vacated a Sixth Circuit Court of Appeals decision which had upheld a remedy plan requiring that the racial distribution of each school be brought within 15% of the 48%-52% black-white population ratio of the Dayton schools.

Mr. Justice Rehnquist, writing for a unanimous Court, set forth the following duties of lower courts in school desegregation cases:

"The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis*, *supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to the review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed

to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, *supra*, at 213."

Dayton Board of Education v. Brinkman, Slip Opinion at 12-14.

The Columbus defendants respectfully submit that *Dayton* requires the Court to determine the "incremental segregative effect" of the constitutional violations identified in its March 8, 1977 Opinion and Order before any remedy can be required. The *Dayton* case also instructs the Court on the method of determining such effect. The Court must compare the racial distribution of the Columbus school population as presently constituted to what the racial distribution would have been in the absence of the constitutional violations found. It is the difference yielded from that comparison that must be remedied. *Dayton*, — U.S. —, Slip Opinion at 13-14.

The applicability of *Dayton* to other school desegregation cases was illustrated in two Supreme Court announcements on June 29, 1977. In both cases, the Supreme Court vacated lower court judgments and remanded for reconsideration in light of *Dayton*.

In *School District of Omaha v. United States*, — U.S. — (Slip Opinion June 29, 1977), the district court had originally found in favor of the school system and had dismissed the complaint. 389 F. Supp. 293 (D. Neb. 1974). On appeal, the Eighth Circuit reversed, held that the segregation in the Omaha schools must be eliminated "root and branch," and remanded with directions and guidelines for development of a system-wide remedy. 521 F.2d 530 (8th Cir. 1975). In particular, the Court of Appeals found:

"We conclude that, in five decision-making areas, the appellants produced substantial evidence that the defendants' actions and inactions in the face of tendered choices had the natural, probable and foreseeable consequence of creating and maintaining segregation. The five areas include faculty assignment, student

transfers, optional attendance zones, school construction, and the deterioration of Tech High. The proof in each area was sufficient in and of itself to trigger the presumption of segregative intent. We also conclude that the defendants failed to carry their burden of establishing that segregative intent was not among the factors which motivated their actions. Accordingly, we hold that the segregation in the Omaha public schools violates the Constitution and must be 'eliminated root and branch.' *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)." [Footnote omitted.]

United States v. School District of Omaha, 521 F.2d at 537.

The Supreme Court denied certiorari. 423 U.S. 946 (1975).

On remand, the district court ordered a comprehensive, system-wide student integration plan in accordance with the Eighth Circuit's express guidelines. 418 F. Supp. 22 (D. Neb. 1976). The plan was affirmed by the Court of Appeals. 541 F.2d 708 (8th Cir. 1976). The Supreme Court's June 29 decision vacated the Eighth Circuit's decision affirming the system-wide remedy because neither the Court nor the district court had addressed the "inquiry required by our opinion" in *Dayton*. The Supreme Court said:

"Neither the Court of Appeals nor the District Court, in addressing themselves to the remedial plan mandated by the earlier decision of the Court of Appeals, addressed itself to the inquiry required by our opinion in No. 76-539, *Dayton Board of Education v. Brinkman*, in which we said:

'If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would

have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy.' Slip Op. at 13-14.

"The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of *Village of Arlington Heights*, and *Dayton*, *supra*."

School District of Omaha, Slip Opinion at p. 2.

Thus, the system-wide remedy order in Omaha was vacated pending the determination of the "incremental segregative effect" of the specific constitutional violations found. The court of appeals' broad declarations that a system-wide remedy was required were not sufficient absent the more specific determinations required by *Dayton*.

Also on June 29, 1977, the Supreme Court applied the *Dayton* case to the Milwaukee school desegregation litigation. *Brennan v. Armstrong*, ___ U.S. ___ (Slip Opinion, June 29, 1977). As in *Omaha*, the Supreme Court vacated the judgment of the Court of Appeals for reconsideration in light of *Village of Arlington Heights* and *Dayton*.

In the Milwaukee case, the district court originally found intentionally caused segregation in the Milwaukee system. *Amos v. Board of Directors of City of Milwaukee*, 408 F. Supp. 765 (E.D. Wis. 1976):

"The Court concludes that the defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities, and have intentionally brought about and maintained a dual school system. The Court therefore holds that the entire Milwaukee public school system is unconstitutionally segregated."

Amos, *supra*, 408 F. Supp. at 821.

The Seventh Circuit affirmed the lower court's finding, *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), and the school board sought a writ of certiorari on December

14, 1976. 45 U.S.L.W. 3477. On March 17, 1977, the district court ordered implementation of a system-wide plan of desegregation. *Armstrong v. O'Connell*, 427 F. Supp. 1377 (E.D. Wis. 1977).

The June 29, 1977 decision of the Supreme Court, vacating the Seventh Circuit's decision, said:

"Neither the District Court in ordering development of a remedial plan, nor the Court of Appeals in affirming, addressed itself to the inquiry mandated by our opinion in No. 76-539, *Dayton Board of Education v. Brinkman*, in which we said:

'If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy.' Slip op., at 13-14.

"The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of the *Village of Arlington Heights v. Metropolitan Development Corp.*, ___ U.S. ___ (1977), and *Dayton*."

Brennan v. Armstrong, Slip Opinion at pp. 1-2.

Thus, notwithstanding the lower courts' general pronouncements that the violation or liability in the Milwaukee case was system-wide, the Supreme Court's remand required the lower courts to address and to make the specific determination of incremental segregative effect as defined in *Dayton*.

We respectfully submit that this Court is also required to address itself to the "inquiry mandated" by the Supreme Court's *Dayton* opinion. As in *Dayton*, *Omaha*, and *Bren-*

nan, this Court must "determine how much incremental segregative effect these violations had on the racial distribution of the [Columbus] school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations." *Dayton*, Slip Opinion at 13-14. As made clear in *Brennan*, the required inquiry should be made when the court first orders development of a remedial plan. Only in that manner will the Court and the litigants know what type of "remedy must be designed to redress that difference." *Dayton*, Slip Opinion at 14.

The Court's March 8, 1977 Opinion and Order, like the decisions in *Omaha* and *Brennan*, finds certain constitutional violations and holds that the liability is system-wide. 429 F. Supp. 266. In its Memorandum and Order of July 7, 1977, the Court said that it would not "order implementation of a plan which fails to take into account the systemwide nature of the liability of the defendants." In view of the recent decisions of the Supreme Court, however, the Court is required to do more: to determine the difference between the present racial distribution in the Columbus public schools as compared to what it would have been in the absence of such constitutional violations. It is only that difference, the incremental segregative effect, that must be remedied under constitutional principles.

Because of the mandatory considerations now required by *Dayton*, *Omaha* and *Brennan*, the findings of fact contained in the March 8, 1977 Opinion and Order are insufficient to permit the formulation of an appropriate remedy. It is respectfully submitted that a remedy cannot be fashioned in accordance with current constitutional requirements until the Court first defines the contemporary effects of the constitutional violations described in the March 8 Opinion and Order.

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ORDER

[Filed August 30, 1977]

[Caption Omitted in Printing]

This matter is before the Court upon the August 17, 1977, report concerning Phase I preparatory efforts which the Columbus defendants have submitted pursuant to the Court's July 29, 1977, order. The intervening defendants have filed objections to the report; plaintiffs have not.

The Court finds that the August 17, 1977, Phase I report should be approved as submitted, with the understanding that modifications of the Phase I plan may be in order for good cause shown once details of the remainder of the desegregation plan become known.

It is accordingly ORDERED that the August 17, 1977, Phase I report of the Columbus defendants is approved for implementation.

ROBERT M. DUNCAN, *Judge*
United States District Court

◆

**COLUMBUS BOARD OF EDUCATION'S
RESPONSE TO THE COURT'S
JULY 29, 1977 ORDER**

[Filed August 31, 1977, Amended September 26, 1977]

[Caption Omitted in Printing]

Pursuant to this Court's July 29, 1977 Order, the Columbus Board of Education hereby submits the following, all of which are attached hereto:

(i) a new pupil reassignment plan prepared according to the guidelines set by the Court in its Order and entitled The Columbus City School District Response to a July 29, 1977 Federal District Court Pupil Desegregation Order;

(ii) a transportation report entitled Analysis of Transportation Requirements and Alternatives for Systemwide Desegregation of Columbus Schools, prepared for the Board by Simpson & Curtin, Transportation Engineers, August, 1977;

[Omitted in Printing]

(iii) Resolution in Response to July 29, 1977 Court Order to Produce Pupil Reassignment Plan and to Report on Transportation, which was adopted by the Columbus Board of Education on August 30, 1977; and

[Omitted in Printing]

(iv) Resolution in Response to July 29, 1977 Court Order to Indicate Which Transportation Method the Board of Education Proposes to Use to Implement Student Reassignment Plan, which was adopted by the Columbus Board of Education on August 30, 1977.

[Omitted in Printing]

Pursuant to the first resolution referenced above, counsel, on behalf of the Board of Education, hereby notifies and informs the Court that nothing contained in any submission by the Columbus Board of Education is intended to disqualify the school system from eligibility for any federal or state funds, including Emergency School Aid Act Funds, and requests that the Court, in any future remedy orders issued in this case, not include any provisions therein that would disqualify the Columbus School system from eligibility for any such funds.

Pursuant to the second resolution referenced above, counsel, on behalf of the Board of Education, hereby notifies the Court that the Columbus Board of Education recommends against the purchase of second-hand or used school buses and transportation equipment because of safety, financial and administrative considerations, and further recommends against implementation of the pupil reassignment plan until such time as adequate new school buses can be obtained, thus assuring safe and reliable

school transportation for the students required to be transported.

In submitting new pupil reassignment plan and transportation report pursuant to the Court's July 29 Order, the Columbus Board of Education does not waive, and indeed specifically reserves, all of its rights to continue the prior initiated appeals of the Court's March 8, 1977 Opinion and Order and March 9, 1977 Judgment and the Court's July 29, 1977 Order and to take an appeal from any future orders of the Court if the Board should so elect at the appropriate time.

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The Columbus City School District

**Response To A July 29, 1977
Federal District Court Pupil
Desegregation Order**

August 30, 1977

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I. DESEGREGATION REMEDY PLAN

A. The Pupil Assignment Component

1. Preface

The pupil assignment plan described herein was developed to comply with the July 29, 1977 Order of the United States Federal District Court. The plan desegregates the entire Columbus City School District by eliminating the racial identifiability of schools. The definition of a racially identifiable school follows the criterion applied throughout the July 29th Court Order — that is, any school in which the black pupil population falls outside a range of $32\% \pm 15\%$.

2. Considerations for Pupil Assignment

In developing the pupil assignment component of the remedy plan, considerations which gave direction to planning included:

Approach (Goal, Techniques). Eliminate racially identifiable schools. Use techniques such as boundary changes, grade level reorganizations, pairings and pairings and clusterings, and the vacating of schools.

Approach (Equitability). Distribute the burdens of desegregating equitably among black and non-black pupils.

Process (Racially Non-Identifiable Schools). Involve racially non-identifiable schools when it contributes to the elimination of racially identifiable schools.

Process (Non-Contiguous Attendance Areas). Assign no more than one non-contiguous attendance area to a junior or senior high school attendance area.

Process (Building Blocks). Use elementary school attendance areas as the major building blocks in developing the pupil assignment component of the remedy plan.

Process (Building Location). Locate all buildings within the attendance areas they serve.

Definition (Racially Identifiable School). Consider schools racially unidentifiable if they are $\pm 15\%$ of the city-wide black average.

Enrollment Figures. Use the pupil population figures from the October 1, 1976 HEW Report adjusted to reflect residential school enrollment. Assume that pupil enrollments in terms of numbers and racial composition at the time of implementation will approximate the October 1, 1976 adjusted HEW Report.

Feeder Patterns. Maintain feeder patterns where possible from elementary to junior and junior to senior high school.

Grade Organization. Maintain an elementary (1-6), junior high (7-9), and senior high (10-12) organization where possible. Establish primary centers (1-3, 1-4) and intermediate centers (4-6, 5-6) when necessary.

Grade Organization (Combination Schools). Eliminate combination schools: elementary-junior high schools, junior-senior high schools.

Grade Organization (Primary Level). Include at least three (3) primary grades in a primary center. Avoid one and/or two grade primary centers.

Grade Organization (Schools Attended). Have a pupil assigned to as few schools as possible in grades 1-12. Avoid more than two schools for the elementary years (Grades 1-6).

Transportation (Minimal). Reassign pupils in ways that result in minimal distance traveled and time required for transportation.

Transportation. Provide transportation when —

- Pupil resides more than 2 miles from assigned school and desires transportation.
- Severe safety hazards exist.

Reimburse pupils when transportation cannot be realistically provided yet the pupil is eligible.

Finance. General fund monies are at a critical low. Make prudent use of all funds including those related to desegregation.

Finance (Efficient Operation). Operate school at capacity or slightly above it to encourage the vacating of unneeded schools (low capacity and small enrollments) and the efficient use of staff in the remaining schools.

3. Vacated Buildings

In the development of the pupil assignment plan, several buildings were vacated. Factors considered in vacating these buildings included:

Building Capacity — when a building has a capacity of less than 400 pupils.

Declining Enrollment — when a school drops substantially below rated capacity.

Building Age/Nature — When a building reaches the point that the costs of maintenance/remodeling are excessively high and/or the internal organization of the rooms does not accommodate the instructional program.

Maintenance Costs — when a building cannot be operated economically, due to heating plant or maintenance costs.

Environmental Changes — when a building location becomes inaccessible, undesirable, hazardous, etc., due to urban deterioration, urban development/renewal, alterations of traffic patterns, etc.

Alternate Use — when a building location or physical design provide good prospects for an alternative school, sale or conversion to another use.

Organizational Considerations — when a building includes more than one organizational unit (elementary-junior or junior-senior) and can be reduced to one organizational unit.

Desegregation Potential — when the vacating of a building and subsequent consolidation/redistricting/clustering can improve racial balance.

Table 1 contains a listing of vacated buildings and their intended disposition under the auspices of the Remedy Plan.

4. Pupil Assignment: Elementary School Groupings

The pages following Table 1 contain charts reflecting Desegregation Remedy Plan statistics for each elementary school or school cluster.

Each chart contains the names of the schools involved in the cluster and the designated grade level organization of the building. Vacated schools are identified. The projected enrollment of the school is then listed in terms of the number of black pupils, the number of non-black pupils, the percent of the total enrollment that is black, kindergarten enrollment and total enrollment. The school enrollment capacity follows these projections.

The next section of each chart portrays projected pupil transportation in terms of the number of pupils to be transported. The transportation projections are presented for black and non-black pupils, and in terms of the total number of pupils transported.

The last chart in this sequence presents the overall totals for the elementary school aspect of the Desegregation Remedy Plan.

TABLE I
VACATED BUILDINGS AND BUILDING
DISPOSITION

School	Racial Identity: % Black, Oct. 1976			Disposition
	(47.1-100%) Black	(17.0-47.0%) Unidentifiable	(0.0-16.9%) Non-Black	
Elementary				
ALUM CREST	X			Junior High Occupancy Alternative L.E.M.
BARNETT		X		
BELLOWS			X	
COURTRIGHT		X		
CRESTVIEW			X	
DOUGLAS	X			Alternative: Informal
EAKIN		X		
GETTYSBURG			X	
GLENMONT			X	
HEIMANDALE		X		
HOMEDALE			X	Alternative: I.G.E.
INDIANOLA			X	
JAMES ROAD			X	
LEXINGTON	X			Alternative: Traditional
LINDEN PARK		X		
MARBURN			X	
MILO	X			Alternative: Traditional
NORTHRIDGE			X	
OAKLAND PARK			X	
PARSONS			X	
SHEPARD	X			
STEWART			X	Alternative: Traditional
VALLEYVIEW			X	
WALFORD			X	
WAYNE			X	
WILLIS PARK			X	
Elementary Total	5	5	16	

TABLE I
VACATED BUILDINGS AND BUILDING
DISPOSITION (Continued)

School	Racial Identity: % Black, Oct. 1976			Disposition
	(47.1-100%) Black	(17.0-47.0%) Unidentifiable	(0.0-16.9%) Non-Black	
<u>Junior High</u>				
BEEHCROFT			X	Senior High Occupancy Alternative: Success Impact
FRANKLIN	X			
INDEPENDENCE			X	Senior High Occupancy Elementary Occupancy
McGUFFEY		X		
ROOSEVELT	X			Junior High Occupancy
Junior High Total	<u>2</u>	<u>1</u>	<u>2</u>	
<u>Senior High</u>				
NORTH			X	
MOHAWK	X			
Senior High Total	<u>1</u>	<u>0</u>	<u>1</u>	
All School Total	<u>8</u>	<u>6</u>	<u>19</u>	

CHART I
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Clarfield	K, 1-3	159	432	26.9	591	56	647	690	149	17	166
Parsons	(Vacate)							420	9	124	133
Scioto Trail	K, 4-6	99	270	26.8	369	89	458	540	0	133	133
Stockbridge	K, 4-6	60	162	27.0	222	52	274	480	0	156	156
	Total	318	864	27.0	1182	197	1,379		158	430	588

CHART 2
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Cedarwood Moler (11%) Watkins	K, 4-6	108	258	29.5	366	79	445	630	6	231	237
	K, 1-3	108	258	29.5	366	43	409	510	28	21	49
	Total	216	516	29.5	732	122	854		89	18	107
									123	270	393

CHART 3

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Non-Black		% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black		Total
		Black		Black					Black		
Fornof	K, 1-4	120	220	35.3	340	61	401	390	3	51	54
Heimandale	(Vacate)							420	73	165	238
Koebel	K, 5-6	126	240	34.4	366	59	425	420	177	58	235
Reeb	K, 1-4	132	260	33.7	392	63	455	660	14	112	126
	Total	378	720	34.4	1098	183	1281		267	386	653

CHART 4
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

[illegible]

CHART 5
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Deshler Hcyl Siebert	K, 5-6	188	334	36.0	522	123	645	810	144	77	221
	K, 1-4	232	384	37.7	616	86	702	630			
	K, 1-4	144	284	33.6	428	52	480	480	1	104	105
	Total	564	1002	36.0	1566	261	1827		145	181	326

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CHART 6
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Barnett (43%)											
Berwick	K, 1-4	132	312	29.7	444	77	521	480	9	83	92
Courtright (90%)	(Vacate)								40	39	79
Olde Orchard	K, 5-6	152	360	29.7	512	76	588	540	47	84	131
Scottwood	K, 1-4	172	408	29.7	580	103	683	720	2	388	390
								630	60	64	124
	Total	456	1080	29.7	1536	256	1792		158	658	816

CHART 7

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation					
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Alum Crest	(Vacate)							420	132	43	175
Moler (89%)	K, 5-6	130	298	30.5	428	78	506	480	143	71	214
Oakmont	K, 1-4	120	276	30.3	396	63	459	420	10	115	125
Woodcrest	K, 1-4	140	320	30.4	460	73	533	600	11	134	145
	Total	390	894	30.5	1284	214	1498		296	363	659

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CHART 8
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Fairwood	K, 5-6	152	262	36.7	414	79	493	720	298	21	319
Liberty	K, 1-4	168	288	36.8	456	70	526	660	12	234	246
Maybury	K, 1-4	136	236	36.6	372	58	430	720	2	115	117

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Main	K, 1-3	171	285	37.5	456	54	510	450	148	14	162
Slady Lane	K, 4-6	171	285	37.5	456	98	554	630	4	147	151
Willis Park	(Vacate)							480	18	124	142
	Total	342	570	37.5	912	152	1064		170	285	455

CHART 10

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Courtright (10%)											
Easthaven	K, 1-4	112	320	25.9	432	87	519	630	18	33	51
Kent (75%)	K, 5-6	126	385	26.0	484	48	532	570	16	159	175
Leawood	K, 1-4	140	396	26.1	536	107	643	640	181	13	194
Pinecrest (20%)									17	217	234
									1	22	23
	Total	378	1074	26.0	1452	242	1694		233	444	677

CHART 11

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

Projected Pupil Enrollment						Projected Pupil Transportation				
School	Organization	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Barnett (57%)	(Vacate)									
Fair	K, 5-6	310	32.3	458	68	526	330	8	27	35
Fairmoor	K, 1-4	384	30.9	556	98	654	620	247	24	271
James	(Vacate)						660	11	117	128
Pinecrest (80%)	K, 1-4	236	34.4	360	63	423	450	2	67	69
	Total	930	32.3	1374	229	1603	660	4	87	91
								272	322	594

CHART 12

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation			
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black	
									Black	Total
Broadleigh	K, 1-6	138	228	37.7	366	61	427	630		

CHART 13

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Total
Alpine	156	376	29.3	532	92	624	630	183
Northgate	160	404	28.4	564	99	663	600	304
South Mifflin	158	390	28.8	548	83	631	690	334
Total	474	1170	28.8	1644	274	1,918		821

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CHART 14

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Total
Cassady	198	330	37.5	528	107	635	630	525
Devonshire	236	388	37.8	624	92	716	690	186
Forest Park	160	272	37.2	432	65	497	660	130
Total	594	990	37.5	1584	264	1848		841

CHART 15

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Total
Arlington Park	144	316	31.3	460	74	534	540	294
Avalon	168	360	31.8	528	91	619	600	289
Walden	120	272	30.6	392	65	457	450	131
Total	432	948	31.3	1,380	230	1610		714

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CHART 16

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Total
East Columbus	146	388	27.3	534	96	630	630	276
Northtowne	92	232	28.4	324	52	376	420	103
Parkmoor	116	300	27.8	416	66	482	480	131
Shepard (Vacate)							330	192
Valley Forge	84	244	25.6	328	53	381	630	106
Total	438	1164	27.3	1602	267	1869		808

CHART 17

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation							
		Non-Black		% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black		Total		
		Black	Black		Black				Black	Black			
Beatty Park (50%)													
Maize	K, 4-6	186	324	36.5	510	107	617	660	0	153	153	74	
Northridge	(Vacate)							570	4	167	171		
Pilgrim	K, 1-3	186	324	36.5	510	63	573	540	136	6	142		
	Total	372	648	36.5	1,020	170	1,190		212	328	540		

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CHART 18

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation					
		Non-Black		% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black		
		Black	Black		Black				Black	Total	
Beaumont	K, 1-4	108	244	30.7	352	69	421	450	13	83	96
Eastgate	K, 5-6	120	264	31.3	384	48	432	450	193	2	195
North Linden	K, 1-4	132	284	31.7	416	75	491	510	7	104	111
Walford	(Vacate)								4	76	80
	Total	360	792	31.3	1152	192	1344		217	265	482

CHART 19

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Kdgn.	Total	School Capacity	Projected Pupil Transportation		
		Black	Non-Black	%	Sub Total				Black	Non-Black	Total
Huy Oakland Park	K, 4-6	150	360	29.4	510	88	598	720	6	258	264
	(Vacate - Alternative)					34	34	480	2	99	101
Trevitt	K, 1-3	150	360	29.4	510	48	558	570	142	2	144
	Total	300	720	29.4	1020	170	1190		150	359	509

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CHART 20

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Innis	K, 1-6	144	348	29.4	492	82	574	600	126	305	431

CHART 21
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation		
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
East Linden	144	276	34.3	420	70	490	540

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CHART 22
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black
Duxberry Park	152	344	30.6	496	81	577	630	28
Gables	152	364	29.5	516	89	605	600	177
Gettysburg	152	324	31.9	476	78	554	300	289
Winterset							680	356
Total	456	1032	30.6	1488	248	1736		850

CHART 23
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black
Gladstone	124	264	32.0	388	60	448	450	5
Homedale							330	59
Salem	124	268	31.6	392	68	460	660	1
Sharon	124	260	32.3	384	66	450	450	69
Total	372	792	32.0	1,164	194	1,358		281

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CHART 24
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation			
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black
Cranbrook	117	171	40.6	288	60	348	570	19
Kenwood	135	216	38.5	351	75	426	480	4
Marburn							420	9
Windsor	252	387	39.4	639	78	717	810	231
Total	504	774	39.4	1,278	213	1,491		560

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CHART 25

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation		
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Brentnell	153	345	30.7	498	53	551	540
Glenmont							540
Indian Springs	153	345	30.7	498	113	611	690
(Colerain)							
Total	306	690	30.7	996	116	1,162	154
							368
							522

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CHART 26

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation		
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Clinton	216	399	35.1	615	133	748	780
Crestview							360
Hamilton	216	399	35.1	615	72	687	720
Total	432	798	35.1	1,230	205	1,435	
							266
							129
							4
							399
							614

CHART 27

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation		
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Calumet	64	156	29.1	220	36	256	360
Como	124	276	31.0	400	67	467	600
Hudson	94	216	30.3	310	52	362	420
Total	282	648	30.3	930	155	1,085	
							176
							202
							378

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CHART 28

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation		
	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Linden Park							
(Vacate - Alternative)					53	53	690
McGuffey	240	498	32.5	738	70	808	1,380
Total	240	498	32.5	738	123	861	

CHART 29

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation				
		Non-Black		% Black	Sub Total	Total	School Capacity	Non-Black		Total
		Black	432	32.1	636			106	742	
Linden	K, 1-6	204	432	32.1	636	106	742	840		

CHART 30

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation					
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Eleventh (60%) Indianola	K, 1-4	144	424	25.4	568	32	600	780	58	6	64
	(Vacate - (Alternative)					36	36	420			
Medary	K, 5-6	72	212	25.4	284	74	358	570	11	285	296
	Total	216	636	25.4	852	142	994		69	291	360

CHART 31
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Non-Black	
									Black	Total
Eleventh (40%)										
Fifth	K, 4-6	171	297	36.5	468	75	543	540	58	64
Kingswood	K, 4-6	99	159	38.4	258	42	300	660	14	224
Lexington	(Vacate)								20	153
Weinland Park	K, 1-3	270	456	37.2	726	125	851	270	218	222
								810	89	217
	Total	540	912	37.2	1,452	242	1,694		396	880

CHART 32

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment						Projected Pupil Transportation				
		Non-Black		% Black	Sub Total		Kdgn.	Total	School Capacity	Black	Non-Black	Total
		Black										
Hubbard Milo Second Thurber	K, 1-4 (Vacate)	120	288	29.4	408	40	448	420				
	K, 5-6	110	262	29.6	372	96	468	570	71	7	78	
	K, 1-4	100	236	29.8	336	50	386	390				
	Total	330	786	29.6	1,116	186	1,302		71	7	78	

CHART 33

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation					
		Black	Non-Black	%	Sub		Kdgn.	Total	School Capacity	Black	Non-Black	Total
					Total	Total						
Eakin	(Vacate)								570	31	138	169
Georgian Heights	K, 4-6	195	420	31.7	615	118	733		690	1	185	186
Highland	K, 1-3	195	420	31.7	615	87	702		720	164	98	262
	Total	390	840	31.7	1,230	205	1,435			196	421	617

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CHART 34

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	%	Sub Total	Kdgn.	Total	Schol. Capacity	Black	Non-Black	Total
Bellows (90%)	(Vacate)							390	28	231	259
Sullivant	K, 1-3	141	312	31.1	453	88	541	570	121	33	154
Westgate	K, 4-6	141	312	31.1	453	63	516	600	9	181	190
	Total	282	624	31.1	906	151	1,057		158	445	603

CHART 35

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

Projected Pupil Enrollment							Projected Pupil Transportation				
School	Organization	Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Projected Pupil Transportation		
									Black	Non-Black	
Beatty Park (50%)	K, 1-3	75	201	27.2	276	25	301	540	72	2	74
Garfield	K, 1-3	111	294	27.4	405	35	440	510	106	0	106
Valleyview	(Vacate)							330	6	289	295
West Broad	K, 4-6	186	495	27.3	681	167	848	900	5	369	374
	Total	372	990	27.3	1,362	227	1,589		189	660	849

CHART 36

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment					Projected Pupil Transportation				
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity	Black	Non-Black	Total
Bims	K, 1-4	132	280	32.0	412	65	477	720	3	128	131
Burroughs Douglas	K, 1-4	204	380	34.9	584	96	680	780	17	177	194
	(Vacate - Alternative)					53	53	510	185	28	213
Lindbergh	K, 1-4	148	324	31.4	472	80	552	510	2	86	88
Ohio	K, 5-6	242	492	33.0	734	73	807	780	243	47	290
Wayne	(Vacate)							270	9	65	74
	Total	726	1,476	33.0	2,202	367	2,569		456	531	990

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CHART 37

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation		
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Avondale	K, 1-4	108	300	26.5	408	67	475	510
Dana	K, 1-4	120	324	27.0	444	71	515	630
Kent (25%)								
Livingston (75%)	K, 5-6	164	452	26.6	616	89	705	840
West Mound	K, 1-4	100	280	26.2	380	81	461	660
Total		492	1,356	27.0	1,848	308	2,156	
								293
								502
								795

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CHART 38

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation		
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Chicago	K, 1-6	72	258	21.8	330	55	385	510
Total		72	258	21.8	330	55	385	

CHART 39

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation		
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Bellevue (10%)	K, 1-6	60	192	23.8	252	42	294	420
Franklin		60	192	23.8	252	42	294	
Total		120	384	23.8	504	84	588	

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CHART 40

PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Organization	Projected Pupil Enrollment				Projected Pupil Transportation		
		Black	Non-Black	% Black	Sub Total	Kdgn.	Total	School Capacity
Beck	K, 1-6	138	384	26.4	522	68	590	660
Livingston (25%)								
Stewart	(Vacate - Alternative)					19	19	390
Total		138	384	26.4	522	87	609	

CHART 41
PUPIL ASSIGNMENT: ELEMENTARY ATTENDANCE PATTERNS

School	Projected Pupil Enrollment				Projected Pupil Transportation		
	Black	Non-Black	% Black	Sub Total	Black	Non-Black	Total
TOTAL ELEMENTARY	14,106	30,726	31.5	44,832	7,496	13,113	20,609

5. Pupil Assignment: Junior High School

The following pages contain charts reflecting the Desegregation Remedy Plan statistics for junior high schools.

Each chart contains the name of the junior high school and the names of the elementary schools which will comprise the junior high feeder area. This latter grouping of schools also includes the percent of the elementary school population involved in the designated junior high school feeder area when that percentage is less than 100 percent.

Following this identifying information the projected enrollments of the feeder schools and the designated junior high are presented. These projections are portrayed in terms of the number of black pupils, the number of non-black pupils, percent of the total enrollment that is black, and the total enrollment. The enrollment capacity of the designated junior high is then presented.

The next section of each chart portrays projected pupil transportation data for each elementary school involved in the designated junior high school feeder pattern. The total for the designated junior high feeder area is also presented. These pupil transportation projections are presented in terms of pupils to be transported. Projections are further detailed in each general case for black and non-black pupils, and in terms of the total number of pupils transported.

The last chart in this sequence presents the overall totals associated for the junior high school aspect of the Desegregation Remedy Plan.

CHART 42

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
BARRETT		375	691	35.2	1,066			
	Heyl	41	214	16.1	255			
	Kent	181	13	93.3	194			
	Livingston (75%)	149	68	68.7	217			
	Siebert	1	153	0.6	154			
	Southwood	3	243	1.2	246			

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CHART 43

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
BEERY		248	576	30.1	824	159	559	718
	Fornof	4	75	5.1	79	4	75	79
	Heimandale	31	70	30.7	101	31	70	101
	Lincoln Park	103	117	46.8	220	103	117	220
	Reeb	21	166	11.2	187	21	166	187
	Scioto Trail	0	131	0.0	131	0	131	131
	Watkins	89	17	84.0	106			

CHART 44

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
BUCKEYE		305	574	34.7	879	281	60	341
	Cedarwood	6	227	2.6	233			
	Clarfield	149	17	89.8	166	149	17	166
	Koebel	132	43	75.4	175	132	43	175
	Moler (11%)	9	11	45.0	20			
	Parsons	9	122	6.9	131			
	Stockbridge	0	154	0.0	154			

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CHART 45

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
CHAMPION		258	443	36.8	701	98	437	535
	Beatty Park (50%)	72	2	97.3	74			
	Beaumont	19	121	13.6	140	19	121	140
	Innis	71	171	29.3	242	71	171	242
	Northtowne	8	145	5.2	153	8	145	153
	Pilgrim (80%)	88	4	95.7	92			

CHART 46

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
CLINTON		349	667	34.4	1,016	331	167	498
	Brentnell	150	9	94.3	159	150	9	159
	Gladstone	178	4	97.8	182	178	4	182
	Maize	0	150	0.0	150			
	North Linden	10	154	6.1	164			
	Northridge (51%)	2	84	2.3	86			
	Valley Forge	3	154	1.9	157			
	Walford	6	112	5.1	118			
						3	154	157

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CHART 47

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
CRESTVIEW		281	739	27.5	1,020	278	350	628
	Clinton	2	262	0.8	264			
	Crestview	1	127	0.8	128			
	Hudson	125	31	80.1	156	125	31	156
	Linden	101	212	32.3	313	101	212	313
	Linden Park	52	101	32.7	159	52	107	159

CHART 48

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
DOMINION		229	651	26.0	880	226	320	546
	Duxberry Park	222	21	91.4	243			
	Glenmont	2	147	1.3	149	222	21	243
	Indian Springs (Colerain)	1	184	0.5	185			
	Salem	2	197	1.0	199	2	197	199
	Sharon	2	102	1.9	104	2	102	104

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CHART 49

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
EASTMOOR		294	466	38.7	760	198	89	287
	Barnett (57%)	9	42	17.6	51			
	Broadleigh	70	112	38.5	182			
	East Columbus	121	84	59.0	205	121	84	205
	Fairmoor	16	173	8.5	189			
	James Road (50%)	1	50	2.0	51			
	Shepard	77	5	93.9	82	77	5	82

CHART 50

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment				School Capacity	Projected Pupil Transportation	
		Black	Non-Black	% Black	Total		Black	Non-Black
EVERETT		281	654	30.1	935	154	64	218
	Fifth	14	207	6.3	221			
	Hubbard	1	119	0.8	120			
	Kingswood (52%)	8	57	12.3	65			
	Lexington	93	2	97.9	95	8	57	65
	Milo	106	10	91.4	116	93	2	95
	Second	31	138	18.3	169	53	5	58
	Thurber	28	121	18.8	149			

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CHART 51

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment				School Capacity	Projected Pupil Transportation		
		Black	Non- Black	% Black	Total		Black	Non- Black	Total
HILLTONIA		302	581	34.2	883	1,000	239	127	366
	Binns (20%)	1	37	2.6	38				
	Deshler	239	127	65.3	366				
	Lindbergh	3	127	2.3	130		239	127	366
	Wayne	13	95	12.0	108				
	West Mound	46	195	19.1	241				

CHART 52

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment				School Capacity	Projected Pupil Transportation		
		Black	Non- Black	% Black	Total		Black	Non- Black	Total
INDIANOLA		263	498	34.6	761	800	8	52	60
	Eleventh	145	14	91.2	159				
	Indianola	13	95	12.0	108				
	Kingswood (48%)	8	52	13.3	60		8	52	60
	Medary	8	211	3.7	219				
	Weinland Park	89	126	41.4	215				

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CHART 53

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment				Projected Pupil Transportation			
		Black	Non- Black	% Black	Total	School Capacity	Black	Non- Black	Total
JOHNSON PARK		391	628	38.4	1,019	1,000	151	33	184
	Barnett (43%)	6	32	15.8	38				
	Berwick	60	57	51.3	117		6	32	38
	Courtright (90%)	71	124	36.4	195				
	Eastgate	145	1	99.3	146				
	James Road (50%)	2	50	3.8	52		145	1	146
	Leawood (45%)	9	109	7.6	118				
	Pinecrest	8	160	4.8	168				
	Scottwood	90	95	48.6	185				

CHART 54

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Projected Pupil Enrollment			Projected Pupil Transportation		
	Elementary School Feeder Areas	Black	Non-Black	% Black	School Capacity	Total
LINMOOR		297	510	36.8	1,000	807
	Calumet	3	104	2.8		107
	Como	12	185	6.1		197
	Hamilton	211	4	98.1		215
	McGuffey	69	137	33.5		206
	Northridge (49%)	2	80	2.4		82

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CHART 55

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Projected Pupil Enrollment			Projected Pupil Transportation		
	Elementary School Feeder Areas	Black	Non-Black	% Black	School Capacity	Total
MEDINA		263	524	33.4	900	787
	Arlington Park	183	37	83.2		220
	East Linden	72	136	34.6		208
	Huy	6	254	2.3		260
	Oakland Park	2	97	2.0		99

CHART 56

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Projected Pupil Enrollment			Projected Pupil Transportation		
	Elementary School Feeder Areas	Black	Non-Black	% Black	School Capacity	Total
MIFFLIN		311	848	26.8	1,200	1,159
	Alpine	6	265	2.2		271
	Cassady	298	24	92.6		322
	Devonshire	1	273	0.4		274
	Northgate	6	286	2.1		292

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CHART 57

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Projected Pupil Enrollment			Projected Pupil Transportation		
	Elementary School Feeder Areas	Black	Non-Black	% Black	School Capacity	Total
MOHAWK		462	763	37.7	1,225	1,225
	Beck	18	111	14.0		129
	Burroughs	25	261	8.7		286
	Franklinton	30	85	26.1		115
	Livingston (25%)	50	22	69.4		72
	Main	148	14	91.4		162
	Ohio	182	35	83.9		217
	Stewart	0	56	0.0		56
	Westgate	9	179	4.8		188

CHART 58

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
MONROE		170	491	25.7	661	6	488
	Gables	2	139	1.4	141		139
	Gettysburg	0	122	0.0	122	0	122
	Pilgrim (20%)	22	1	95.7	23		
	Trevitt	142	2	98.6	144		
	Winterset	4	227	1.7	231	4	227

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CHART 59

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
RIDGVIEW		254	469	35.1	723	244	256
	Cranbrook	11	166	6.2	177	11	166
	Homedale	3	87	3.3	90	3	87
	Kenwood	4	109	3.5	113		
	Marburn	6	104	5.5	110		
	Windsor	230	3	98.7	233	230	3

CHART 60

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
SHERWOOD		232	591	28.2	823	201	216
	Fair	185	18	91.1	203	185	18
	Leawood (45%)	9	108	7.7	117		
	Shady Lane	4	145	2.7	149		
	Willis Park	18	122	12.9	140		
	Woodcrest	16	198	7.5	214	16	198

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CHART 61

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
SOUTHMOOR		280	623	31.0	903	98	495
	Alum Crest	58	18	76.3	76	58	18
	Courtright (10%)	8	14	36.4	22	8	14
	Easthaven	24	235	9.3	259	24	235
	Maybury	3	170	1.7	173	3	170
	Moler (89%)	110	51	68.3	161		
	Oakmont (20%)	3	34	8.1	37	3	34
	Smith Road	72	77	48.3	149		
	Leawood (10%)	2	24	7.7	26	2	24
						98	495

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation	
		Black	Non- Black	% Black		Black	Non- Black
		173	673	20.4	900		
	Avondale	2	196	1.0			
	Bellows	13	109	10.7			
	Chicago	35	127	21.6			
	Dana	2	208	1.0			
	Sullivant	121	33	78.6			
							154

CHART 63

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non- Black	% Black		Black	Non- Black	Total
WEDGEWOOD		174	491	26.2	665	139	21	160
	Binns (80%)	3	152	1.9	155			
	Douglas	139	21	86.9	160	139	21	160
	Eakin	31	136	18.6	167			
	Georgian Heights	1	182	0.5	183			

CHART 64

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non- Black	% Black		Black	Non- Black	Total
		350	583	37.5	933	219	51	270
	Beatty Park (50%)	72	2	97.3	74	72	2	74
	Garfield	106	0	100.0	106	106	0	106
	Highland	164	96	63.1	260	41	24	65
	Valleyview	3	122	2.4	125	0	25	25
	West Broad	5	363	1.4	368			

CHART 65

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas		Projected Pupil Enrollment			Projected Pupil Transportation		
	Black	Non-Black	% Black	Total	School Capacity	Black	Non-Black	Total
	268	830	24.4	1,098	1,050	231	82	313
Avalon	24	246	8.9	270				
Forest Park	1	191	0.5	192		6	58	64
Parkmoor	9	185	4.6	194				
South Mifflin	225	24	90.4	249		225	24	249
Walden	9	184	4.7	193				

CHART 66

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
YORKTOWN		240	577	29.4	850	228	441	669
	Fairwood	223	15	93.7		223	15	238
	Liberty	3	204	1.4		3	204	207
	Oakmont (80%)	12	136	8.1				
	Olde Orchard	2	222	0.9		2	222	224

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CHART 67

PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS SUMMARY

School	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
	Black	Non-Black	% Black		Black	Non-Black	Total
TOTAL	7,050	15,141	31.8	22,191	4,030	6,039	10,069
BARRETT	375	691	35.2	1,066			
BEECHCROFT							
BEERY	248	576	30.1	824			
BUCKEYE	305	574	34.7	879	159	559	718
CHAMPION	258	443	36.8	701	281	60	341
CLINTON	349	667	34.4	1,016	98	437	535
CRESTVIEW	281	739	27.5	1,020	331	167	498
DOMINION	229	651	26.0	880	278	350	628
EASTMOOR	294	466	38.7	760	226	320	546
EVERETT	291	654	30.1	935	198	89	287
FRANKLIN					154	64	218
HILLTONIA	302	581	34.2	883	239	127	366
INDEPENDENCE	263	498	34.6	761	8	52	60
INDIANOLA	391	628	38.4	1,019	151	33	184
JOHNSON PARK							

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CHART 67 (Continued)
PUPIL ASSIGNMENT: JUNIOR HIGH SCHOOL ATTENDANCE PATTERNS SUMMARY

School	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
	Black	Non-Black	% Black		Black	Non-Black	Total
LINMOOR	297	510	36.8	1,000	11	276	287
McGUFFEY	ELEMENTARY OCCUPANCY						
MEDINA	263	524	33.4	900	255	173	428
MIFFLIN	311	848	26.8	1,200	241	842	1,083
MOHAWK	462	763	37.7	1,250	34	440	474
MONROE	170	491	25.7	700	6	488	494
RIDGEVIEW	254	469	35.1	900	244	256	500
ROOSEVELT	VACATED						
SHERWOOD	232	591	28.2	900	201	216	417
SOUTHMOOR	280	623	31.0	800	98	495	593
STARLING	173	673	20.4	900			
WEDGEWOOD	174	491	26.2	750	139	21	160
WESTMOOR	350	583	37.5	1,000	219	51	270
WOODWARD PARK	268	830	24.4	1,050	231	82	313
YORKTOWN	240	577	29.4	850	228	441	669

6. Pupil Assignment: Senior High School

The following pages contain charts reflecting the Desegregation Remedy Plan statistics for the senior high schools.

Each chart contains the name of the senior high school and the names of the elementary schools which will comprise the senior high feeder area. This latter grouping of schools also includes the percent of the elementary school population involved in the designated senior high school feeder area when that percentage is less than 100 percent.

Following this identifying information the projected enrollments of the feeder schools and the designated senior high are presented. These projections are portrayed in terms of the number of black pupils, the number of non-black pupils, the percent of the enrollment that is black, and total enrollment. The enrollment capacity of the designated senior high is then presented.

The next section of each chart portrays projected pupil transportation data for each elementary school involved in the designated senior high school feeder pattern. The total for the designated senior high feeder area is also presented. These pupil transportation projections are presented in terms of pupils to be transported. Projections are further detailed in each general case for black and non-black pupils, and in terms of the total number of pupils transported.

The last chart in this sequence presents the overall totals for the senior high school aspect of the Desegregation Remedy Plan.

CHART 68

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
BEECHCROFT		423	867	32.8	1,290	404	56
	Alpine	6	241	2.4	247		
	Arlington Park	181	34	84.2	215		
	Avalon (25%)	6	62	8.8	68	181	34
	Devonshire	1	248	0.4	249		
	Northgate	6	260	2.3	266		
	South Mifflin	223	22	91.0	245	223	22
							245

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CHART 69

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
BRIGGS		209	487	30.0	696	180	31
	Binns	4	172	2.3	176		
	Burroughs (34%)	9	81	10.0	90		
	Lindbergh	3	116	2.5	119		
	Ohio	180	31	85.3	211	180	31
	Wayne	13	87	13.0	100		
							211

CHART 70

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
BROOKHAVEN		517	932	35.7	1,449	511	558
	Duxberry Park	220	19	92.1	239	220	19
	East Linden	71	124	36.4	195	71	124
	Linden	100	193	34.1	293	100	193
	Linden Park	51	97	34.5	148	51	97
	Maize	0	137	0.0	137		
	McGuffey	69	125	35.6	194	69	125
	Northridge	4	149	2.6	153		
	Oakland Park	2	88	2.2	90		
							1,069

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CHART 71

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
CENTENNIAL		278	556	33.3	834	272	222
	Gables	2	127	1.6	129		
	Gettysburg	0	111	0.0	111	0	111
	Kenwood	4	99	3.9	103	4	99
	Milo	105	9	92.1	114	105	9
	Pilgrim (20%)	22	1	95.7	23	22	1
	Trevitt	141	2	98.6	143	141	2
	Winterset	4	207	1.9	211		
							494
							111

CHART 76
PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
LINDEN	McKINLEY	488	928	34.5	1,416	139	670	809
	Calumet	3	95	3.1	98			
	Como	11	168	6.1	179	3	95	98
	Crestview	1	115	0.9	116	5	84	89
	Hamilton	209	3	98.6	212	1	115	116
	Hudson	124	28	81.6	152			
	Indianola	13	86	13.1	99			
	Medary	8	192	4.0	200	8	58	66
	Second	31	126	19.7	157	3	77	80
	Weinland Park	88	115	43.3	203	31	126	157
						88	115	203

CHART 77

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
MARION	FRANKLIN	429	784	35.4	1,213	62	714	776
	Cedarwood	6	207	2.8	213	6	207	213
	Clarfield	148	15	90.8	163			
	Fornof	4	68	5.6	72	4	68	72
	Heimandale	31	63	33.0	94	31	63	94
	Koebel	131	39	77.1	170			
	Moler (11%)	13	6	68.4	19	13	6	19
	Parsons	8	111	6.7	119	8	111	119
	Scioto Trail	0	119	0.0	119	0	119	119
	Stockbridge	0	140	0.0	140	0	140	140
	Watkins	88	16	84.6	104			

CHART 78
PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
MIFFLIN		407	763	34.8	1,170	407	763	1,170
	Beaumont	19	111	14.6	130	19	111	130
	Cassady	295	22	93.1	317	295	22	317
	Huy	6	232	2.5	238	6	232	238
	Innis	71	156	31.3	227	71	156	227
	North Linden	10	140	6.7	150	10	140	150
	Walford	6	102	5.6	108	6	102	108

CHART 79
PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			School Capacity	Projected Pupil Transportation		
		Black	Non-Black	% Black		Black	Non-Black	Total
NORTHLAND		448	959	31.8	1,407	401	16	417
	Avalon (75%)	18	161	10.1	179			
	Brentnell	149	8	94.9	157	149	8	157
	Forest Park	1	174	0.6	175			
	Gladstone	176	3	98.3	179	176	3	179
	Northtowne	8	132	5.7	140			
	Parkmoor	9	169	5.1	178			
	Shepard	76	5	93.8	81	76	5	81
	Valley Forge	3	140	2.1	143			
	Walden	8	167	4.6	175			

CHART 80

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
SOUTH	Deshler	539	988	35.3	1,527		
	Heyl	237	116	67.1	353		
	Kent (75%)	41	195	17.4	236		
	Lincoln Park	134	9	93.7	143		
	Reeb	102	106	49.0	208		
	Siebert	21	151	12.2	172		
	Southwood	1	139	0.7	140		
	Stewart	3	221	1.3	224		
		0	51	0.0	51		

CHART 81

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
WALNUT RIDGE	Fair	621	989	38.6	1,610	565	369
	Fairwood	184	16	92.0	200	184	16
	Leawood (90%)	221	14	94.0	235	221	14
	Main	18	197	80.4	215		
	Oakmont	147	13	91.9	160	147	13
	Olde Orchard	11	124	8.1	135	11	124
	Shady Lane	2	202	1.0	204	2	202
	Willis Park	4	132	2.9	136		
	Woodcrest	18	111	14.0	129		
		16	180	8.2	196		

CHART 82

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
WEST	Beatty Park (50%)	539	1,160	31.7	1,699	545	336
	Burroughs (66%)	71	2	97.3	73	71	2
	Douglas	16	157	9.2	173		
	Eakin	137	19	87.8	156	137	19
	Garfield	31	124	20.0	155	31	124
	Georgian Heights	105	0	0.0	105	105	0
	Highland	1	166	0.6	167	1	166
	Valleyview	162	88	64.8	250		
	West Broad	3	111	2.6	114	0	25
	Westgate	5	331	1.5	336		
		8	162	4.7	170		

CHART 83

PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS

School	Elementary School Feeder Areas	Projected Pupil Enrollment			Projected Pupil Transportation		
		Black	Non-Black	% Black	School Capacity	Black	Non-Black
					Total		Total
WHETSTONE	Clinton	482	1,004	32.4	1,486	472	534
	Eleventh	2	239	0.8	241	1	164
	Glenmont	144	13	91.7	157	144	13
	Homedale	2	134	1.5	136		
	Indian Springs/Colerain	3	79	3.7	82	3	79
	Lexington	1	167	0.6	168		
	Marburn	92	2	97.9	94	92	2
	Salem	6	94	6.0	100		
	Sharon	2	180	1.1	182	2	180
	Windor	2	93	2.1	95	2	93
		228	3	98.7	231	228	3

CHART 84 PUPIL ASSIGNMENT: SENIOR HIGH SCHOOL ATTENDANCE PATTERNS SUMMARY

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School	Projected Pupil Enrollment			Projected Pupil Transportation			
	Black	Non-Black	% Black	School Capacity	Black	Non-Black	Total
TOTAL	6,984	13,779	33.5		4,731	6,078	10,809
BEECHCROFT	423	867	32.8	1,300	404	56	460
BRIGGS	209	487	30.0	800	180	31	211
BROOKHAVEN	517	932	35.7	1,350	511	558	1,069
CENTENNIAL	278	556	33.3	800	272	222	494
CENTRAL	508	1,051	32.6	1,400	289	262	551
EAST	372	663	35.9	1,100	70	657	727
EASTMOOR	450	893	33.5	1,400	346	474	820
INDEPENDENCE	274	755	26.6	1,300	268	416	684
LINDEN MCKINLEY	488	928	34.5	1,500	139	670	809
MARION FRANKLIN	429	784	35.4	1,500	62	714	776
MIFFLIN	407	763	34.8	1,200	407	763	1,170
MOHAWK							
NORTH							
NORTHLAND							
SOUTH							
WALNUT RIDGE							
WEST							
WHETSTONE							
JUNIOR HIGH OCCUPANCY							
VACATED							
	448	959	31.8	1,600	401	16	417
	539	988	35.3	1,600			
	621	989	38.6	1,600	565	369	934
	539	1,160	31.7	1,600	345	336	681
	482	1,004	32.4	1,400	472	534	1,006

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7. Pupil Assignment: All Schools

The following pages contain charts reflecting the school attendance area projections for grades K-12. These projections are portrayed for each elementary school that was open or under construction during the 1976-77 school year.

The name of the elementary school is first presented followed by its Remedy Plan grade level organization. The elementary school designated for kindergarten attendance under the Desegregation Remedy Plan is then presented. This is followed by the elementary school designated for primary grade attendance and intermediate grade attendance. In these last two cases, if the attendance is less than K-6, the grade levels are designated.

The schools designated for elementary school attendance are followed by the schools designated for junior high and senior high attendance in the Desegregation Remedy Plan.

Throughout all charts, if a former elementary attendance area is to be divided among more than one school by the Desegregation Remedy Plan, it is so indicated.

CHART 85 PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
ALPINE	K/1-4	Alpine	1-4 Alpine	5-6 South Mifflin	Mifflin	Beechcroft
ALUM CREST	VACATED	Moler	#1-4 Oakmont	5-6 Moler	Southmoor	Independence
ARLINGTON PARK	K/5-6	Arlington Park	1-4 Woodcrest	5-6 Arlington Park	Medina	Beechcroft
AVALON	K/1-4	Avalon	#1-4 Avalon 1-4 Walden	5-6 Arlington Park	Woodward Park	#Beechcroft Northland Central Eastmoor
AVONDALE	K/1-4	Avondale	1-4 Avondale	5-6 Livingston	Starling	West East
BARNETT	VACATED	#Berwick Pinecrest	#1-4 Berwick 1-4 Pinecrest	#5-6 Olde Orchard 5-6 Fair	#Johnson Park Eastmoor	
BEATTY PARK	K/1-3	#Beatty Park Pilgrim	#1-3 Beatty Park 1-3 Pilgrim	#4-6 West Broad 4-6 Maize	#Westmoor Champion	

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
BEAUMONT	K/1-4	Beaumont	1-4 Beaumont	5-6 Eastgate	Champion	Mifflin
BECK	K/1-6	Beck	1-3 Beck	4-6 Beck	Mohawk	Central
BELLOWS	VACATED	#Sullivan Franklinton	#1-3 Sullivan 1-3 Franklinton	#4-6 Westgate 4-6 Franklinton	Starling	Central
BERWICK	K/1-4	Berwick	1-4 Berwick	5-6 Olde Orchard	Johnson Park	Eastmoor
BINNS	K/1-4	Binns	1-4 Binns	5-6 Ohio	#Hilltonia Wedgewood	Briggs
BRENTNELL	K/4-6	Brentnell	#1-3 Colerain 1-3 Indian Springs	4-6 Brentnell	Clinton	Northland
BROADLEIGH	K/1-6	Broadleigh	1-3 Broadleigh	4-6 Broadleigh	Eastmoor	Eastmoor
BURROUGHS	K/1-4	Burroughs	1-4 Burroughs	5-6 Ohio	Mohawk	#Briggs West

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
CALUMET	K/1-4	Calumet	1-4 Calumet	5-6 Hudson	Linmoor	Linden McKinley
CASSADY	K/5-6	Cassady	#1-4 Devonshire 1-4 Forest Park	5-6 Cassady	Mifflin	Mifflin
CEDARWOOD	K/4-6	Cedarwood	1-3 Watkins	4-6 Cedarwood	Buckeye	Marion Franklin
CHICAGO	K/1-6	Chicago	1-3 Chicago	4-6 Chicago	Starling	Central
CLARFIELD	K/1-3	Clarfield	1-3 Clarfield	#4-6 Scioto Trail 4-6 Stockbridge	Buckeye	Marion Franklin
CLINTON	K/4-6	Clinton	1-3 Hamilton	4-6 Clinton	Crestview	Whetstone
COLERAIN	K/1-3	Colerain	1-3 Colerain	4-6 Brentnell	Dominion	Whetstone
COMO	K/1-4	Como	1-4 Como	5-6 Hudson	Linmoor	Linden McKinley
COURTRIGHT	VACATED	#Scottwood Leawood	#1-4 Scottwood 1-4 Leawood	#5-6 Olde Orchard 6-6 Kent	#Johnson Park Southmoor	#Eastmoor Independence

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
CRANBROOK	K/4-6	Cranbrook	1-3 Windsor	4-6 Cranbrook	Kidgeview	East
CRESTVIEW	VACATED	Clinton	1-3 Hamilton	4-6 Clinton	Crestview	Linden McKinley
DANA	K/1-4	Dana	1-4 Dana	5-6 Livingston	Starling	Central
DESHLER	K/5-6	Deshler	#1-4 Heyl 1-4 Siebert	5-6 Deshler	Hilltonia	South
DEVONSHIRE	K/1-4	Devonshire	1-4 Devonshire	5-6 Cassady	Mifflin	Beechcroft
DOUGLAS	VACATED ALTERNATIVE	Douglas	1-4 Birns #1-4 Burroughs 1-4 Lindbergh	5-6 Ohio	Wedgewood	West
DUXBERRY PARK	K/5-6	Duxberry Park	#1-4 Gables 1-4 Winterset	5-6 Duxberry Park	Dominion	Brookhaven
EAKIN	VACATED	Georgian Heights	1-3 Highland	4-6 Georgian Heights	Wedgewood	West

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
EAST COLUMBUS	K/5-6	East Columbus	#1-4 Northtowne 1-4 Parkmoor 1-4 Valley Forge	5-6 East Columbus	Eastmoor	Eastmoor
EAST LINDEN	K/1-6	East Linden	1-3 East Linden	4-6 East Linden	Medina	Brookhaven
EASTGATE	K/5-6	Eastgate	#1-4 Beaumont	5-6 Eastgate	Johnson Park	East
EASTHAVEN	K/1-4	Easthaven	1-4 North Linden	5-6 Kent	Southmoor	Independence
ELEVENTH	K/1-4	#Eleventh Weinland	1-4 Eleventh 1-3 Weinland	#5-6 Medary 4-6 Fifth	Indianola	Whetstone
FAIR	K/5-6	Fair	#1-4 Fairmoor 1-4 Pinecrest	4-6 Kingswood 5-6 Fair	Sherwood	Walnut Ridge

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
FAIRMOOR	K/1-4	Fairmoor	1-4 Fairmoor	5-6 Fair	Eastmoor	Eastmoor
FAIRWOOD	K/5-6	Fairwood	#1-4 Liberty 1-4 Maybury	5-6 Fairwood	Yorktown	Walnut Ridge
FIFTH	K/4-6	Fifth	1-3 Weinland Park	4-6 Fifth	Everett	East
FOREST PARK	K/1-4	Forest Park	1-4 Forest Park	5-6 Cassidy	Woodward Park	Northland
FORNOF	K/1-4	Fornof	1-4 Fornof	5-6 Koebel	Beery	Marion Franklin
FRANKLINTON	K/1-6	Franklinton	1-3 Franklinton	4-6 Franklinton	Mohawk	Central
GABLES	K/1-4	Gables	1-4 Gables	5-6 Duxberry Park	Monroe	Centennial
GARFIELD	K/1-3	Garfield	1-3 Garfield	4-6 West Broad	Westmoor	West
GEORGIAN HEIGHTS	K/4-6	Georgian Heights	1-3 Highland	4-6 Georgian Heights	Wedgewood	West

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
GETTYSBURG	VACATED	Gables	1-4 Gables	5-6 Duxberry Park	Monroe	Centennial
GLADSTONE	K/5-6	Gladstone	#1-4 Salem 1-4 Sharon	5-6 Gladstone	Clinton	Northland
GLENMONT	VACATED	Indian Springs	1-3 Indian Springs	4-6 Brentnell	Dominion	Whetstone
HAMILTON	K/1-3	Hamilton	1-3 Hamilton	4-6 Clinton	Linmoor	Linden McKinley
HEIMANDALE	VACATED	Fornof	1-4 Fornof	5-6 Koebel	Beery	Marion Franklin
HEYL	K/1-4	Heyl	1-4 Heyl	5-6 Deshler	Barrett	South
HIGHLAND	K/1-3	Highland	1-3 Highland	4-6 Georgian Heights	Westmoor	West
HOMEDALE	VACATED	Sharon	1-4 Sharon	5-6 Gladstone	Ridgeview	Whetstone
HUBBARD	K/1-4	Hubbard	1-4 Hubbard	5-6 Second	Everett	East

#Pupils will be assigned by geographic area to one of these schools.

CHART 85 (Continued) PUPIL ASSIGNMENT: ALL SCHOOLS (Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
HUDSON	K/5-6	Hudson	#1-4 Calumet 1-4 Como	5-6 Hudson	Crestview	Linden McKinley
HUY	K/4-6	Huy	1-3 Trevitt	4-6 Huy	Medina	Mifflin
INDIANOLA	VACATED ALTERNATIVE	Indianola	1-4 Eleventh	5-6 Medary	Indianola	Linden McKinley
INDIAN SPRINGS	K/1-3	Indian Springs	1-3 Indian Springs	4-6 Brentnell	Dominion	Whetstone
INNIS	K/1-6	Innis	1-3 Innis	4-6 Innis	Champion	Mifflin
JAMES ROAD	VACATED	Fairmoor	1-4 Fairmoor	5-6 Fair	#Eastmoor Johnson Park	Eastmoor
KENT	K/5-6	Livingston	1-4 Avondale #1-4 Dana 1-4 West Mound	5-6 Livingston	Barrett	South
		Kent	#1-4 Easthaven 1-4 Leawood	5-6 Kent	Barrett	South

#Pupils will be assigned by geographic area to one of these schools.

CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
KENWOOD	K/4-6	Kenwood	1-3 Windsor	4-6 Kenwood	Ridgeview	Centennial
KINGSWOOD	K/4-6	Kingswood	1-3 Weinland Park	4-6 Kingswood	#Everett	East
KOEBEL	K/5-6	Koebel	#1-4 Fornof 1-4 Reeb	5-6 Koebel	Indianola	Marion Franklin
LEAWOOD	K/1-4	Leawood	1-4 Leawood	5-6 Kent	Buckeye	
LXINGTON	VACATED	Weinland Park	1-3 Weinland Park	#4-6 Fifth	#Johnson Park	#Independence
LIBERTY	K/1-4	Liberty	1-4 Liberty	4-6 Kingswood	Sherwood	Walnut Ridge
LINCOLN PARK	K/1-4	Lincoln Park	1-4 Lincoln Park	5-6 Fairwood	Everett	Whetstone
LINDBERGH	K/1-4	Lindbergh	1-4 Lindbergh	5-6 Southwood	Yorktown	Independence
				5-6 Ohio	Beery	South
					Hilltonia	Briggs

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
LINDEN	K/1-6	Linden	1-3 Linden	4-6 Linden	Crestview	Brookhaven
LINDEN PARK	VACATED	Linden Park	1-3 McGuffey	4-6 McGuffey	Crestview	Brookhaven
LIVINGSTON	K/5-6	Livingston	1-4 Avondale #1-4 Dana 1-4 West Mound	5-6 Livingston	#Barrett Mohawk	Central
		Beck	1-4 Beck	5-6 Beck	#Barrett Mohawk	Central
MAIN	K/1-3	Main	1-3 Main	4-6 Shady Lane	Mohawk	Walnut Ridge
MAIZE	K/4-6	Maize	1-3 Pilgrim	4-6 Maize	Clinton	Brookhaven
MARBURN	VACATED	Kenwood	1-3 Windsor	4-6 Kenwood	Ridgeview	Whetstone
MAYBURY	K/1-4	Maybury	1-4 Maybury	5-6 Fairwood	Southmoor	Independence

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
McGUFFEY	K/1-6	McGuffey	1-3 McGuffey	4-6 McGuffey	Linmoor	Brookhaven
MEDARY	K/5-6	Medary	1-4 Eleventh	5-6 Medary	Indianola	Linden McKinley
MILO	VACATED	Second	1-4 Hubbard	5-6 Second	Everett	Centennial
MOLER	K/5-6	Watkins Moler	1-4 Thurber 1-3 Watkins 1-4 Oakmont	1-4-6 Cedarwood 5-6 Moler	Buckeye Southmoor	Marion Franklin Independence
NORTH LINDEN	K/1-4	North Linden	1-4 Woodcrest 1-4 North Linden	5-6 Eastgate	Clinton	Mifflin
NORTHGATE	K/1-4	Northgate	1-4 Northgate	5-6 South Mifflin	Mifflin	Beechcroft
NORTHBRIDGE	VACATED	Maize	1-3 Pilgrim	4-6 Maize	Clinton Linmoor	Beechcroft
NORTHTOWNE	K/1-4	Northtowne	1-4 Northtowne	5-6 East Columbus	Champion	Northland

1-4 Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
OAKLAND PARK	VACATED	Oakland Park	1-3 Trevitt	4-6 Huy	Medina	Brookhaven
OAKMONT	ALTERNATIVE K/1-4	Oakmont	1-4 Oakmont	5-6 Moler	Southmoor Yorktown	Independence Walnut Ridge Briggs
OHIO	K/5-6	Ohio	1-4 Binns 1-4 Burroughs 1-4 Lindbergh	5-6 Ohio	Mohawk	
OLDE ORCHARD	K/5-6	Olde Orchard	1-4 Berwick 1-4 Scottwood	5-6 Olde Orchard	Yorktown	Walnut Ridge
PARKMOOR	K/1-4	Parkmoor	1-4 Parkmoor	5-6 East Columbus	Woodward Park	Northland
PARSONS	VACATED	Scioto Trail	1-3 Scioto Trail	4-6 Clarfield	Buckeye	Marion Franklin
PILGRIM	K/1-3	Pilgrim	1-3 Pilgrim	4-6 Maize	Champion Monroe	East Centennial

1-4 Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
PINECREST	K/1-4	#Leawood Pinecrest	#1-4 Leawood 1-4 Pinecrest	#5-6 Kent 5-6 Fair	Johnson Park	Eastmoor
REEB	K/1-4	Reeb	1-4 Reeb	5-6 Koebel	Beery	South
SALEM	K/1-4	Salem	1-4 Salem	5-6 Gladstone	Dominion	Whetstone
SCIOTO TRAIL	K/4-6	Scioto Trail	1-3 Clarfield	4-6 Scioto Trail	Beery	Marion Franklin
SCOTTWOOD	K/1-4	Scottwood	1-4 Scottwood	5-6 Olde Orchard	Johnson Park	Eastmoor
SECOND	K/5-6	Second	#1-4 Hubbard 1-4 Thurber	5-6 Second	Everett	Linden McKinley
SHADY LANE	K/4-6	Shady Lane	1-3 Main	4-6 Shady Lane	Sherwood	Walnut Ridge
SHARON	K/1-4	Sharon	1-4 Sharon	5-6 Gladstone	Dominion	Whetstone

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
SHEPARD	VACATED	East Columbus	1-4 Northtowne #1-4 Parkmoor	5-6 East Columbus	Eastmoor	Northland
SIEBERT	K/1-4	Siebert	1-4 Valley Forge	5-6 Deshler	Barrett	South
SMITH ROAD SOUTH	K/1-4	Smith Road	1-4 Siebert	5-6 Southwood	Southmoor	Independence
MIFFLIN	K/5-6	South Mifflin	1-4 Alpine			
SOUTHWOOD	K/5-6	Southwood	1-4 Northgate	5-6 South Mifflin	Woodward Park	Beechcroft
			#1-4 Lincoln Park	5-6 Southwood	Barrett	South
STEWARD	VACATED ALTERNATIVE	Stewart	1-4 Smith Road	4-6 Beck	Mohawk	South
			1-3 Beck			

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
STOCKBRIDGE	K/4-6	Stockbridge	1-3 Clarfield	4-6 Stockbridge	Buckeye	Marion Franklin
SULLIVANT	K/1-3	Sullivant	1-3 Sullivant	4-6 Westgate	Starling	Central
THURBER	K/1-4	Thurber	1-4 Thurber	5-6 Second	Everett	East
TREVITT	K/1-3	Trevitt	1-3 Trevitt	4-6 Huy	Monroe	Centennial
VALLEY FORGE	K/1-4	Valley Forge	1-4 Valley Forge	5-6 East Columbus	Clinton	Northland
VALLEYVIEW	VACATED	West Broad	#1-3 Beatty Park	4-6 West Broad	Westmoor	West
			1-3 Garfield			
WALDEN	K/1-4	Walden	1-4 Walden	5-6 Arlington Park	Woodward Park	Northland
WALFORD	VACATED	North Linden	1-4 North Linden	5-6 Eastgate	Clinton	Mifflin
WATKINS	K/1-3	Watkins	1-3 Watkins	4-6 Cedarwood	Beery	Marion Franklin

#Pupils will be assigned by geographic area to one of these schools.

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CHART 85 (Continued)
PUPIL ASSIGNMENT: ALL SCHOOLS
(Grades K, 1-12)

Former Elementary School	New Elementary Organization	Pupil Assignment				
		Elementary Kindergarten	Elementary Primary	Elementary Intermediate	Junior High (Grades 7-9)	Senior High (Grades 10-12)
WAYNE	VACATED	Lindbergh	1-4 Lindbergh	5-6 Ohio	Hilltonia	Briggs
WEINLAND PARK	K/1-3	Weinland Park	1-3 Weinland Park	#4-6 Fifth	Indianola	Linden McKinley
WEST BROAD	K/4-6	West Broad	#1-3 Beatty Park	4-6 Kingswood	Westmoor	West
			1-3 Garfield	4-6 West Broad		
WEST MOUND	K/1-4	West Mound	1-4 West Mound	5-6 Livingston	Hilltonia	Central
WESTGATE	K/4-6	Westgate	1-3 Sullivant	4-6 Westgate	Mohawk	West
WILLIS PARK	VACATED	Shady Lane	1-3 Main	4-6 Shady Lane	Sherwood	Walnut Ridge
WINDSOR	K/1-3	Windsor	1-3 Windsor	#4-6 Cranbrook	Ridgeview	Whetstone
				4-6 Kenwood		
WINTERSET	K/1-4	Winteret	1-4 Winteret	5-6 Duxberry Park	Monroe	Centennial
WOODCREST	K/1-4	Woodcrest	1-4 Woodcrest	5-6 Moler	Sherwood	Walnut Ridge

#Pupils will be assigned by geographic area to one of these schools.

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8. Career Center Programs

The Columbus City School District proposes to continue the program of vocational education through career centers. Existing procedures for enrollment in the various program offerings based on pupil interest, counselor assessment, program capacity, and racial balance will be observed.

9. Alternative School Programs

The Columbus City School District proposes to continue to offer alternative school programs, but only on a racially balanced basis.

Existing alternative school programs will be given first priority for opening. New alternative school programs will be considered as financial resources are available and as parent and pupil interest justify.

10. Columbus Plan Pupil Participation

All Columbus Plan transfers at a given grade level, except for those discussed above under "Career Center Programs" and "Alternative School Programs," will be terminated when that grade level is involved in implementation of the pupil assignment component of the Desegregation Remedy Plan. These pupils will report to their newly assigned school as specified herein.

B. Exceptions to Pupil Assignment

The Columbus City School District proposes that all pupils enrolled in the school district be involved in the Desegregation Remedy Plan with the following exceptions:

1. Kindergarten

Only pupils in grades 1-12 will be included. Kindergarten will be excluded.

2. Graduating Seniors

All pupils enrolled in the 12th grade at the beginning of the 1978-79 school year will be permitted to graduate from the high school in which they were enrolled in the 1977-78 school year, provided the school remains open as a senior high school for the 1978-79 school year. If the school is closed, seniors will be reassigned to the senior high school designated by the Desegregation Remedy Plan.

This exception will be in effect only for the 1978-79 school year.

3. Special Education Program Enrollees

Students enrolled in classes for the educable mentally retarded and for the learning and behavior disordered; as well as the low incidence handicapped — the blind and partially sighted, the deaf and hard of hearing, the orthopedically and multiply handicapped, and the severe behavior disorder cases — will not be part of the general Desegregation Remedy Plan.

Classes for the educable mentally retarded and learning behavior disordered pupils will be placed such that the resulting program enrollment will be racially desegregated.

Specialized physical facilities — and in three instances, specialized school buildings — will continue to be provided for the low incidence handicapped.

Tutoring services will continue to be provided for eligible pupils up to the limit of the school district's financial capacity.

4. Gifted and Talented

Pupils selected for the Gifted and Talented Program will not be included in the remedy plan. Pupil selection will occur so that the program will be racially balanced.

C. Pupil Transportation

The Columbus City School District proposes the following transportation system for the Desegregation Remedy Plan. Specifics are presented regarding the existing bus fleet, its use during the 1976-77 school year, and its anticipated uses in September, 1977, in January, 1978, and September, 1978. Specifics concerning additional bus fleet requirements due to involuntary pupil assignment in January, 1978 and September, 1978 are also presented. Finally, the specifics associated with pupil time in transit and distances to be traveled are presented.

1. The 1976-77 School Year Transportation System

End-of-year accounting indicates that during the 1976-77 school year the Columbus City School District transported 17,528 pupils using 222 board-owned vehicles, 28 contract carriers, taxi-service, and direct parent payments in lieu of school bus service.

The type and number of buses in the board-owned fleet were as follows:

<u>Type of Bus</u>	<u>Number of Buses</u>
66-Passenger	129
36-Passenger	39
16-21-Passenger	45
Wheelchair Lift Vans	9
TOTAL	222

All twenty-eight contract carriers were 66-passenger buses.

End-of-year accounting indicated the following transportation data for each pupil group transported.

<u>Pupil Group Transported</u>	<u>Number of Pupils</u>	<u>Bus Loads</u>	<u>Equipment Used</u>
Non-Public Pupils	2,333	59	55 sixty-six passenger buses and 4 vans
Secondary Columbus Plan Pupils	2,549	69	51 sixty-six passenger buses
Elementary Columbus Plan Pupils	1,028	43	38 vans 5 sixty-six passenger buses
Special Education Pupils	445	37	9 wheelchair lift van 28 vans
	1,437	—	Taxi-service
Residential Population	9,155	170	89 sixty-six passenger buses

In addition to the above, the Columbus City School District transported 581 pupils under agreements with parents which provided reimbursement payments in lieu of school bus service.

The Columbus City School District maintained a spare bus fleet of 12 sixty-six passenger buses and 14 vans.

This transportation system costs the Columbus City School District an estimated \$3,150,700.00 to operate.

2. The 1977-78 School Year: September, 1977 Transportation System

The Columbus City School District has anticipated the following transportation system without the impact of school desegregation for the 1977-78 school year.

The 1977-78 bus fleet is constituted as previously indicated at 222 units. The number of contract carrier buses has risen to 30 sixty-six passenger buses.

The Columbus City School District plans to employ board-owned buses, contract carriers, taxi-service, and parental reimbursement payments in lieu of school bus

service to transport an estimated 18,313 pupils in the following fashion. Specifics are presented for each pupil group to be transported.

<u>Pupil Group Transported</u>	<u>Number of Pupils</u>	<u>Bus Loads</u>	<u>Equipment to be Used</u>
Non-Public Pupils	2,333	59	55 sixty-six passenger buses 4 vans
Secondary Columbus Plan Pupils	3,280	99	69 sixty-six passenger buses
Elementary Columbus Plan Pupils	1,100	43	5 sixty-six passenger buses 38 vans
Special Education Pupils	450	37	9 wheelchair lift vans 28 vans
	1,580	—	Taxi-service
Residential Population	8,990	191	112 sixty-six passenger buses

In addition to the above, the Columbus City School District anticipates transporting 580 pupils under agreements with parents to provide reimbursement payments in lieu of school bus service.

The Columbus City School District plans to maintain a spare bus fleet of 14 vans and only four of the needed 13 sixty-six passenger buses.

This transportation system is estimated to cost the Columbus City School District \$3,927,407.00.

3. Desegregation Transportation Planning Considerations

As stated in the July 29, 1977 Federal District Court Order, The Columbus City School District is to implement the elementary school component of a pupil desegregation plan when schools reopen after January 1, 1978. The anticipated 1977-78 school year transportation system, described previously will need to be modified to accommodate the Desegregation Remedy Plan.

The following considerations were used in modifying the September, 1977 school year transportation system, and in formulating the 1978-79 school year transportation system.

Transportation Policy — Continue the current Board policy of providing transportation to students living more than two miles from their assigned school who are in grades K-9. Expand the Board policy on transportation to include the transportation of pupils in grades 10-12 living more than two miles from their assigned school when the high school component of the remedy plan is implemented.

Factors for Estimating Transportation — Base estimates of pupil transportation on the Board policy as noted above, include considerations of adverse safety conditions and the need for a pupil to walk past a school of appropriate grade assignment to reach the assigned school.

Distance — Measure distance on a school site to school site straight line basis. When it appears walking distance could exceed two miles, an estimate of the distance of the walking route will be applied in determining the estimate of students eligible for transportation.

Travel Time — Estimate travel time on a school site to school site basis in multiples of five minutes for each straight line mile. Note special traffic situations (congestion, freeways, bridges, etc.) and adjust times accordingly.

Loading — Use a loading factor of 66 pupils per elementary bus, 60 pupils per junior high bus and 55 per senior high bus.

Loads Needed — Calculate loads as indicated above. Use elementary attendance areas in planning and calculating the number of trips for elementary, junior and senior high schools.

Pick Up — Provide neighborhood (residential) or other appropriate pick-up locations for transported pupils.

Residential Transportation — Continue residential transportation within the current and expanded policy. Include residential transportation when determining the number of buses needed.

Starting Time — Assume two starting times in the Elementary phase of this Desegregation Plan and four starting times, one each for junior and senior high schools and two for elementary schools, in the Secondary phase of this Desegregation Plan.

Special Education — Needs will continue to be served on van vehicles. As the elementary Columbus Plan is modified, additional van buses will be used to transport special education pupils now transported on outside contracted services.

Non-Public — Requests have continued to increase during the last two years and have increased again this fall. The service is not expected to drop below the current 59 trip schedule.

Columbus Plan Secondary Pupils — These pupils will continue to be transported to their assigned school throughout the 1977-78 school year. Columbus Plan transfers for vocational programs, career centers and alternative programs will continue after the implementation of both the elementary and secondary phases of the desegregation plan. They would remain on the same time schedule initiated in September, 1977.

Columbus Plan Elementary Pupils — The elementary Columbus Plan will be modified at the time of implementation of the desegregation plan and will include

transportation to and from the five existing alternative schools plus any additions the Board of Education elects to add. The transportation of elementary pupils will be redesigned for greater efficiency and will use 66 passenger buses in place of the smaller units now in service.

4. January, 1978 Modification of the September, 1977 Transportation System

The following transportation requirements will have to be met by the Columbus City School District when the court-ordered elementary component of school desegregation is implemented after January 1, 1978. All requirements are presented in terms of the pupil group to be transported.

<u>Pupil Group Transported</u>	<u>Number of Pupils</u>	<u>Bus Loads</u>
Non-Public Pupils	2,333	59
Secondary Career-Vocational Pupils	1,704	48
Secondary Program Transfer Pupils	1,376	46
Secondary Alternative School Pupils	200	5
Elementary Alternative School Pupils	1,500	25
Special Education Pupils	2,030	154
Secondary Residential Pupils	3,789	81
Elementary Level Desegregation Transfers	20,609	353
TOTAL	35,541	771

Of the bus load total of 771, 145 pupils loads will be accommodated by 70 thirty-six passenger vans (66 for special education pupils and four for non-public pupils) and 9 wheelchair lift vans for special education pupils.

Thirteen (13) special education pupil loads will still need to be transported by taxi-service. The remaining 613 pupil loads need to be transported with sixty-six passenger buses. Using a two-bell school starting schedule these 613 pupil loads would be transported in the following fashion:

<u>Bell Schedule 1</u>	<u>Bell Schedule 2</u>	<u>Buses Required</u>
55 Non-Public Pupil Loads	55 Elementary Desegregation Pupil Loads	55
48 Secondary Career-Vocational Pupil Loads	14 Elementary Desegregation Pupil Loads	34
46 Secondary Program Transfer Pupil Loads	15 Elementary Desegregation Pupil Loads	35
5 Secondary Alternative School Pupil Loads	0 Elementary Desegregation Pupil Loads	5
81 Secondary Residential Pupil Loads	69 Elementary Desegregation Pupil Loads	81
100 Elementary Desegregation Pupil Loads	100 Elementary Desegregation Pupil Loads	100
25 Elementary Alternative School Pupil Loads	0 Elementary Desegregation Pupil Loads	25
<hr/> 360 Loads	<hr/> 253 Loads	<hr/> 335 Buses

A total of 369 sixty-six passenger buses including 34 spares are required, the school district owns 129 and estimates having lease agreements for 30 contract carriers for a total of 159 vehicles. An additional fleet of 210 sixty-six passenger buses would be needed 176 of which would comprise the operational fleet.

5. Acquiring the Needed Equipment for the January, 1978 Desegregation Component

The Columbus City School District Board of Education authorized its legal counsel to retain the firm of Simpson and Curtin, Inc., Philadelphia, Pennsylvania, to perform the transportation study ordered by the Court on July 29, 1977. That report accompanies this plan.

The report identified five possible means of securing the transportation resources required to desegregate the Columbus City School District. It also includes the number of school bus coaches which would be required by both elementary and secondary involuntary pupil reassignments. The report also evaluated the availability and adequacy of each source of transportation in terms of its ability to satisfy the needs projected.

The report states that sufficient new buses could not be purchased in time to accomplish a January, 1978 desegregation of the elementary school population. A national leasing firm, ARA of California, would not provide enough information to truly evaluate the possible use of the transportation services available from such leasing agencies. No agreement appears possible with the Central Ohio Transit Authority. There is a possibility that up to thirty 66-passenger school buses could be loaned to the Columbus City School District by other Ohio school districts. Finally, the report indicates that there will likely be a supply of used buses available resulting from trade-ins by other Ohio school districts. However, it is somewhat improbable that the latter could be obtained to accommodate a January implementation.

Simpson and Curtin, Inc., state that "about 60 percent utilization can be counted upon for day-to-day use with a fleet made up entirely of second-hand school buses." This would mean that the true purchase requirement for used vehicles would be 167 percent of day-to-day operating

needs. In this instance, the operating fleet need is 176 sixty-six passenger buses and 13 spares for the board-owned 66-passenger bus fleet of 129 vehicles. Applying the recommended 167 percent factor would increase the purchase requirement to 315 sixty-six passenger buses.

Though the Simpson and Curtin, Inc. report indicates that the used-bus option might possibly accommodate a January, 1978 implementation, it is not recommended.

6. The 1978-79 School Year Transportation System

Beginning with the opening of school in the 1978-79 school year, the Columbus City School District has been ordered by the Federal District Court to implement a secondary school desegregation plan. The transportation requirements incumbent on the school district at that time are estimated to be as follows. Again, the information is presented in terms of the pupil group to be transported.

<u>Pupil Group Transported</u>	<u>Number of Pupils</u>	<u>Bus Loads</u>
Non-Public Pupils	3,500	65
Secondary Career-Vocational Pupils	2,112	56
Secondary Alternative School Pupils	320	8
Elementary Alternative School Pupils	1,500	25
Special Education Pupils	2,030	154
Elementary Level Desegregation Transfers	20,609	353
Junior High Level Desegregation Transfers	10,069	185
Senior High Level Desegregation Transfers	10,809	212
TOTAL	<u>50,949</u>	<u>1,058</u>

Of the bus load of 1,058, 145 loads would be accommodated by 70 thirty-six passenger vans, (66 for special education pupils and 4 for non-public pupils) and 9 wheel-chair lift vans for special education pupils. Thirteen special education pupil loads will again be transported by taxi-service. The remaining 900 pupil loads would need to be transported with sixty-six passenger buses. Using the four-bell school starting schedule listed under "Desegregation Transportation Planning Considerations" on page 114 of this document these 900 pupil loads would be transported as shown in Table 2.

The total 66-passenger bus fleet required is 338 vehicles plus a 10 percent spare factor, or 372 buses. Of this total, 336 buses will be used for desegregation.

TABLE 2
TRANSPORTATION OF 66-PASSENGER
BUS LOADS IN SEPTEMBER, 1978
BY BELL SCHEDULE

Bell Schedule 1	Bell Schedule 2	Bell Schedule 3	Bell Schedule 4	Total Buses
65 Non-Public Pupil Loads	4 Junior High Desegregation Pupil Loads	20 Elementary Desegregation Pupil Loads	41 Elementary Desegregation Pupil Loads	65
56 Secondary Career-Vocational Pupil Loads	—	28 Elementary Desegregation Pupil Loads	—	28
212 Senior High Desegregation Pupil Loads	181 Junior High Desegregation Pupil Loads	130 Elementary Desegregation Pupil Loads	130 Elementary Desegregation Pupil Loads	212
—	8 Junior High Alternative Pupil Loads	—	—	8
—	—	25 Elementary Alternative Pupil Loads	—	25
333 TOTAL	193 TOTAL	203 TOTAL	171 TOTAL	338

150

151

7. September, 1978 Bus Fleet Considerations

The method used to acquire the bus fleet necessary to desegregate the secondary school population is dependent upon the fleet acquisition for the January, 1978 elementary desegregation component.

If the recommendation of Simpson and Curtin, Inc. were followed, no elementary school desegregation would have occurred in that new school buses could not have been purchased in time. However, if used school buses were purchased, delivered, and operated, the Columbus City School District would have 444 used 66-passenger school buses on hand in September, 1978.

Of the aforementioned board-owned fleet of 444 used 66-passenger buses, 129 would be retained for service in the 1978-79 school year. Following the recommendation of Simpson and Curtin, Inc., the remaining fleet of 315 sixty-six passenger school buses would be traded in on 213 new sixty-five passenger buses. An additional expenditure of funds would be required.

If a contract lease agreement were effected in January, 1978 for elementary school desegregation, the Columbus City School District would need to terminate that contract and purchase 213 new 65-passenger school buses.

If no desegregation occurred in January, 1978 the Columbus Board of Education would have no buses to trade-in, and no lease contract to terminate, but would have to purchase 213 new 65-passenger school buses.

Whether or not the elementary pupil reassignment component is first implemented in January, 1978 or September, 1978, the Columbus City School District will need to purchase 213 new 65-passenger school buses to accommodate the entire pupil reassignment component in September, 1978.

In summary, the recommendation of the Simpson and Curtin, Inc. firm is that the most preferred manner of acquiring transportation to desegregate the Columbus

City School District is the purchase of new vehicles. The only alternative open is the purchase of used school buses being traded-in by other Ohio school districts this Fall and the borrowing of 30 spare school buses from other Ohio school districts. The trade-in buses could only be used for the period January, 1978 through June, 1978 and would be buses which the Ohio Department of Education would have already certified as unserviceable, unsafe, or non-cost-effective. Substantial funds would have to be spent to re-condition the trade-in buses.

The firm of Simpson and Curtin, Inc. recommends against the purchase or use of used school buses. Agreement with this recommendation would require that all pupil reassignment initially occur in September, 1978.

8. Transportation Specifics in Terms of Pupil Time in Transit and Distances to be Traveled

When all components of the pupil reassignment plan are implemented, pupils will be eligible for transportation for the following reasons: Involuntary Desegregation Transfers, Alternative School Enrollment, and Career-Vocational Transfers. The table below contains the numbers of pupils eligible for transportation for each phase of the Desegregation Remedy Plan and for each of the aforementioned reasons for transportation eligibility.

TABLE 3
ESTIMATED NUMBERS OF PUPILS ELIGIBLE FOR
TRANSPORTATION BY COMPONENT
AND PURPOSE

	Voluntary Transfers		
	Involuntary Transfers	Alternatives	Career-Vocational Program
Elementary Component	20,609	1,700	1,704
Secondary Component	20,878	120	2,112
	41,487	1,820	3,816

The amount of time a pupil spends riding a bus is a function of the distance to be traveled, the types of surface routes to be used, the volume of traffic, and the number of pick-up points involved for a particular route. The transportation of court-ordered, involuntary desegregation transfers is similarly affected. The Columbus City School District Desegregation Remedy Plan would involve the following estimated site-to-site riding times for involuntary transfers.

Elementary pupils would ride a bus for a minimum of five minutes to a maximum of twenty-five minutes, with the median travel time being twenty minutes.

Junior high pupils would ride a bus from a minimum of five minutes to a maximum of thirty minutes, with the median travel time being ten minutes.

Senior high pupils would ride a bus from a minimum of five minutes to a maximum of twenty-five minutes, with the median travel time being ten minutes.

The estimated straight-line, school site to school site mileage that involuntary-transfer pupils will travel ranges from less than two miles to approximately seven miles at the elementary and from less than two miles to eight miles at the junior high level. Senior high students residing more than two miles from their assigned high school will receive transportation if requested. If transportation is requested by all, they could be transported from two miles to eight miles.

The cost of the pupil transportation component is found in Section II of this document.

Table 4 contains a summarization of transportation data for all involuntary transfers associated with the Desegregation Remedy Plan. It includes numbers of students transported, percent of students transported, and average years transported for black and non-black students. Totals

are also presented. As well, school site to school site mileage is presented in frequency distribution form. The same is true for time spent being transported from school site to school site. Median statistics and range statistics are presented in these latter two cases.

TABLE 4
SUMMARY TRANSPORTATION DATA
BY REMEDY PLAN

Elementary Transportation Data

Number of Students Transported

Black	7,496
Non-Black	13,113
Total	20,609

Percent Students Transported

Black	36.4%
Non-Black	63.6%

Average Years Transported of Those Students Transported

Black	3.6 years
Non-Black	3.0 years
Total	3.2 years

Distance Transported (School Site to School Site)

Range:	
Less than 2 miles	25
2-3 miles	14
3-4 miles	9
4-5 miles	22
5-6 miles	34
6-7 miles	12
7-8 miles	
8-9 miles	
Median	4-5 miles
Range	Less than 2-7 miles

TABLE 4 (Continued)

Time Spent Being Transported (School Site to School Site)

5 minutes	13
10 minutes	23
15 minutes	5
20 minutes	40
25 minutes	35
30 minutes	
Median	20 minutes
Range	5-25 minutes

Junior High Transportation Data

Number of Student Transported

Black	4,030
Non-Black	6,039
Total	10,069

Percent Students Transported

Black	40.0%
Non-Black	60.0%

Average Years Transported of Those Students Transported

Black	3.0 years
Non-Black	3.0 years
Total	3.0 years

Distance Transported (School Site to School Site)

Range:	
Less than 2 miles	31
2-3 miles	21

TABLE 4 (Continued)

3-4 miles	2
4-5 miles	7
5-6 miles	11
6-7 miles	3
7-8 miles	2
8-9 miles	
Median	2-3 miles
Range	2-8 miles
Time Spent Being Transported (School Site to School Site)	
5 minutes	5
10 minutes	30
15 minutes	3
20 minutes	6
25 minutes	18
30 minutes	
Median	10 minutes
Range	5-30 minutes
Senior High Transportation Data (based on 2 mile limit)	
Number of Students Transported	
Black	4,731
Non-Black	6,078
Total	10,809
Percent Students Transported	
Black	43.8%
Non-Black	56.2%
Average Years Transported of Those Students Transported	
Black	3.0 years
Non-Black	3.0 years
Total	3.0 years

TABLE 4 (Continued)

Distance Transported (School Site to School Site)	
Range:	
Less than 2 miles	28
2-3 miles	21
3-4 miles	2
4-5 miles	7
5-6 miles	3
6-7 miles	2
7-8 miles	
8-9 miles	
Median	2-3 miles
Range	Less than 2-8 miles
Time Spent Being Transported (School Site to School Site)	
5 minutes	2
10 minutes	38
15 minutes	11
20 minutes	11
25 minutes	12
30 minutes	
Median	10 minutes
Range	5-25 minutes

In the United States District Court
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GARY L. PENICK, et al.,
Plaintiffs

-VS-

COLUMBUS BOARD OF
 EDUCATION, et al.,
Defendants.

Civil Action
 No. C-2-73-248
 JUDGE DUNCAN

REVISIONS TO PAGES 125-135
OF COLUMBUS BOARD OF EDUCATION'S
RESPONSE TO THE COURT'S
JULY 29, 1977 ORDER

Defendant Columbus Board of Education submits herewith the attached revised pages 125-135 of the Columbus Board of Education's Response to the Court's July 29, 1977 Order, which was filed August 31, 1977.

Respectfully submitted,

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 Superintendent Joseph L. Davis

II. THE DESEGREGATION BUDGET

A. The Phase I Budget

On August 16, 1977 the Columbus City School District approved a response to certain desegregation preparation court orders. The summary budget contained in that response was as follows.

Program	Budget	
	1977-78	1978-79
Pupil Orientation — Elementary Level	\$ 20,156.00	\$ —0—
Pupil Orientation — Secondary Level	17,990.00	—0—
Multi-Cultural Curriculum — Elementary Level	26,030.00	—0—
Multi-Cultural Curriculum — Secondary Level	32,800.00	—0—
Staff Orientation	103,780.00	119,466.00
Community Orientation and Information Services	142,477.00	129,283.00
Reading Development	3,320,067.00	3,460,652.00
Total	\$3,663,300.00	\$3,709,401.00
Two-Year Total		\$7,372,701.00

B. The Phase I Budget Revised

When the Columbus City School District initiated the organizational planning associated with its August 16, 1977 response to the July 29, 1977 Court order, certain alterations had to be made in the original plan. Originally, the 1977-78 total cost was to \$3,663,300; however, when the personnel were assigned to the task their replacements

cost more than anticipated. The new Phase I budget is as follows.

Program	Budget	
	1977-78	1978-79
Pupil Orientation — Elementary Level		\$ —0—
Pupil Orientation — Secondary Level		—0—
Multi-Cultural Curriculum — Elementary Level	\$ 446,040.00	—0—
Multi-Cultural Curriculum — Secondary Level		—0—
Staff Orientation		119,466.00
Community Orientation and Information Services	\$ 142,477.00	129,283.00
Reading Development	3,320,067.00	3,460,652.00
Total	\$3,908,584.00	\$3,709,401.00
Two-Year Total		\$7,617,985.00

C. The Phase II Budget

The desegregation of the Columbus schools could cost \$19,022,101 depending on the initial transportation option selected: contract lease, or used bus purchase. However, the cost of the contract lease option cannot be determined due to the unavailability of such information from potential lessors. Hence, only the used bus purchase option will be presented here.

1. The Transportation System

a. Needed Equipment — January, 1978

To implement the elementary component of this Desegregation Remedy Plan, 315 used, sixty-six passenger school buses would be required. Their purchase price is

estimated to be \$3,800 each. They would also cost an estimated \$1,500 each to ready them to pass State Highway Patrol inspections. This would total to \$5,300 each. The total cost would be \$1,669,500. The State of Ohio would reimburse the Columbus City School District 35 percent of a depreciated cost based on a current market value of \$14,236. This amount is depreciated 10 percent per annum: 20 percent the first year and 10 percent each year thereafter. The reimbursement could range from zero to \$1,255,277. However, a final figure cannot be computed until all these used buses are purchased.

As well, each of these used buses would require a two-way radio. Each radio would cost \$885. This cost would be \$278,775. The current school district bus fleet is not totally equipped with the necessary radio equipment. In order to accomplish maximum flexibility through interchangeability among the school district's 66- and 65-passenger bus fleet 43 buses will need to be equipped with two-channel, two-way radios. In order that contact with the special education bus fleet can be maintained at all times 55 radios need to be purchased and installed, each at a cost of \$885. The total radios needed is 98 and the total cost of this purchase to the city school district would be \$86,730. The total radio purchase price for all buses would then be \$365,505.

The school district would also need to purchase a large wrecker at \$28,000 and service truck for \$10,000.

Total equipment costs would be \$2,073,005 less a to-be-determined amount of state reimbursement.

b. Needed Personnel — January, 1978

The Columbus City School District would need to employ 176 regular, part-time school bus drivers and 14 substitute, part-time school bus drivers. These 190 drivers would be employed for five hours daily for 120 days each. These drivers will also be employed for 80 hours of pre-service training. The hourly rate of pay for pre-service

training would be \$4.58 plus 16.056 percent for fringe benefits or \$5.32 and the hourly rate of pay for regular service would be \$4.68 plus 16.056 percent for fringe benefits or \$5.43 per hour. The total 1977-78 school year cost for each driver would be \$3,684. Total driver cost would be \$699,960. The State of Ohio would reimburse the school district \$7 per driver trainee or \$1,330. The net driver cost would then become \$698,630.

One automotive body mechanic would need to be employed at a cost of \$8,313 plus 16.056 percent for fringe benefits or a cost of \$9,648.

Five automotive service workers would need to be employed at a cost of \$7,185 each plus 16.056 percent for fringe benefits or \$8,339 for a total 1977-78 school year cost of \$41,695.

An automotive parts clerk would be employed at a cost of \$7,185 plus 16.056 percent for fringe benefits or \$8,339 for a total school year cost of \$8,339.

Twelve automotive mechanics would be employed: six mechanic I's and six mechanic II's. The former would cost \$7,973 each plus 16.056 percent for fringe benefits or \$9,253 each. The latter group would cost \$8,237 plus 16.056 for fringe benefits or \$9,560 each. The total cost for these personnel would be \$112,878.

Three typist-clerk II's would be employed at a cost of \$5,836 each plus 16.056 percent for fringe benefits or \$6,773 each. The total cost would be \$20,319.

Six assistant bus supervisors would be employed at a cost of \$8,847 each plus 16.056 percent for fringe benefits or \$10,267 each. The total cost for these personnel would be \$61,602.

One bus dispatcher would be employed at a cost of \$8,847 plus 16.056 percent for fringe benefits or \$10,267.

One certificated 52-week supervisor would be employed at a cost of \$17,506 plus 17.056 percent for fringe benefits or \$20,492.

Forty certificated pupil personnel specialists would be employed at an average salary of \$17,021 plus 17.056 percent for fringe benefits or \$19,924 each. The total cost for these personnel would be \$796,960.

Total elementary desegregation component personnel costs would be \$1,780,830 for an eight-month period.

c. Needed Capital Improvement — January, 1978

Three new bus storage facilities would be required at a cost of \$552,000, exclusive of land purchase expenses.

A new body shop facility would be needed at a cost of \$121,000, exclusive of land purchase expenses.

Expansion of the present bus storage and maintenance facilities would cost \$298,000, exclusive of land purchase expenses.

The total capital improvements expenses required exclusive of land purchase expenses would be \$971,000.

d. Required Bus Operation and Maintenance Costs — January, 1978

End-of-year accounting indicates that the per-pupil cost of school bus operation and maintenance in the Columbus City School District was \$35. Using this figure as an index, the estimated cost of transporting 20,609 elementary, involuntary desegregation transfer pupils would be \$721,315. The estimate of State of Ohio reimbursement for this amount would be \$23 per pupil or \$474,007.

Conversations with Ohio Department of Education desegregation consultants indicate that this estimate should be inflated by as much as 50 percent because used buses would be the prime vehicle in use. However, as the above estimate is based on a full school year's transportation costs and the bus fleet would only be in use 60 percent of the 1977-78 school year, it can be balanced against the 50 percent suggested estimate and be permitted to stand.

**e. Total Required Transportation Cost —
January, 1978**

The following transportation costs would be incurred by the Columbus City School District if a January, 1978 desegregation of elementary schools were to occur as described herein.

Equipment	\$2,073,005 ^a
Personnel	1,780,830
Capital Improvements	971,000
Operation and Maintenance	721,315
Sub Total	5,546,150
State Reimbursement	(474,007)
Total	\$5,072,143

^aThis cost would be reduced by a yet-to-be-determined State of Ohio bus purchase reimbursement.

f. Needed Equipment — September, 1978

No matter the option selected in January, 1978 from no implementation to implementation with leased or used buses 213 new 65-passenger buses would need to be purchased as recommended by Simpson and Curtin, Inc., for initiation of the secondary component of this pupil desegregation plan or for implementation of the total desegregation contained herein. Each of these buses would cost \$19,100. If an elementary desegregation component had been implemented in January, 1978, no two-way radios would be required and the cost of each bus would be reduced to \$18,215.

The former figures would yield a total cost of \$4,068,300 and the latter a total cost of \$3,879,795. In either case, State of Ohio reimbursement would be the same: 35 percent of \$14,236 or \$4,982.60 per bus for a

total reimbursement of \$1,061,294. As well, if a January, 1978 elementary component were implemented, 315 used 66-passenger buses would be available for trade at an estimated value of \$1,800 per bus for a total value of \$567,000. Thus, the total bus cost for a September, 1978 secondary school desegregation component could range from \$2,251,501 to \$3,007,006.

Additional radio service for board-owned vehicles could range from zero to \$86,730, depending on whether or not an elementary desegregation component were implemented in January, 1978. If not, the second figure would apply; if so, the first.

The \$28,000 cost of a wrecker and the \$10,000 cost of a service truck would also be attributed to this date unless the January, 1978 component implementation required the purchase earlier.

Total equipment cost for the September, 1978 Desegregation Remedy Plan contained herein would be \$2,251,501 if it were preceded by a January, 1978 elementary school desegregation implementation and \$3,131,736 if it were not.

g. Needed Personnel — September, 1978

Seven additional part-time bus drivers would need to be employed for 195 days each for six hours per day in addition to 80 hours of pre-service training. The per-hour cost would be \$4.93 plus 16.056 percent for fringe benefits or \$5.72 per hour. The cost per driver would be \$7,150 and the total cost for seven additional drivers would be \$50,050 less a total of \$49 state reimbursement for seven driver trainees or \$50,001. The cost of the previously employed 190 drivers would be \$5.87 including 16.056 percent for fringe benefits per hour for 1,210 hours or \$7,103 each or a total of \$1,349,570.

The cost of other employee groups previously cited in the January, 1978 section of this budget would be as

follows for this desegregation component. All costs include fringe benefits of 16.056 or 17.056 whichever is appropriate.

<u>Employee Group</u>	<u>Number</u>	<u>Unit Cost</u>	<u>Total Cost</u>
Automotive Body Mechanic	1	\$15,885	\$ 15,885
Automotive Service Worker II	5	13,486	67,430
Automotive Parts Clerk	1	13,486	13,486
Automotive Mechanic I	6	14,983	89,898
Automotive Mechanic II	6	15,885	95,310
Typist-Clerk II	3	11,700	35,100
Assistant Bus Supervisors	6	16,982	101,892
Bus Dispatcher	1	16,982	16,982
Certificated Supervisor	1	31,520	31,520
Pupil Personnel Specialist	40	21,267	850,680
Total			\$1,318,183

The total personnel costs of the September, 1978 pupil desegregation component would be \$2,713,859 whether or not it was preceded by a January, 1978 pupil desegregation component.

h. Needed Capital Improvements — September, 1978

If this component of the Desegregation Remedy Plan is preceded by a January, 1978 component, there are no capital improvement costs associated with this component. Otherwise, the capital improvements budget required at this point is \$971,000.

i. Required Bus Operation and Maintenance Costs — September, 1978

Using the 1976-77 per-pupil bus operation and maintenance cost of \$35 as a beginning index and inflating it by

eight percent, an index of \$38 per pupil may be used to estimate the bus operation and maintenance costs associated with this desegregation component. This plan indicates that 41,487 pupils will be transported in this desegregation component. The total bus operation and maintenance budget required would be \$1,576,506. State reimbursement is estimated to be \$40 per pupil resulting in a total reimbursement of \$1,659,480.

j. Total Required Transportation Cost — September, 1978

The following transportation costs would be incurred by the Columbus City School District in this component of the Desegregation Remedy Plan.

	<u>January, 1978 Component-Yes</u>	<u>January, 1978 Component-No</u>
Equipment	\$2,251,501	\$3,131,736
Personnel	2,717,754	2,717,754
Capital Improvements	—0—	971,000
Operation and Maintenance	1,576,506	1,576,506
Sub Total	6,545,761	8,396,996
State Reimbursement	(1,659,480)	(1,659,480)
Total	\$4,886,281	\$6,737,516

2. Other Costs

a. Needed Equipment — January, 1978

Funds for the purchase of extra telephone service in schools, of radio communication equipment, of portable communications equipment, of portable sound equipment in schools would cost an estimated \$203,300.

b. Contract Carrier Costs — January, 1978

Recall that 30 contract 66-passenger buses are to be employed in the January, 1978 desegregation transporta-

tion plan. These buses will carry one desegregation pupil load daily of 66 pupils. The 1976-77 cost of this transportation was \$130 per pupil. During 1977-78 this cost is estimated to be \$140 per pupil. The cost of transporting 1,980 pupils will be \$166,320 for the January, 1978-June, 1978 period.

c. Needed Personnel — January, 1978

An in-system security unit would be established that would work at the direction of the Division of Administrative Services. This unit would be comprised of six (6) specially trained persons who would be responsible for crisis control, liaison between state and local agencies, surveillance, and the coordination of other security related activities. The cost of this unit would include one director at a cost of \$18,802 plus 17.056 percent for fringe benefits or \$22,009. Also included would be five specialists at a cost of \$12,361 plus 17.056 percent for fringe benefits or \$14,469 each. The total cost of this unit would be \$94,354.

d. Total Other Costs — January, 1978

The total cost for the above additional but needed equipment and personnel plus \$150,000 for external computer services is \$447,654.

e. Needed Personnel — September, 1978

The cost of an in-system security unit for this component of the Desegregation Remedy Plan would be \$29,373 plus 17.056 percent for fringe benefits or \$34,383. Five specialists would cost \$17,724 plus 17.056 percent for fringe benefits or \$20,747 each. The total cost of specialists would be \$103,735. The total cost of this unit would be \$138,118 whether or not it were preceded by a January, 1978 desegregation component.

f. Needed Equipment — September, 1978

No additional costs would be incurred in this area at this time unless no January, 1978 component occurred. The cost in that instance would be \$203,300 for the desegregation component.

g. Contract Carrier Costs — September, 1978

Thirty contract carrier 66-passenger buses are projected as part of the September, 1978 desegregation transportation plan. These buses will carry two pupil loads daily of an average of 60 pupils per load or 120 pupils daily. The 1978-79 per pupil cost for this service is estimated to be \$151. The cost of transporting 3,600 pupils will be \$543,600 for the September, 1978-June, 1979 period.

h. Total Required Other Costs — September, 1978

The following additional but required costs would be incurred by the Columbus City School District in this component of the Desegregation Remedy Plan.

	January, 1978 Component-Yes	January, 1978 Component-No
Equipment	—0—	\$ 203,300
Purchased Services	\$316,320	843,600
Personnel	94,354	138,118
Total	\$410,674	\$1,185,018

C. Total Desegregation Costs

Depending on the order of implementation the costs for desegregating the Columbus City School District would approximate the following schedules.

Schedule A

Elementary school desegregation is implemented in January, 1978 and Secondary school desegregation is implemented in September, 1978.

Expenditure Category	January 1, 1978 Amount	September, 1978 Amount	Total
Transportation Purchased Services	316,320	693,600	\$ 1,009,920
Transportation Equipment	2,073,005 ^a	2,251,501	4,324,506 ^a
Transportation Personnel	1,780,830	2,717,754	4,498,584
Transportation Capital Improvements	971,000	—0—	971,000
Transportation Operation and Maintenance	721,315	1,576,506	2,297,821
Other Equipment	203,300	—0—	203,300
Other Personnel	94,354	138,118	232,472
Phase I Costs	3,908,584	3,709,401	7,617,985
Sub Total	10,068,708 ^a	11,086,880	21,155,588 ^a
State Reimbursement	(474,007)	(1,659,480)	(2,133,487)
Total	\$ 9,594,701 ^a	\$ 9,427,400	\$19,022,101 ^a

^aThis cost would be reduced by a yet-to-be-determined State of Ohio used bus purchase reimbursement.

The funds represented in Schedule A will finance desegregation costs incurred by the Columbus City School District from December 1, 1977 through July 31, 1979.

Schedule B

Total Desegregation in September, 1978

Expenditure Category	Cost
Transportation Purchased Services	\$ 843,600
Transportation Equipment	3,131,736
Transportation Personnel	2,717,754
Transportation Capital Improvements	971,000
Transportation Operation and Maintenance	1,576,506
Other Equipment	203,300
Other Personnel	138,118
Phase I Costs	4,366,635
Sub Total	13,948,649
State Reimbursement	(1,659,480)
Total	\$12,289,169

The funds represented in Schedule B will finance desegregation costs incurred by the Columbus City School District from August 1, 1978 through July 31, 1979.

The cost of purchasing used buses to accomplish a January, 1978 elementary desegregation needs to be considered in light of the facts that —

- Total desegregation in September, 1978 costs 35 percent less than desegregating elementary schools in January, 1978 and secondary schools in September, 1978.
- Safer more reliable transportation could be provided each pupil.

III. SCHOOL DISTRICT BUDGET STATUS

The Columbus City School District would remind the Court of the statement of budget and finance submitted in both the June 10, 1977 and July 8, 1977 Desegregation Remedy Plans. That statement is still highly relevant to

school district operations and most especially to the implementation of a pupil desegregation plan. The critical financial factors associated with this plan follow.

The Columbus City School District would need to spend money they do not presently possess in order to implement the Desegregation Remedy Plan submitted herewith.

The actions described in this Desegregation Remedy Plan will cost the Columbus City School District approximately \$19,022,101. These dollars are above the anticipated 1977, 1978, and 1979 revenues of the Columbus City School District.

The Board of Education will be asked to place a levy on the ballot in 1977 in an attempt to secure additional local tax funds to maintain the current level of operation and provide funds for the educational programs provided in this plan. It will be necessary for the Board to consider the probability of passage of the levy in arriving at its decision of when to place the issue on the ballot.

The Columbus City School District has insufficient funds to even maintain present operations. If additional funding from state, federal, local, or private sources is not available in an amount sufficient to sustain operations and fund this remedy plan, the only alternative left will be to close the schools. If the remedy plan is implemented in January, 1978, the estimated January through December cost would be approximately \$10.5 million. Other costs incurred in 1977 would increase the estimated 1977 deficit to \$4.7 million but would not cause the closing of the Columbus City School District in 1977. Even though schools will remain open throughout 1977, the added costs could require the closing of school as early as October 18, 1978, without additional funds. Such school closings are required by the Ohio Revised Code when the cash balance falls to zero, as determined by the Auditor of the State of Ohio.

MEMORANDUM AND ORDER

[Filed September 16, 1977]

[Caption Omitted in Printing]

On August 31, 1977, the Columbus Board of Education submitted its response to this Court's order of July 29, 1977. The July 29 order required the submission of a plan including provisions for the reassignment of elementary school students in January 1978. The Columbus defendants claim that new school buses cannot be purchased and delivered by January 1978; therefore, some used vehicles and other used equipment will have to be purchased in order to meet the January 1978 implementation requirement. In this regard the Columbus Board's submission contains two recommendations:

THEREFORE, BE IT RESOLVED, that the Board of Education recommends against the purchase of second-hand or used school buses and transportation equipment because of safety, financial, and administrative considerations, and authorizes and directs legal counsel to so notify the Court when the new pupil reassignment plan is submitted.

BE IT FURTHER RESOLVED, that legal counsel is authorized and directed to notify the Court that the Board of Education recommends against implementation of the pupil reassignment plan until such time as adequate new school buses can be obtained, thus assuring safe and reliable school transportation for the students required to be transported.

The transportation report filed by the State Board of Education states that:

Pupil transportation can be provided for implementing a January 1978 desegregation plan of the elementary schools in Columbus provided sufficient lead-time is given to consummate the available options identified in this study. Given experiences with certain leasing arrangements and the problems associated with used buses, it is not possible to assure the

desirability, economy or efficiency of such transportation.

On September 13, 1977, the plaintiffs filed a response to the defendants' August 31 submissions in which they stated their belief that the study of transportation requirements and alternatives submitted by the defendant Columbus Board of Education is "inadequate and does not justify the conclusions drawn by the defendants." The plaintiffs assert that "[t]he costs figures concerning transportation as proposed in this [August 31] plan are still highly inflated and plaintiffs disagree with both defendants as to the use of used buses and the availability of various forms of transportation."

In addition to the questions of the cost and availability of transportation equipment, there are those who strongly argue that a mid-year implementation would grossly impair the ability of the Columbus school system to provide quality educational opportunities to elementary pupils. Plaintiffs vehemently disagree "with any suggestion that implementation be delayed again to September, 1978, for the additional reasons that the constitution requires an immediate remedy."

In considering these issues, one fact remains of paramount importance: constitutional rights have been, and are presently being, violated. The Court, therefore, is under a duty to redress these rights with all due dispatch. *Green v. County School Board*, 391 U.S. 430, 439 (1968). On the other hand the Court is well aware that a school desegregation remedy that becomes "so burdensome upon a school system as to impair its basic ability to provide the best possible educational opportunities, is no remedy at all." *Penick v. Columbus Board of Education*, 429 F. Supp. 229, 266 (S.D. Ohio 1977).

Recognizing these competing considerations, the Court finds that there are issues raised which necessitate that the Court hold further evidentiary hearings. The

Court has already heard volumes of evidence in this case and has considered numerous arguments of counsel. Therefore, the scope of the inquiry permitted at such hearings will be limited. The presentation of cumulative or extraneous evidence will not aid the Court's critical examination of these issues.

The Court will hear this case commencing on September 26, 1977, at 9:00 a.m. The scope of the hearing will be limited to:

1. The cost and availability of transportation equipment and related transportation facilities necessary for the safe and reliable implementation of the student reassignment component of the Columbus Board of Education's August 31, 1977, submission; and
2. An opportunity for the defendants to show cause why a further delay should be granted in the mid-year implementation phase of the remedy in this case.

The Court requests counsel to present concise (preferably expert) testimony directed toward matters not previously considered and decided by the Court. The Court will allow a maximum of four (4) days for the presentation of evidence and argument concerning the issues set forth herein.

It is so ORDERED.

ROBERT M. DUNCAN, JUDGE
United States District Court

No. 77-8347/8

United States Court of Appeals
FOR THE SIXTH CIRCUIT

GARY L. PENICK, et al.,
Plaintiffs-Respondents

v.

COLUMBUS BOARD OF
 EDUCATION, et al., (77-8347)

OHIO STATE BOARD OF
 EDUCATION, et al., (77-8348),
Defendants-Petitioners

BEFORE: EDWARDS, CELEBREZZE and ENGEL,
 Circuit Judges

ORDER
[Filed
October 3,
1977]

Both the Ohio State Board of Education and the City of Columbus, Ohio Board of Education have filed petitions for permission to appeal, pursuant to 28 U.S.C. § 1292(b), the district court's orders filed July 7, 1977 and July 29, 1977. The petitions also seek to have this Court stay any pupil reassignments pending disposition of these appeals, should permission be granted.

Upon consideration, it is ORDERED that the petitions be and they hereby are granted. Counsel for the petitioners shall file a brief and joint appendix not later than October 24, 1977; counsel for the respondents shall file their brief not later than November 18, 1977; any reply brief may be filed within seven (7) days thereafter.

Upon further consideration, the application for stay is denied.

The Clerk is directed to schedule these cases, together with the appeals in Nos. 77-3365/6, at the earliest practicable date after all briefs have been filed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk*

NOTICE OF APPEAL

[Filed November 4, 1977]

[Caption Omitted in Printing]

Notice is hereby given that the defendants Columbus Board of Education and M. Steven Boley, Paul Langdon, Virginia Prentice and Marilyn Redden, Board members, and Joseph L. Davis, Superintendent of the Columbus Public Schools, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the Judgment entered in this action on the 7th day of October, 1977, ordering the implementation of a system-wide desegregation remedy plan in September, 1978, denying the Columbus Board of Education's motion for a stay pending appeal, ordering the continuation of certain preparatory efforts, ordering the re-examination of the anticipated budget for the desegregation remedy, ordering the commencement of the bidding process for the acquisition of new school buses and related equipment necessary for a September 1978 implementation, and ordering the filing of periodic written reports with the Court.

This appeal is filed pursuant to 28 U.S.C. § 1292(a).

[Subscription Omitted in Printing]

• • • • •

HELEN JENKINS DAVIS
 called as a witness on behalf of the
 Intervening Plaintiffs, being first
 duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS:

[128] Q. [By Mr. Atkins] Would you state your full name and address for the record, please?

A. Mrs. Helen Jenkins Davis, 1100 East Broad Street, Columbus, Ohio.

Q. Now, Mrs. Davis, did you attend public schools in Columbus?

[129] A. Yes. I am a native of Columbus, Ohio, and attended all my education in Columbus.

Q. And you attended the Garfield Elementary School?

A. From the first grade through the eighth.

Q. And the Douglas Junior High School?

A. Ninth grade. It was the first year they put the ninth grade out of the regular high schools. One was at Mt. Vernon School, and one was at Douglas.

Q. Then from there you went to East High School?

A. I went to East for ten, eleven and twelve. They didn't call it that. They called it two, three and four then.

Q. And you graduated from East High School in what year, Mrs. Davis?

A. 1914.

[130] Q. And from East High School, you went to Teacher's Training School, did you not?

A. Yes, Columbus Normal School.

Q. Now, at that time, was the Columbus Normal School a part of the Columbus Public School System?

A. It was a part of the System. You had to go there. It was free, and you had to go there to become an elementary teacher.

Q. And how long were you at Columbus Normal?

A. Two years. It was a two-year course.

Q. So, in 1916, you graduated from Columbus Normal; is that correct?

A. Yes, that's right.

Q. And is it true that you had a rather high grade point average?

A. My grade average was 98.5 — .6, rather.

Q. 98.6 out of a hundred?

A. Yes. They gave us all our grades in all of the subjects and then gave us the average.

Q. Now, after graduation from Columbus Normal, did you make an effort to obtain a teaching position in the Columbus Public Schools?

A. Well, immediately upon graduation, I put an application in the Columbus System —

Q. And that —

[131] A. — and I — I waited eighteen months before I was hired.

[136] Q. Now, you were filling in the rest of the term for this teacher who had gotten married?

A. Yes.

Q. How long did you remain at Spring Street?

A. Two and a half years.

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[140] Q. Now, at the time you were teaching at Spring Street School, were there any black teachers in any other schools in the Columbus Public School System, as far as you know?

A. None but Champion Avenue. They took them out of the schools where they were before they built Champion and put them there, and they hired no more.

Q. There had been black teachers in other schools prior to the opening of Champion?

A. Yes, in the integrated schools.

Q. What schools were they?

A. Mound Street, Fieser and where the YMCA is, there was a school there. Of course, they tore that down. YMCA bought that. Years and years ago there was one on Spring Street, but I don't recall the name because it has been so long ago. My mother told me that.

Q. Now, did you know the teachers who had been [141] teaching at Mound Street?

A. Yes. Miss Baker who became principal when they built Champion and Miss Nell Moffitt who was also a teacher now at Mound Street, being an integrated school. Miss Baker was the eighth grade teacher, and Miss Moffitt was the sixth grade teacher. They took those two out and put those in Champion and didn't replace them. They hired no more black teachers.

Q. You mentioned there also had been black teachers at Fieser School?

A. Yes, and she was put in Champion. She was taken out and put in Champion.

Q. Do you remember who that teacher was?

A. Ranetta Monmouth. She married later, and her name was Morgan.

[142] Q. And the school that was located near where the Y was, was that the Front Street School?

A. Yes, that was Front Street School.

Q. Now, there were black teachers at that school?

A. There was one there. Her name was Celia Davis. I remember seeing her once, but she died years ago.

Q. And when Champion opened, this would have been around 1910.

A. Yes.

Q. Did Champion have an integrated student body, also, like Spring did?

A. No, all black, all black teachers and all black children. When you got there, there was never any openings because the teachers weren't old, too old — they weren't old enough to retire, and, of course, if you got married, you didn't have a job so they just stayed, and then that meant less openings for the younger colored girls coming out.

Q. So from 1910 until Champion opened, until 1918, Champion was the only school in which blacks were permitted to —

A. Yes, that's right, that was the only place I could go, because Miss Gule had already said that was the only place I could go in Columbus, and here I was for generations and her generations just came from Europe, and yet she's telling me there's no place for me in Columbus, Ohio.

[143] Q. Now, you mentioned that Champion was the only school where blacks were permitted to teach. I take it, then, that the only time a black was hired was when someone left Champion; would that be correct?

A. That's right. That's right.

Q. And in 1921, when you left Spring Street School to go to Champion, Champion was — what grades were taught there?

A. They had kindergarten through the eighth grade, and they had two white teachers in the kindergarten, because there weren't any colored trained to teach in Columbus. They were trained in the grades. And then, later, when a couple of colored girls took the training at Normal School, they were placed in there.

Q. Replaced the two white teachers?

A. Yes.

* * * * *

[144] Q. All right. Do you recall the closing of the Eastwood Elementary School during the time you were teaching at Champion?

[145] A. I certainly do. Those — some of those children were sent to me. I had fifty-two children in my classroom.

Q. You mean the children from Eastwood were re-assigned to Champion?

A. Yes, and we were overcrowded.

Q. Were these the black and the white children?

A. No, just — no whites, just blacks.

Q. Well, what happened to the white students who had been attending that school?

A. Well, they were sent over to Fair — over to some of the other schools.

Q. Do you remember what schools they were sent to?

A. It was — they went over on Fair Avenue.

Q. Fair Avenue School?

A. Yeah, Fair Avenue School.

Q. And that was a predominantly white school?

A. It was all white, yes.

Q. Majority white school. You say it was all white at that time?

A. Yes. I don't know of any colored that went there.

* * * * *

[147] Q. Let me ask you if you know, and if you don't, you may say so, if you know why it was reported that the Eastwood School was closed?

A. There were all white people living in that neighborhood, and they did not want colored children crossing Long to come over into their neighborhood.

Q. Was the Eastwood School torn down at the time it was closed?

A. Oh, no, it's still standing. It just closed from use not long ago. I even subbed over there.

[148] Q. You subbed there afterwards?

A. Yes, since I retired.

Q. Now, you mentioned that one of the effects of the closing of the Eastwood Elementary School was that some of the students, the black students, were reassigned to Champion and that you remember having —

A. Fifty-two children in my room.

Q. Where did you seat fifty-two children?

A. They put in an extra row of seats. There were eight. I had forty. They put eight more — eight more — another row of eight seats, and then I had four more, fifty-two sitting on the seats with no desks in front of them, the books beside them on the seat or on the floor.

Q. Were the classes in Champion while you were there larger or smaller or about the same size as the Spring Street when you taught there?

A. Oh, they were small — Spring Street was smaller.

Q. Champion classes were larger?

A. Yes. Twice a year we had to go to an art meeting or a music meeting or some other of the supervisors were called and they would ask us when they called the roll how many pupils we had. Champion Avenue and Pilgrim always had more than the white schools. They would have in the 30's, and we had in the 40's and 50's. Of course, they had to know how much material to send to us, and that's how I know [149] what the other schools had.

Q. Do you recall during the time you were at Champion ever having a white child in your class?

A. Never.

Q. How long were you at Champion, Mrs. Davis?

A. Seventeen years.

Q. From 1921 to 1938?

A. Yes.

Q. And during the time you were at Champion, do you recall the method by which textbooks and desks and other material got to Champion?

A. Oh, yes, I do. It was demoralizing. We got all the old books from the white schools and the old desks.

Q. You mean the used?

A. The used, and they had been all old. All summer — we had to turn our books in if they were worn out or poor. We sent our report in June.

In the fall, when we came back, our report had been filled but they were filled with old books.

Q. How do you know that?

A. In the back of the cover of all the books was a paper with the name of the book, the school, the date, the teacher's name and condition —

Q. I see.

A. — starting with new, good, fair, poor, worn out, [149A] and we got the good, fair and worn out, and they had been pasted and glued and it was really demoralizing.

[150] Q. Was this also the practice when you were at Spring Street School?

A. No.

Q. The books there were new?

A. We got new books. We never got the old books.

Q. And the desks, were they ever sent to Spring Street from the other schools?

A. No, we got desks that had been sanded, and you could see the initials that had been carved so deep. We got the old.

Q. That was at Champion Avenue?

A. We got the old desks. Even the teachers' desks were old.

* * * * *

[152] Q. Now, do you recall the old Children's Home on Sunbury Road?

A. Yes, I got the children when — they had to go to school, because there was no school there where the Children's Home was on Sunbury. The white children were sent to Shepard. The black children passed their neighborhood school and were sent to Champion and Pilgrim, because I had them.

Q. Now, what was the old Children's Home?

A. Well, that was an orphanage.

Q. All right. The white students, you say, were permitted to go to Shepard?

[153] A. Yes.

Q. Was that within walking distance?

A. Yes. They wouldn't have a colored child in that school.

Q. But there were black children in the old Children's Home?

A. Yes.

Q. How did they get to Champion or to Pilgrim?

A. They bussed them because it was too far to walk. They had them in a bus and took them in a bus.

[154] Q. Now, in 1937 and 1938 or around that period, a decision was made relative to the Champion and elementary schools. Do you recall the nature of the decision that was made at that point?

Q. About what?

A. About the Champion and elementary — Champion and Pilgrim Schools?

A. Oh, yes. They were going to make Champion an all junior high school.

Q. And up to that time, it had been a K through eighth?

A. Yes, yes, and then Pilgrim School was an integrated junior high.

Q. A seventh through ninth?

A. Yes.

Q. And what was to happen to —

A. They took us — they took the elementary teachers out of Champion and put us in Pilgrim School, making it an all black elementary school.

Q. Now, at this time, was Champion still an all black school?

A. Yes, it was still.

Q. So, now, Champion is an all black junior high school?

A. Yes.

Q. And its students were coming from Pilgrim, or were they coming from other schools as well, if you recall?

[155] A. I don't know whether — the blacks would have to go to Champion, but I don't know where the whites went.

Q. All right. Now, you left Champion, then, in 1938, and where did you go from there?

A. Well, we were assigned to — Pilgrim, an all black elementary school, which had been integrated, had been an integrated junior high.

Q. Prior to your leaving Champion, do you recall the American Addition area and where the children who lived in that area went to school?

A. Yes, I think it was two or three portables out there. The white children never went there.

Q. Never went to the American Addition?

A. They never went there. They were taken out and sent someplace else, either to Leonard Avenue School or Eleventh.

Q. So American Addition was —

A. All black, a segregated school.

Q. Well, now, there came a time when American Addition students were assigned to Champion; is that not correct?

A. When they go to the — I think they only had to the fourth grade there.

Q. And so they were then regularly —

A. Sent to Champion, yes.

Q. Was Champion their regular elementary school?

[156] A. Yes, they were sent there. They were bussed there.

Q. Now, do you recall, is the American Addition —

A. They had to pass Shepard School.

Q. I was going to ask you that. Is the American Addition contiguous to the Champion attendance area?

A. Well, they made it so. They made it that all their children there either had to come to Pilgrim or Champion. There was no place else where they would send them.

Q. Was the American School closer to Champion than it was to the Eleventh Avenue Junior High School, for instance?

A. I don't recall how far Eleventh is, but, you know —

Q. All right. Now, in 1938, you began teaching at Pilgrim; is that correct?

A. That's right.

Q. And this would have been what, in September of 1938?

A. September.

Q. And do you recall whether or not there were any white children within the Pilgrim attendance area?

A. Yes, right across the street. White families across the street, down the street and all the way down on Taylor Avenue and all of Greenway. Greenway, which is east of Taylor Avenue, was white because they had restrictive covenant on that street and they were just lower income white people.

* * * * *

[163] Q. How long did you teach at Pilgrim, Mrs. Davis?

A. Seventeen years there.

Q. During the 17 years you taught at Pilgrim, did you ever have a white child in your class?

A. Never. None were assigned there. They were always assigned someplace else.

Q. So for 17 years at Champion and for another 17 years at Pilgrim —

A. All black; all black.

* * * * *

[166] Q. Now, you said you retired in 1954. Did you have any subsequent involvement with the Columbus Public Schools after 1954?

A. Yes. I went to California and stayed for a while, and then I came back. My friends said they wanted me to sub in their rooms if they had to be absent because they wanted somebody experienced. So I applied like on Monday, and on Tuesday Miss Ryan had charge of choosing the substitutes. She called me, and she said, "You didn't think I was going to call you so soon, did you?" And I said, "No."

She said, "I am going to send you to Pilgrim." I said, "I live in the Shepard district. I can hear the children when they are on the school grounds." She never answered. I went to Pilgrim.

Then she would call me, but always to an all-black school. So one time she called me to go [167] down to Beck Street, way down behind Schottenstein's. I said, "I told you the first time you called me I live in the Shepard district." They had something going on between them. That principal and those teachers wanted no black face over in that building, and she would not send me over there. By that time, I was living in that district, and colored children were moving into the district.

Q. Into the Shepard district?

A. Yes. They even had colored children over there at that time. She would never send me over there.

I said, "I have had enough racism. I am going to quit."

Q. That was when, what year?

A. In the '60's; about '61 or something like that. I had all I could take.

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[171] Q. Now, Mrs. Davis, I would like to ask you, if you can, to identify at each of several different periods the schools in which black teachers were permitted to teach. For instance, in 1910 you have indicated that there were black teachers, there had been black teachers prior to the opening of Champion at Mound, Front, Fieser, and I think you said perhaps Spring?

A. Yes.

Q. Now, in 1918 when you left or when you began at Spring, the only schools were Champion and Spring. Those were the only schools in which black teachers could teach; is that correct?

A. Yes.

Q. In 1921 when you left Spring, where could black teachers teach then?

A. Champion.

[172] Q. Was that the only school?

A. Yes. If you didn't teach there, you had no job.

Q. In 1938 when you left Champion, where could black teachers teach in the Columbus Public School System?

A. When I left Champion?

Q. Yes, when you left Champion?

A. Only Champion and Pilgrim.

Q. And in 1954 when you retired from the Columbus Public School System, where then could black teachers teach?

A. In '54, let me see. They were beginning to be put in Douglas and a few of the others like Felton. They were beginning to put one or two in some of those schools, but not predominantly.

Q. Champion was still a school in which blacks taught; is that right?

A. Yes.

Q. And Pilgrim was also a school?

A. Yes.

Q. What about Leonard Avenue? Did blacks teach in Leonard Avenue in 1954?

A. If they had done away with the schools out there where they had the portables.

[173] Q. American Addition?

A. American Addition, because they were transferred.

Q. To Leonard?

A. Yes.

Q. What about Mt. Vernon, were blacks able to teach then in Mt. Vernon, 1954?

A. That was an all-black school.

Q. So blacks were able to teach?

A. Oh, yes.

Q. What about Kent School, were blacks permitted to teach at the Kent School?

A. When I subbed there, they were.

Q. But not in 1954?

A. I don't know because I never got down that way.

Q. What about Main Street?

A. I really don't know because I never—I wasn't interested, only in the school where I was teaching.

Q. Do you know whether blacks were permitted to teach in the Reeb School?

A. Not then, no.

Q. Not in 1954?

A. No.

[174] Q. What about Eastwood, the school that had been closed in 1932 and then reopened subsequently; were blacks permitted to teach at Eastwood?

A. When I subbed, there were black and white.

Q. That was in 1958-'59?

A. Yes.

Q. Do you know whether in 1954 a black teacher would have been permitted to teach?

A. No, I don't know.

* * * * *

CROSS EXAMINATION BY MR. PORTER

* * * * *

[205] Q. [By Mr. Porter] You were hired at the end of about 18 months?

A. Eighteen months, yes.

Q. And then, at that time, you taught in a white school. I think you referred to it as the Spring Street School; is that correct?

A. That's right, yes.

Q. And the Spring Street was both black and white?

A. About — about 2/5 black when I ended.

Q. And from there you went to Champion and then to Pilgrim and then retired while you were at Pilgrim; am I correct about this?

A. Uh-huh.

Q. Is that right?

A. That's right.

Q. Now, the students that attended Champion while you were a teacher there I believe you said came primarily, or came from the East end of the city; is that right?

A. Uh-huh.

Q. They would have been from a specific geographical [206] area; am I correct?

A. That's the only place they were allowed to live.

Q. All right. So that the school itself reflected, if I may, the housing patterns from the area from which it drew; is that right?

A. That's the way it was designed.

Q. Thank you. Now, would it not be correct that through your years as a teacher in the Columbus Public School System, and let's say until the time of your retirement in 1954 — was it '54?

A. '54.

Q. All right. — until the time of your retirement in 1954, it was the practice of the Columbus Public School System to have school attendance zones; is that right, to have attendance zones —

A. They were supposed to have them, yes, but any white child that wanted to leave could leave.

Q. If I understood what you're saying, this was through some kind of an optional zone; is that right?

A. For white children, yes.

Q. Right. That's your testimony?

A. Yes.

Q. All right. But that the schools themselves had an attendance area; is that right?

A. They have an attendance area, yes —

[207] Q. Okay.

A. — for a neighborhood school.

Q. And they were neighborhood schools, were they not?

A. Yes.

* * * * *

WILLIAM LAMSON

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[271] Q. [By Mr. Lucas] State your full name and occupation, please.

A. William Lamson. That is spelled L-a-m-s-o-n. I am working as a forensic demographer primarily for the NAACP.

* * * *

[276] Q. [By Mr. Lucas] Mr. Lamson, in preparing the census data and transferring it to a map, what kind of base data do you use first? What do you look at?

A. I take the 1970 or the most current census, U. S. Census, and look at the individual percentage black per block, block by block throughout the city.

Q. All right, the Census Bureau also reports that information on the basis of census tracts, does it not?

A. Yes. It is essentially a compilation of each tract as composed of a number of blocks, blocks being city blocks essentially.

* * * *

[278] Q. Is block data generally considered a finer and therefore more accurate measure?

A. Generally, yes.

Q. Now, you have a legend on this map. Would you explain to the Court and counsel what the legend means and how you arrived at it?

A. All right. The color breakdown of the [279] legend is that all areas indicated as uncolored or white represent 0 to 9.9 percent black in their racial composition.

Q. That information comes from the U. S. Census?

A. That is right.

Q. That is the 1970 Census we are using on that map?

A. That's right, but it is my color scheme.

Green represents racial percentages of from 10 to 27.9. Blue represents racial compositions, general population racial composition of from 28 to 49.9 percent black. Orange represents from 50 to 89.9 percent black, and red represents from 90 to 100 percent black in racial composition.

The way I come to this, I draw a graph of the occurrences of blackness block by block in the city, and I start

in from 0 to 100 percent black, and I see the number of occurrences. What I get is an inverted bell curve with the highest number of occurrences at the opposite ends, either at 0 percent black or 100 percent black, and the curve is essentially a trough.

The choosing of the 50 percent line is because in every case I have ever been in, it seems to end being important. Everybody want to know [280] where 50 percent is. I just take that as an arbitrary 50 percent, and the blue is under 50 percent immediately, and the orange is immediately over 50 percent. Other than that, I look for the natural apparent cutoffs in the data as they are arrayed across this 0-to-100 percent grade.

[281] Q. And based upon the distribution as it occurs from the census data?

A. Right, so at 9.9 or 10, the really steep downslope from 0 percent blacks, it more or less bottoms out at around 10 occurrences, 5 to 10 occurrences. Then it maintains a rather uniform posture until it gets to 89, between 89 and 90, and then it again assumes a steep curve up to 100 percent black.

* * * *

[283] Q. Mr. Lamson, if you would step to the maps, we have an overlay. Would you tell us if that overlay has an exhibit number from the elementary?

A. Yes, the exhibit number is 278.

Q. And that's the elementary boundaries for 75-76; is that correct?

[284] A. That's correct.

Q. Can you tell me what you did in putting the information that appears in that overlay on that piece of paper?

A. All right. For each one of the schools shown on this overlay, there is a single sheet of paper and that sheet of paper has a verbal and a graphic description of the individual elementary school on it. I read the description,

the written description, compare it with the graphic description and then represent it on this overlay.

After doing that approximately 150 times, you arrive at the — this representation of the school system and its elementary attendance zones and school locations.

* * * * *

BARBEE WILLIAM DURHAM
called as a witness on behalf of the
Intervening Plaintiffs, being first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION BY MR. LUCAS:

[354] Q. [By Mr. Lucas] Please give us your full name and you occupation, sir?

A. Barbee William Durham. I'm a laboratory supervisor.

Q. And where are you employed, sir?

A. Ohio State University.

* * * * *

[355] Q. All right. Can you tell us first when the Vanguard League was formed?

A. 1940.

Q. And what was its most active period?

A. From that period on, from 1940 until about 1945.

Q. All right. Did you hold a position, office in that organization?

A. I did.

Q. And what positions did you hold?

A. I was chairman of the education committee and vice president at one time.

Q. Did you hold any positions in the NAACP?

A. I did.

Q. And what positions did you hold, and can you tell [356] us your term?

A. For several years, I served as chairman of the education committee, and for 15 years I served as the

executive director of the Columbus branch, and I also served as a member of the board of the state in NAACP.

* * * * *

[363] Q. [By Mr. Lucas] Did you start this before the Vanguard League? Did it start in about 1940 at the same time the League was founded?

A. About 1941, '40 to '41, the Education Committee of the Vanguard League on a number of occasions attempted to persuade the Board of Education, the administration, to hire, place and promote school personnel on the basis of qualification rather than race. It was a policy of the administration to hire, place and promote on the basis of race.

An example of this is what happened at one of the schools with which we were particularly concerned. It was Felton School. Felton School was changed from an all-white faculty to an all-Negro faculty, and when the Vanguard League learned that this was going to happen, the League asked the Board and the administration to not do this, to have an integrated staff at Felton, but this was done. During one change, 13 teachers and principal, all white, were exchanged for 13 teachers and the principal, all Negro.

* * * * *

[365] Q. Were there certain schools where there were only black teachers at this time?

A. Yes.

Q. What schools were those?

A. Garfield, Mt. Vernon, Felton after the change, Champion and Pilgrim.

Q. Are any of those schools still around today?

A. Yes.

Q. Are they still black schools?

A. Yes. Mt. Vernon, the name of Mt. Vernon has been changed to Ohio Avenue School.

Q. I am sorry, to what?

A. The name of Mt. Vernon has been changed to Ohio Avenue School, I believe, but they are all still black schools.

.

[369] Q. I show you Plaintiffs' Exhibit 376, a booklet entitled "Which September" and ask you if this is the booklet published by the Vanguard League?

A. It is.

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[375] Q. Would you read the section beginning, "The apparent intention and policy of the Board"?

[376] A. The Vanguard League is well justified in stating the apparent intention of the Board of Education to perpetuate and expand the segregated school system. This conclusion is substantiated by the past performance of the Board and recent evidence secured by the League. The evidence is:

1. With few exceptions, white families residing within the Felton school district send their children to Milo, East Columbus, Douglas and Shepard Schools;

2. Two years before Felton was made into a colored school, the white families in that district were informed of the impending change and were told that they might send their children to other schools. The same thing was done when Garfield was made into a colored school;

3. Children of white families that move into colored districts are transferred by school officials to white schools instead of to the colored school, the one to which they would normally be sent;

4. The white families residing within the colored school districts do not find it necessary to get the required permission to send their children to a school outside of the district. On the other hand, it is almost impossible for colored families to get permission to send their children to schools in other districts;

5. School districts are established in such a [377] manner that white families living near colored schools will not be in the colored school district. The area in the vicinity of Pilgrim School embracing Richmond, Parkwood, and parts of Greenway, Clifton, Woodland and Granville Streets is an excellent example of such gerrymandering. A part of Greenway is only one block from Pilgrim School, however, the children who live there are in Fair Avenue School district twelve and one-half blocks away.

Q. Would you go on?

A. A more striking example of such gerrymandering is Taylor and Woodland Avenues between Long Street and Greenway. Here we find school districts skipping about as capriciously as a young child at play. The west side of Taylor Avenue, colored residence is in Pilgrim Elementary district and Champion Junior High. The east side of Taylor, white families is in Fair Avenue Elementary district and Franklin Junior High. Both sides of Woodland Avenue between Long and Greenway are occupied by white families and are therefor in the Fair Avenue-Franklin district. Both sides of this same street between 340 and 500 are occupied by colored families and in the — are in the Pilgrim-Champion or colored school district. White families occupy the residences between 500 and 940, and as you would expect, the white family — the white school district of Shepard and Franklin applies;

.

[380] Q. Mr. Durham, you have written I guess over the years hundreds and hundreds of letters to individuals and newspapers concerning problems of race in this community. Is that a fair statement?

A. Yes.

Q. Have you addressed yourself to the issue of school construction in Columbus?

A. Yes, I have.

Q. Let me show you a series of documents which have previously been marked as Exhibits.

MR. LUCAS: May I stand by the witness, Your Honor?

THE COURT: Yes.

Q. (By Mr. Lucas) The first document is Plaintiffs' Exhibit 361, and I ask you if this is a letter you furnished to me?

A. Yes.

Q. Who is it addressed to?

A. Attorney Donald E. Calhoun, President of the Columbus Board of Education.

Q. What is the date?

A. August 24, 1970.

Q. And the letter is from you; is that correct?

A. Yes.

Q. If you will, would you read the first two paragraphs of the letter?

[381] A. "Dear Mr. Calhoun: I note in the press that the Columbus Board of Education has purchased an elementary school site in the Scarborough community. This community is to have 376 townhouses and is one of the sections of the larger development of Walnut Hills which is to total 3,500 to 4,000 rental and condominium units.

"I should like to know what consideration the Board has given to the possibility of this school being one from which Negroes will be excluded by virtue of their being excluded from the community as a result of racially discriminatory practices in spite of laws that now exist?"

Q. All right, did you — perhaps you should read the remainder.

A. "It is my feeling that if it has not already been done so, the Board of Education ought to inquire of the developers their intentions in this area. Will Negroes have the same opportunity to obtain housing in this new development as other citizens? I feel this way because if the

Board is going to purchase land in a self-contained community, thereby furnishing the developers with one of the necessary factors to state in their promotion that this is to be self-contained, then the Board has an obligation to make every effort to assure that this community will be open to all on an equal basis. [382] "I would appreciate hearing from you at your earliest convenience."

Q. All right, and the date of the letter is August 24th; is that correct?

A. Yes.

Q. Did you receive a reply?

A. I did.

Q. I show you what has been marked as Plaintiffs' Exhibit 362 and ask you if you can identify it?

A. Yes. This is a response from Mr. Calhoun.

Q. And he simply acknowledges your letter and indicates he will attempt to become informed on the matter; is that correct?

A. Yes.

Q. I show you another letter marked for identification Plaintiffs' Exhibit 366 bearing the date October 4, 1970. Is this letter also addressed to Mr. Calhoun?

A. It is.

Q. Does it refer to another development area?

A. Yes.

Q. What area is that?

A. Evergreen on the Commons.

Q. That is a \$20 million apartment complex?

A. Yes.

Q. How many townhouses and apartment units?

[383] A. 350 townhouses and apartment units.

Q. Do you refer in this letter to your letter of August 24?

A. Yes. Would you like for me to read this letter?

Q. Well, let me see. I don't want you to duplicate anything.

This letter is essentially the same inquiry you made with respect to the other community; is that correct?

A. Yes.

Q. I will show you a letter dated October 6th from Mr. Calhoun marked for identification Plaintiffs' Exhibit 364 and ask you to read that letter.

A. "Dear Mr. Durham: I wish to acknowledge your letter of October 4, 1970. I have no personal knowledge of this. I have sent a copy of your letter to all Board members and will ask Mr. Ramsey, Chairman of our Building Committee, to check into it.

"As to your letter of August 24, I requested a reply from the administration. When they gave it to me, I was not satisfied with it. I showed their comments to other Board members, and they did not feel that it was adequately responsive to your inquiries. Thereupon, I have asked Mr. Ramsey to work on an investigation. I expect soon to have a response for you based on his investigation.

"Yours very truly, Donald E. Calhoun."

[384] Q. All right, did you write him again in March, 1971?

A. I did.

Q. And the date is March 13?

A. Yes.

Q. And that is to Mr. Calhoun?

A. Yes.

Q. Would you read that letter, please?

A. "Dear Mr. Calhoun: I wish to call your attention to an announcement of a new housing and shopping area planned for New Albany. Included in this development is an elementary school and neighborhood park which would occupy 11.5 acres, 10 of which are owned by the Plain Local School Board. You may recall my concern about this pattern as evidenced in my letters of August 24 and October 4, a pattern which indicates possibly co-operation between real estate developers and Boards of Education or their agents.

"I am very much concerned about this because it enables developers to more easily control the racial makeup of the school since the school became a part of the deal which they, the developers, can offer prospects.

"I have not heard from you since your letter of October 6, and I am wondering if Mr. Ramsey completed the investigation you requested of him. Might I hear from you at your earliest convenience?"

[385] Q. An I believe you heard from him on March 23, 1971, did you not?

A. I did.

Q. I show you now Plaintiffs' Exhibit 366, a letter to you from Mr. Calhoun. Would you read that letter, please.

A. Dear Mr. Durham:

I spoke to Mr. Ramsey recently concerning your unanswered inquiries. He says that he looked, questioned and watched the development of sites selection and school location planning but has found no indication that the staff has been subservient to developers. He says that sites are selected for new schools through consultation with the City Planning Department whereby areas for residential development are indicated. By this process of identification, we did, when we had the money, purchase a school site long before it developed and before the developers had acquired the land.

Q. Let's stop right there. The areas you had written him about were areas that had already been announced for development and the announcements indicated that there was a school site already selected; is that correct?

A. Right.

Q. And this letter indicates that the Board of Education, before there is a development, is purchasing sites; [386] is that correct?

A. Right.

Q. And before there's any development planned, according to this letter?

A. Yes.

Q. All right. Go on.

A. This type of planning is, of course, based on providing a school where the population needs require a school. Mr. Ramsey recognizes that developers have exploited the fact that a school will be located nearby in their advertisements to appeal to buyers. In this respect, we are much like sewer and water being available.

It has been suggested that developers sign an agreement in advance that their project will be open to all people. We believe in this and believe that it is something that the City of Columbus could enforce. This is because all the plans, zoning, building, sewer and water permits are controlled by the City.

If an agreement were violated, why won't it be possible for the City to cut off the services that we granted in reliance upon the agreement? Specifically, you asked about Green Commons and Scarborough Community. Mr. Ramsey and I were both advised that in each of these instances the school site need was identified by the City Planning Commission and we acted to acquire or protect a [387] suitable school site before area development plans were submitted. The Planning Commission's staffs resolved all the proposals, which include accommodation of school sites.

Yours very truly,
Donald E. Calhoun.

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[445] CROSS-EXAMINATION BY MR. PORTER:

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[452] Q. The point that I wish to make and wish to discuss with you just a little bit, Mr. Durham, is this, that it is my understanding from what you have said and written over the years — and you correct me, please — that you consider probably the single most significant factor

in the dealing with racially imbalanced schools is the lack of open housing; isn't that true?

[453] A. This is sort of a chicken and egg situation. If the schools make a purchase of land even before developers get into it, the schools have taken the first step.

Secondly, there are many occasions where schools boards of education administrators work in conjunction with the development of new areas. This was the burden of my letter to Mr. Calhoun.

• • • • •

CLARENCE LUMPKIN

called as a witness on behalf of the
Plaintiffs, having been first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS

[478A] Q. [By Mr. Atkins] Would you give your name and address for the record, please?

A. My name is Clarence Lumpkin, I live at 1362 East 20th Avenue, Columbus, Ohio.

• • • • •

[488] Q. I show you now what has been marked Plaintiffs' Exhibit 198 and ask that you take a look at it, please. Do you recognize that document, sir?

A. Yes, sir.

Q. And what is it?

A. This is an official press release issued by the NAACP.

Q. What date?

A. June 5, 1967.

Q. And at the time this press release was issued, were you still co-chairman of the NAACP's Education Committee?

A. Yes, sir.

Q. Would you read the press release, please, Mr. Lumpkin?

A. To all Press Media for Release June 5, 1967:

NAACP announced today that it would request action at the Tuesday, June 6 Board of Education Meeting on the suggestions and questions made by the NAACP Urban League and numerous neighborhood clubs and individual parents. "After a year and a half of discussions of the damages done to children by segregated schools, it is time that the School Board did something for a change," commented William J. Davis, Legal Redress Chairman of the branch office, Columbus Branch.

The Columbus NAACP also released two resolutions [489] by its Executive Board demanding the release of the achievement test scores and the termination of bussing to perpetuate school segregation and cover planning mistakes by school officials.

Q. Now, the first resolution contained in this press release I take it was a resolution adopted by the Columbus NAACP; is that correct?

A. That is correct.

Q. As was the case with the second resolution?

A. That is correct.

Q. So this represented the official position of the Columbus NAACP in 1967 in June; is that right?

A. Yes, sir.

Q. Would you read Resolution No. 1?

A. Resolution 1: The Executive Board of the Columbus NAACP demanded that the Board of Education release to parents and civic organization the results of standardized tests to all Columbus children during grade school.

The Executive Board further demands that nationally standardized exams be required through the twelfth grade. These tests are essential in those inner city schools where previous tests indicate that children are being irreparably damaged by inferior segregated schools.

[490] Q. And would you read Resolution No. 2?

A. Resolution No. 2: The Executive Board of the Columbus NAACP demands that the Board of Education stop busing Negro children to maintain school segregation and to cover up failures to build adequate facilities. Columbus spent over half a million dollars last year in busing. Negro children were among the main victims. Gladstone Elementary School is a well-known example of busing Negro children to cover up the failure of the school board to correct errors in the building and location of schools. The first year the school was opened, there was no space for the sixth grade. This year, after repeated complaints of parents about several rooms with more than one class, school officials saw the problem. They bused out the kindergarten students.

Negro parents know that school boundaries.

Q. I think there is an "a" missing, school boundaries.

A. All school boundaries are carefully redesigned to maintain and increase segregation in our schools. These parents also know that bussing is a glaring example — these parents also know that bussing is used where necessary to keep Negro children out of primarily white schools.

As a glaring example, school officials admitted last fall to the Council on Intercultural Education that [491] children were being bused from the other side of the Alum Crest School district, 80-percent Negro, to Molar School, 2-percent Negro. One official, after saying that it was temporary — I am sorry. One official, after saying that it was a temporary measure, admitted that the children had been bused ever since Alum Crest School was built.

Clearly the Board of Education is against bussing only when they want to maintain segregation. The NAACP and Negro parents will regain their faith in the school board only when they see action, not just words.

* * * * *

[493] Q. Do you remember whether, in response to either Resolution I or Resolution II, the Columbus Board

invited the NAACP's Education Committee members, of co-chairman of the NAACP's Education Committee to come and meet with it for the purpose of discussing these resolutions.

Q. Was such a meeting requested by the Columbus Board?

A. I do not recall a specific meeting being set up for that particular purpose. There was several meetings over a period of years held with the Board of Education. I cannot say that these resolutions was not discussed.

[494] I am sure that these particular resolutions was presented to the Board. Whether or not, or when, if a specific meeting was called to discuss these resolutions, I do not recall, sir.

Q. I show you now what has been marked previously as Plaintiffs' Exhibit 199 and ask that you examine it.

Do you recognize this document, Mr. Lumpkin?

A. Yes, sir.

Q. Would you identify it, please?

A. This is a press release issued by the Education Committee of the Columbus Branch of the National Association for the Advancement of Colored People.

Q. What date was on this document?

A. June 20, 1967.

Q. At that time were you still co-chairman of the NAACP's Education Committee?

A. Yes, sir.

Q. Was this press release, in addition to being released to the press, sent to the Columbus Board of Education?

A. Yes, sir.

* * * * *

[496] Q. Were any boundaries changed as a result of the recommendation from the NAACP that boundaries be changed rather than setting up a program of open enrollment as I understand this release?

A. Some boundaries was changed, but not in accordance with our recommendation. Boundaries was changed at Gladstone Elementary School, for an example, but this was not in accordance to our recommendation.

Q. In what way did it differ from the recommendation made by the NAACP on June 20, 1967?

A. The intent of the recommendation-resolution was to change boundaries in order to bring about a better racial composition or racial balance in the public school system throughout the City of Columbus, not to change boundaries; to restrict, to continue or to perpetuate the racial isolation in the Columbus public schools.

[497] Gladstone was built and then Hamilton Elementary School was built. There was — Attendance pattern then was changed. Gladstone boundary children came from far west of Cleveland Avenue to Gladstone Elementary School, and when Hudson Elementary School was built, then some of the children that had been attending Gladstone, which was — I don't know — probably at that time 70, maybe 80 percent black, some of them then was shifted to Hudson Elementary School, which I think was either predominant black or very rapidly became black.

There were no children brought in from other predominant white schools into Gladstone or to 11th Avenue, Windsor Terrace, what-have-you, sir.

Q. So far as you could see, the effect of the boundary changes at Gladstone, construction of Gladstone, the boundary changes there, and the attendance boundaries drawn for, I believe you said Hudson? —

A. Yes, sir.

Q. — and Hamilton Schools, had a segregative effect rather than an integrative effect as recommended; is that correct?

A. That's my opinion.

Q. Can you recall any instances in which the School Board, either in response to the NAACP, or on its own

initiative, changed boundaries for the purpose of effecting integration?

[498] A. I don't know of any, sir.

* * * *

[504] Q. I show you what has been marked previously, Mr. Lumpkin, as Plaintiffs' Exhibit 352 and ask that you examine it, please. Do you recognize this document, Mr. Lumpkin?

A. Yes, sir.

Q. Would you identify it, please?

A. Subject of this document is "Racial Segregation In The Columbus Public Schools." This is a position paper presented to the Council on Intercultural Education by the Columbus, Ohio, National Association for the Advancement of Colored People, August 10, 1966, and this paper was prepared by the Education Committee of the NAACP, and this was — this was a paper that consisted of statistics and data that was compiled for the presentation to the Columbus Public School System on desegregation of the Columbus Public Schools, various plans, et cetera.

Q. Now, what was the Council on Intercultural Education, if you can recall?

A. This was a council, a group made up of various community organizations of which NAACP, Urban League, Civil Organization and interested and concerned citizens and parents.

Q. Now, do you know whether or not there was any issue representation on this council from the Columbus Public School System?

A. I believe there were -- there was a liason person [505] or persons on this committee. I know we met with several -- several occasions with administrators, staff persons. I don't know if Mister -- what was his name -- Davis -- what's Mr. Davis' first name? Joe Davis? Joe Davis?

Q. Joseph?

A. Joe Davis, I believe. Mr. Joseph Davis and the Superintendent in charge of buildings, Mr. Warren Beers, I think, acted as a liaison person. There could have been others.

Q. Now, in answer to previous exchanges between Plaintiffs and the Columbus Defendants it has been acknowledged that this particular document was received by the Board, and I want to call your attention to particular sections of it and ask you a couple of questions about it. If you'll look at page 3, under "Recommendations," it says, No. 1, desegregation.

A. That's right.

Q. Would you read that particular part of that recommendation?

A. "The Columbus NAACP proposes that a combination of the Princeton pairings and redistricting be applied to eliminate racial imbalance where school districts in the same area have widely dispar --" Hmm -- "percentages of Negroes. The Princeton Plan should be applied in those cases where two school districts could be combined to provide racial [506] balance and redistricting should be applied. Where there are three or more, districts must be combined to meet this necessity. The possibilities mentioned below pinpoint which schools fall into these categories and may serve as a point of departure. We realize that many other factors must be considered in the final location of school district boundaries but racial balance must be a requirement. Appendix 3 contains appropriate definitions and descriptions relative to our usage of certain terms in connection with desegregation."

Q. Now, on the next page, page 4, the indication is that in this series of recommendations, as to the first one, the Princeton Plan pairing concept, some 16 schools were mentioned in which Princeton Plan pairing could be used to achieve, as called here, a balanced distribution of Negro

children. Do you recall whether, with respect to any of these recommendations, there was either action by the Columbus Board or a response as to why action was not taken?

A. I do not recall, sir, a response as to any action taken on the Princeton Plan upon the recommendation coming from the — the Committee. No, I do not recall this type of plan being implemented or receiving written communication that it would be implemented.

Q. Let me call your attention specifically to No. 1 on [506A] that list of proposed pairings. It mentions East Columbus, which in that year this says had an enrollment of 606, 39 percent Negro, and Broadleigh which had an enrollment of 447 with a 0.2 percent Negro enrollment should be paired, giving two racially balanced schools of 22 and a half percent Negro. Do you know where those schools are?

[507] A. Yes. East Columbus and Broadleigh, that is, do I know what section of the city they are geographically located in?

Q. Yes, my question is, as far as you can recall, Mr. Lumpkin, were these contiguous school attendance areas?

A. Yes.

Q. Now, would that be true then of each of the other seven pairings mentioned on this page?

A. Yes, sir. As I recall, as we went over the maps and the racial composition of the schools, we arrived at the decision that these schools could be — the Princeton Plan could be implemented here, sir.

• • • • •

[510] Q. Now, a second part of that recommendation on desegregation had to do with redistricting. It says here that — the recommendation was that redistricting be used according to the following six plans to restore racial balance in 21 schools. As far as you can recall, Mr. Lumpkin,

were any of the boundary changes proposed here involving these 21 schools, were any of those boundary changes in fact effected by the Columbus Board?

A. As far as I can recall, no, sir. There was one school, and I don't recall the name, in the far south end, but, as far as I can recall, no, sir, none of these.

Q. Now, at the end of that particular section on redistricting, it says on this section on desegregation, and I am quoting: "We propose open enrollment financed by the school district to begin desegregation in the remaining elementary schools. The NAACP will offer plans in the future to desegregate junior high and high schools."

[511] As far as you can recall, were there similar plans for desegregation offered having to do with junior high and high schools?

A. Yes, sir, there were plans offered. I can't recall at this point, without referring to some of my notes at home, what these plans were, sir.

Q. Do you recall, Mr. Lumpkin, attending any meetings of the Columbus Board during the period 1965 to 1970? Did you attend any of the Board meetings?

A. Yes, sir.

Q. Did you attend many of the Board meetings?

A. Yes, sir.

Q. At any of the Board meetings that you attended during that five, four or five-year period, were any of the techniques for desegregation which were mentioned here that we have discussed this afternoon, were any of those discussed by the Board?

A. In an open forum?

Q. Yes.

A. They were discussed when we brought forth — some time at an open regular Board meeting we presented these plans, and they were discussed by Board members, yes.

Q. So it would be safe to say, would it not, that the Board was aware of these techniques of desegregation?

A. Yes, sir.

.

[543] Q. Mr. Lumpkin, you indicated that you were at one point I believe you said President of the Gladstone Parent-Teacher Association; is that correct?

A. Yes, sir.

Q. Prior to the construction of the Gladstone School, did you and others with whom you were acquainted oppose the [544] construction of that school?

A. Yes, sir, we did.

Q. Was the grounds of your opposition the size of the school, the location of it, what? What were the grounds for your opposition, if you can recall?

A. My opposition to the construction of the Gladstone Elementary School was because, after looking at the architect — after looking at the drawing and the statistics and the population density up there, that this school would be inadequate, that it would be too small to serve the children that would be required to attend that school.

I told them that they should acquire additional property and build a larger school because I did not believe that the school would be large enough for the — to enroll all of the students that would be required to attend that particular school, sir.

Q. When you say it wouldn't be large enough to enroll all the students who would be required to attend it, were you referring to the need to provide for integration at the Gladstone School?

A. Both, sir. At that particular time, the racial composition, the racial makeup of the community was changing. The population was increasing. I saw this school as being a building, another school building, that would be totally black or predominantly black within a very short

period of time, [545] maybe less than two years, that it would be predominantly black.

In fact, I don't recall the exact percentage, but I believe it opened up in the neighborhood of about 75 or 70 percent black when it was opened up, and I saw this being another totally black school, in addition to not being large enough to house the children that was there.

[546] Q. Now, when you say you opposed the Board's plans for the construction of the Gladstone School, do you mean that you by some means communicated that opposition to the Board of Education or to the Superintendent or to the staff?

A. Yes, sir. I communicated this information to the Board. I had numerous conversation with Mr. Beers, I think, whom at that —

Q. Would that be Warren Beers?

A. Yes, sir, who I think was in charge of building or building constructions and, et cetera. I had many conversations with him. I also appeared before the Board of Education trying to convince them that this building was inadequate, sir.

Q. When the school opened was it, in fact, in addition to being, as you indicated, a predominantly black school as you predicted, was it also too small, as you had also predicted?

A. Yes, sir, it was. The first year it opened, kindergarten and sixth grade and I believe the first grade was unable to attend that school. We had also provided in that building at that time two classes in one classroom. For example, you may have first and second grade in one classroom. And my child, my son, was bussed to Duxberry Elementary School from the first year that it opened, sir.

Q. Did the Board take any action or make any effort, [547] as far as you can recall, to provide for this integration at the Gladstone School?

A. In my opinion, no, sir.

Q. When the Gladstone School opened, you indicated that at least some of the children were being transported to the Duxberry Elementary School because of lack of space. Did there come a time when the Gladstone PTA, of which you were president, requested the Board of Education or the Superintendent and the staff to make provisions for integrating the . . . further integrating the Gladstone School?

A. Yes, sir.

[548] Q. Did you make specific recommendations of how or what alternative ways might be pursued to enhance integration at Gladstone?

A. Yes, sir. I recall making a recommendation that there were other schools in the area that children could be attending if the boundary lines were — was redrawn. For example, there was Linden Elementary School, which was predominant white. At that particular time, Duxberry, I believe, was predominant white. McGuffey was predominant white. So there were other schools, that by drawing or redrawing the attendance, that we could have changed the racial balance or the composition of any of the schools in that area, sir.

Q. Did the Board or the Superintendent, in fact, change the boundaries of the Gladstone attendance area to bring about this desegregation you had recommended?

A. No, sir.

* * * * *

[554] Q. You indicated, Mr. Lumpkin, that you have served as [555] a member of the Urban League's Education Committee.

A. Yes, sir.

Q. Approximately when did that service begin, if you can recall?

A. Probably in the year of '65. I'm not exact sure of the year. It may have been '65 or '64. It's been a long time, sir. I'm not exactly sure, but I believe it was '64, '65.

Q. And how long did you serve on the Urban League's Education Committee, sir?

A. Up to the present, I'm still a member of the Urban League Education Committee, sir.

Q. And during the time that you served on the Urban League's Education Committee, do you recall the Urban League ever recommending to the Board of Education that it take action to desegregate schools in Columbus?

A. Yes, sir. In fact, the Urban League undertook a study of the Columbus Public Schools System and compiled a book, document, which we presented to the administration, the Board of Education, in which there were many meetings held around the recommendation of the Columbus Urban League proposal.

Q. Just a second.

Were the recommendations made by the Columbus Urban League's Education Committee, of which you were a member, [556] essentially the same as or different from the recommendations made by the NAACP's Education Committee of which you were co-chairman?

A. No, sir. They were very similar. In fact, we collaborated on most of all of them. We all was in support of them, sir.

Q. And during the time that you served on the Urban League's Education Committee, did you have occasion to accompany the members, other members of the Committee to meetings with staff members, employees of the Columbus Board of Education?

A. Yes, sir.

Q. Did you also have occasion to accompany them on meetings — to meetings with members of the Columbus Board?

A. Yes, sir.

Q. And during the course of these meetings, were the recommendations for desegregation to which you have referred discussed directly with the Columbus Board members and/or Columbus Board employees?

A. Yes, sir.

Q. Now, can you recall, Mr. Lumpkin, whether or not the Board response to the recommendations of the Urban League, as far as integration is concerned, did it differ any from the response of the NAACP's recommendation?

A. There was no difference in the response. If you're [557] referring to implementation of any of the recommendations, there was no difference in the response, sir.

* * * * *

CROSS-EXAMINATION BY MR. PORTER

* * * * *

[582] Q. [By Mr. Porter] It was your opinion, was it not, in June of 1967, your opinion in June of 1967 that the Columbus Public School System had inadequate physical facilities, wasn't [583] that true?

A. That is true.

Q. And that it needed more physical facilities in order to better provide education to the Negro population; wasn't that true?

[584] A. Not only to the Negro population, but to the population as a whole, sir.

Q. Thank you very much. And it was your opinion at that time and it was contained implicit in the news release that the way to accomplish that was for the Columbus Public School System to build schools; isn't that right?

A. That is not completely correct, sir.

Q. All right then, straighten it out.

A. To build schools, but not build them in a manner to further segregate the Columbus School System or to perpetuate segregation.

Q. Thank you.

A. I think we presented plans showing schools could be built in a manner wherein they would not perpetuate the segregation in the Columbus Public School System.

Q. Where are those plans?

A. I don't recall now, sir, where they are. I am sure that — it's been a long time ago, and they may be contained in some of these documents here of building schools, the campus type, et cetera.

Q. Thank you. Would you explain, please, not — would you explain, please, the concept that you felt was presented to the school system that they should follow in the construction of buildings?

[585] MR. ATKINS: Your Honor, I am going to object to the question in that form because it is broader than the direct examination.

THE COURT: Overruled. You may answer.

A. State the question again.

Q. I believe that you said at the end of your last answer that you thought you could not remember what the specifics were but that you thought the buildings were possibly on a campus?

A. That was just one. That was one method that we discussed and thought out to be looked into.

There were, as the population, as the whites moved out to the suburbs, there was another discussion, and there was another plan wherein — and I am sure this was the recommendation made, that even if a parent found out of the particular attendance in the area where his child was going to school, that the child would remain in that particular school; that if you drew rings around the City of Columbus and you built the school on maybe the first ring which would be the center city, central city, and the second ring could we say the next level and the third ring would be the outermost area of the school, Columbus School District, that if you built schools around on the second ring, that you could feed in from both areas and therefore bring about a better racial balance of the school. Do you understand the picture that I [586] am trying to paint, present to you?

Q. Yes, I do.

A. Well, this was one other method that I personally and we discussed this. I don't know if it shows up in one of the plans that's in all these documents. I haven't had a chance to go through them. That was one we talked about, that you could feed in from both directions rather than continuing to build little schools in a particular area and contain that population in there.

For instance, one time we were really seriously considering putting portable schools around even Linmoor Junior High. I was forced to accept that, although I was opposed to that, and it never happened simply because we didn't have enough space, and I would be opposed to enlarging of Linmoor Junior High which had about 1,300 students in it. It was only built for 800. I was opposed to enlarging Linmoor Junior High because I felt that here again we were bringing more and more blacks into a particular geographical area, school.

* * * * *

[605] Q. Mr. Lumpkin, let me do it another way. You do not need that.

It is your opinion, is it not, that you cannot, through the manipulation of zones, school zones, effect the segregation unless there is a change in housing patterns; isn't that right?

A. That is not my opinion, sir.

Q. All right. What is your opinion?

[606] A. My opinion is that the desegregation of the — a school system can be achieved even though you cannot change the housing policies of a particular location, community, locale or municipality. I think this has been demonstrated throughout the South.

I think that the School Board has a moral obligation to attempt, as well as other officials, to eliminate housing discrimination, red lining, and restriction, and etc., but that to say that you cannot eliminate geographical school zones unless you eliminate segregated housing, I don't

believe, in my own opinion — in my own opinion that that is true, sir, that you can.

Q. Mr. Lumpkin, that wasn't my question. My question was that it is a fact, is it not, that it is your opinion that you cannot desegregate simply through the changing of school zones?

* * * * *

[608] Q. All right. Now, my question, Mr. Lumpkin, is this: As long as housing is not integrated, schools will not reflect the racial balance of the community simply through the manipulation of school zones; isn't that true?

A. My answer to your question is that as long as the Board of Education continued to follow — or build schools in areas, as it gives an example here where blacks cannot attend, you will have segregated schools.

Q. Would you agree — would you agree with the proposition that the Columbus Board of Education, however, has built schools where there was a necessity to serve a school population?

A. I would agree that they have built schools where there was a necessity to serve a particular racial or ethnic population.

Q. All right. And you would also, I take it, agree that they have done this on a so-called neighborhood school basis; is that right?

A. I will agree that they use the neighborhood concept as a justification for building the school.

Q. All right. Now, directing your attention to your [609] last statement, is it your position that the construction of a school building in north Columbus in 1950 or the early '50's was a racially motivated decision?

A. In 1950 in north Columbus? How far north Columbus? I live in north Columbus, sir.

Q. Anywhere north.

A. Was racially motivated?

Q. Yes.

A. It goes back to my previous answer to you, sir, that if you built the school in north Columbus, one of your justifications for building it there in addition to the need, as you put it, to serve the people that live there would be of the demand concept. I say that the school could be built south, further south, and both groups of the community could feed into that particular school.

Q. And if that was done, that would be a departure from the so-called neighborhood concept, would it not?

A. I would say so.

• • • • •

[610] Q. Okay. Now, just a few more questions, and I'll be through.

You have stated that Gladstone, you felt, should have been constructed with more capacity than was initially contained in the building; am I right about that?

A. Yes, sir.

Q. It is true, is it not, that it was built, and then within two or three years an addition was put onto it so that its capacity went from, I think — its enrollment, at least, went from 300 and some to I think almost 500; is that right?

A. That is correct, sir.

Q. All right. And you also suggested that it should have been combined with, or there should have been a different district is more accurate, I guess, than that which was [611] adopted?

A. That is correct, sir.

Q. And did you take into account the capacities and enrollments of the surrounding schools when you made that recommendation?

A. Yes, sir.

Q. I believe that you referred to Duxberry as one of them, of the schools, —

A. Yes, sir.

Q. — and Hudson, possibly, as another. I'm not sure whether you mentioned Hudson or not. It would be a possibility, I assume, would it not?

[612] A. I think Hudson was — Gladstone was built — I will have to assume this. Gladstone was built to relieve some of the pressure of Hudson Elementary School. That was the idea. This is what we were led to assume.

Q. And I think that Linden which would be also immediately to the north of Gladstone was over capacity at the time, was it not?

A. No, sir, I am not aware of that fact.

Q. All right. It is immaterial here either way. Do you happen to recall what the situation was with respect to capacity enrollment of Duxberry which was another one you mentioned as a possibility of being included?

A. Duxberry, I don't remember the exact capacity, what the capacity is for Duxberry, but it stood to reason to me that if you were busing children from Gladstone over to Duxberry, it could not have been as crowded as Gladstone; and when you brought the students from Duxberry back into Gladstone, either you then brought children from some other area to take up that space or you had some extra space there. I don't recall the number of capacity for this school at this time.

• • • • •

REDIRECT EXAMINATION BY MR. ATKINS

[618] Q. [By Mr. Atkins] Mr. Lumpkin, I am showing you what is a missing page 2 from the exhibit marked Plaintiffs' Exhibit 352, and will ask you to read what is Paragraph 2 on that page?

[619] A. "While residential housing patterns have contributed to segregation in fact, we charge that the Board of Education has also deliberately promoted segregation in some school zones by drawing zone lines around segregated residential areas in order to contain Negro students in separate schools.

"In some instances, the zone lines have been drawn in particular shapes to avoid sending children of one skin color to schools with those of another color. The Moler school zone, for an example, is split in two, two separate distinct zones (outlined in green on the map overlay) which lies on the south and west boundaries of the Alum Crest School zone." May I read that again. "Alum Crest on the south." May I read that again. "outlined in green on the map overlay) which lies on the south and west boundaries of the Alum Crest zone. Alum Crest, as noted earlier, is over 80-percent Negro, while Moler is a mere 2.5-percent Negro.

"The NAACP will not permit the Columbus Board of Education to hide behind the so-called neighborhood school concept, especially when the board invokes this concept only when necessary to confine Negro children to sub-standard schools."

Q. Was that the position of the NAACP in 1966 and throughout the period up until and including 1969 when you [620] were co-chairman of its Education Committee?

A. It was, sir.

* * * * *

MARJORIE GIVEN

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:-

DIRECT EXAMINATION BY MR. LUCAS

[624] Q. [By Mr. Lucas] State your full name and occupation, please, ma'am?

A. My name is Marjorie Given. My job classification is Typist-Clerk III. My function is assigning substitutes in the Columbus Public Schools.

* * * * *

[627] Q. [By Mr. Lucas] Mrs. Given, can you explain how your office operates in terms of placement of substitute teachers?

A. Our primary function is to fill a vacancy of an absent teacher with a certified substitute teacher. We receive the substitute teachers from Teachers Personnel. We receive them after they are hired.

[628] Q. And they have to be appointed by the Board; is that correct?

A. Yes.

* * * * *

[629] Q. The information you get from the Personnel Office contains an original personnel folder with the application of the individual, does it not?

A. Yes.

Q. And that application, how does it show the race of the applicant?

A. I can speak for elementary only because I —

Q. Yes, I understand.

A. On the application when the folder comes to us, there is a minority code number 1 or a 2 with a circle around it or a 4.

Q. What does 1 mean?

A. One means White.

Q. Two?

A. Black.

Q. Do you know what the others mean?

A. Well, 4 is oriental. Those are the only three that I have ever used.

Q. And it doesn't have any letters in front of it? It just has the number with the circle?

A. That is true.

Q. And that is on the original application for employment as a substitute; is that correct?

A. I see it on the application when it comes down to us after the substitute teacher has been hired, yes.

[630] Q. Now, are these numbers a code used by the Columbus School System?

A. Yes, at least by Teacher Personnel.

Q. Now, do many of these applications also contain the pictures of an applicant?

A. In the past the pictures were there. The picture is not required anymore, and many of the folders that come down never do have a picture in the folder.

Q. But they do have the code designation; is that correct?

A. Yes, yes.

Q. Now, you work with that as your base folder, and then you have another card that you use; is that correct?

A. Yes.

* * * * *

[631] Q. Now, there is a third type of card that you utilized in your day-to-day operations; is that correct?

A. Yes.

Q. Are these cards prepared each year —

A. Yes.

Q. — on each teacher?

A. Yes, they are.

* * * * *

[632] Q. I'll show you a card which has been marked Plaintiff's Exhibit 433-A, a card you furnished us at deposition. This is a Xerox copy furnished us at the time. You maintained your original card, did you not, —

A. Yes, sir.

Q. — because you needed it?

A. Yes.

* * * * *

[634] Q. Now, just on the right of that on the same line in the same box, essentially, is the racial code, is it not?

A. Yes.

Q. And what is that code?

A. It says MC-1.

* * * * *

[640] Q. And do you work closely with the lady who works with the secondary teachers?

A. We work side by side.

Q. And do you occasionally dip into each other's boxes for people when you need them?

A. Yes, on a very busy day, if I run out of substitutes, I will borrow some of hers and vice versa.

Q. And does she use a slightly different code system than you do?

A. I cannot honestly answer that question.

Q. From handling her —

A. She does not — we do not keep our cards the same way.

Q. The same way. From handling her cards, can you tell me whether or not a number of those cards have the corner blacked out?

A. Yes.

Q. And is that the way she codes race on her cards, to your knowledge?

[641] A. Yes, to my knowledge.

* * * * *

[645] Q. All right, I would like to show you a card from 1953 which is not marked as an exhibit, but it is not out of the card files that were brought here at our request, not our demand, our request to Mr. Porter, and he was kind enough to bring them here.

I recognize that you had no responsibility whatsoever for preparing these cards, but I show you a card, a printed card. Is this similar to the cards that are utilized by you?

A. I have seen that card in the card file, but I have not seen — I do not believe I have seen any other one like it.

Q. What does this card say?

A. That card in the upper left-hand corner says "Colored."

Q. What is the date?

A. January 1953.

Q. Mrs. Givens, I show you another card, and perhaps I better let you tell me what you think that date is on it?

[646] A. Well, it is for the school year 1959-1960.

Q. There is a pencil date, and then there is a typed date also; is that correct?

A. I don't know exactly what the pencil date is either.

Q. It looks like 190 or 196. In any event, it is typed on the card?

A. It is for the 1959-60 school year, yes.

Q. And what does it say at the top? Would you read what is typed in at the top?

A. Okay. It says: "Not Bellows, Fairwood, Southwood, Chicago, Avondale or colored schools."

Q. I am sorry, it doesn't have any conjunction, does it? It just has a dash?

A. That is right. I am sorry.

Q. I show you another card, 1960-61. Unless the other parties insist, I would prefer not to read the name into the record, but is there a "C" behind the name of the individual shown on that card?

A. Yes.

Q. All right. It is in parens, isn't that correct?

A. Yes.

Q. I show you a card for 1965-66. Is there a "C" behind that individual's name in parens?

A. Yes.

* * * * *

JOHN ELLIS

called as a witness on behalf of the Intervening Plaintiffs, being first duly sworn, was examined and testified as follows:

CROSS EXAMINATION BY MR. LUCAS

[661] Q. [By Mr. Lucas] State your full name and your occupation, please.

A. John Ellis, Superintendent of the Columbus [662] Public Schools.

Q. How long have you been Superintendent?

A. Since August, 1971.

Q. And that's also the date you first became employed in the system?

A. Yes, sir.

* * * * *

[683] Q. [By Mr. Lucas] Dr. Ellis, can you define for me the neighborhood [684] school concept as used in the Columbus School System?

A. In the Columbus School System we attempt to construct a school building in an area where a large number of pupils exist so that the pupils will not have to travel an excessive distance to get to their school, but will be attending a school as close to their home as possible.

Q. Is the neighborhood school concept as used here in Columbus in any way a sociological concept of neighborhood?

A. It is primarily a school that is defined geographically. We attempt to set boundaries based on natural boundaries such as rivers, super highways, major arteries and things of that nature.

Q. Would I be correct in saying that in addition to those physical dimensions you just described that the neighborhood school concept in Columbus is not a sociological concept of ethnic neighborhood or any other kind of homogenous group? [685]

A. We do not attempt to draw school boundary to isolate or identify anyone on a sociological basis.

Q. You don't look at the idea of the community having a separate integrity of its own which is described by the boundaries drawn around it for the school purposes? That's not the concept you use?

A. The concept is essentially to draw a boundary that makes the most sense, to create a boundary where the greatest number of pupils exist, where they can get to school in the most convenient fashion. I don't know how that relates to your question of integrity, but it's essentially a geographic concept.

Q. Would it be fair to describe it as: Your basic purpose is to obtain a walk-in school?

A. The basic purpose is to provide a school that is convenient to the home and the parent so that they can establish a good relationship between the school and the home to insure that we reduce travel time to a minimum, transportation costs to a minimum and improve the communications between the home and the school and create a school in an area where it can be close to the people.

[686] Q. In referring now to Plaintiffs' Exhibit 278, the elementary overlay for 1975-76, which is superimposed on top of the 1978 Census, Plaintiffs' Exhibit 252.

Let me ask you first, since I noticed during the recess you were comparing this with a map that you had, is this overlay correct as far as you know?

A. As far as I know, but I've only had a minute or two to look at it, so that's not sufficient to confirm its authenticity.

Q. Has you staff reported to you as to whether or not it's correct?

A. They have not.

Q. Have they been studying it?

A. If they have, I have not been advised.

Q. But from your quick inspection, you do not see anything wrong with it?

A. It appears to be okay.

[687] Q. Okay. All right. Let's look at Beatty Park School.

A. Beatty Park.

Q. Is it Beatty? I am sorry. Is that a — one of the smaller school attendance areas in the Columbus School District?

A. I don't know. I can only look at the map, and it appears to be the same size as many others I see on the map.

Q. Is that a neighborhood school?

A. It is.

Q. All right. The school's not located in the center of that; is it?

A. It is not.

Q. All right. There is another school building, looks like three, four blocks to the west, called Garfield; is that correct?

A. That's correct.

Q. That zone's about doubled the size of the Beatty zone; isn't it?

A. Yes.

Q. Is that the same kind of neighborhood school as the Beatty School?

A. Yes, it is. There is a lower density, and we've had a decrease in pupil population in that particular area. In fact, the Felton School was located here at one point in [688] time, and it was one of the schools that we mentioned that we have closed because there was a dramatic reduction in the number of pupils.

Q. But students in the Garfield zone would have to travel further distances than those in the Beatty Park School zone; is that correct?

A. My understanding, based on recollection and not that particular map, is that no pupil in the Garfield area has to travel more than a mile and a half, I think 90%

of them one mile or less, but I'm recalling from a year or two ago, the statistics.

Q. The Beatty Park children, do they have to travel that far?

A. They would have to travel a half mile or less in most cases.

Q. How about the Main Street School? Do they have to travel less distance?

A. Yes, for the most part.

Q. You call those neighborhood schools; is that right?

A. We do.

Q. What about the Kingswood School, that's about — it looks to me about three times the size of the Garfield zone, geographically speaking.

A. That is correct. I would point out, however, that in a large portion of that zone we had the University Farms, [689] which do not house children but rather that is property that is owned by the Ohio State University. There are a few, if any, children in there, so the size of the zone does not represent the distance the child might have to travel.

Q. Are there any streets above the Lane Street?

There appears to be some sort of thoroughfare.

A. Yes, Lane travels across.

Q. Are there some streets above that?

A. There are some streets above that, yes.

Q. All right. What about the Winterset zone, is that also another neighborhood school, walk-in school?

A. It is a neighborhood school, yes.

Q. For people to walk in from all over Winterset?

A. I believe that most of them do.

There has been some transportation in the entire northern area of the city because we have had a tremendous amount of overcrowding, so children have been transported to the various schools. I would state that when you locate a school in a developing area, there is a tend-

ency to have that school be sort of a wider geographical area, and then as it develops, we would sometimes subdivide the area because you have a greater number of pupils living there, and in order to locate the school that's close to the people and as efficiently as I described we attempt to do, a subdivision sometimes occurs.

Q. There is no consistent pattern, though, in the size [690] of the school attendance area and the colored schools in Columbus, is there?

A. The consistency is in attempting to locate a school as close to the greatest number of pupils as possible. Size is only one criterion.

Q. How about distance from school?

A. That's another.

* * * * *

[690] Q. [By Mr. Lucas] All right. Just limiting your answer, if you will, at this point to distance to the school, is there any consistency in the pattern of neighborhood schools in Columbus?

A. Yes, there is a consistency. We have attempted to locate schools so that a child will not have to travel farther than one mile to the neighborhood school. Now we do not meet that criterion in every instance, but that has been a general guideline.

* * * * *

[713] Q. Have you examined the pattern of principal assignment in the Columbus School District?

A. Yes.

Q. Is there a congruence between black principals and black pupils in the Columbus School District?

A. There was a tendency to assign black principals to schools that were predominantly black.

* * * * *

[717] Q. [By Mr. Lucas] From an educational point of view, do you favor an educational process whereby

children attend — black and white children attend the same school building?

A. Yes.

Q. What steps are you taking to achieve that in Columbus?

A. The major effort that we have taken I would characterize as twofold. First, through the school building program, we have added a variety of career centers that are open and available to students from across the school district. At the elementary and junior high school level, we have designated schools as developmental learning centers that are open to children beyond the neighborhood district. We are also offering different alternative schools such as an informal school, a traditional school, an IGE school, a positive reinforcement school, all schools that will have students from across the entire school system. So one thrust is to insure that we have a wide diversity of educational programs that will appeal to the great needs of a metropolitan area.

The second part of our approach, and all of this I [718] assume could be embraced under the label "Columbus Plan," is to insure that pupils know about the opportunities, that parents know about the opportunities and that a transportation network is created so that the opportunities are not merely ephemeral but can become actual. [719]

Q. But this is a programmatic alternative offered to all students, regardless of race. It is not a desegregation device, is it?

A. In order for a pupil to transfer to another school for the entire day, that transfer must improve the racial balance of the transferring and receiving school, and therefore it could be construed as an integration device.

Q. That's not its primary purpose or effect, is it?

A. It is certainly a primary purpose.

Q. The first two years of the Columbus Plan, as a matter of fact, the district refused to provide free trans-

portation for students whose express intent was to achieve a desegregated education; isn't that true?

A. That is true.

Q. So would you characterize the plan as a desegregation plan during the first two years of its operation?

A. It still had an integrative effect.

Q. What percentage of the total enrollment of the Columbus School System is involved on a full-time basis in the Columbus Plan?

A. The total participants in the Columbus Plan are approximately 3,600 pupils, so we are talking about a percentage of slightly less than 4 percent.

[722] Q. [By Mr. Lucas] Over that period with the figures and the changes you have seen, can you describe the Columbus Plan as a plan likely to eliminate the pattern of segregation in the Columbus Public Schools?

A. The Columbus Plan has been in operation for three years. We have made an enormous effort to communicate its advantages to set up different alternatives. Many of the new facilities that are programmed to become part of the Columbus Plan are not yet operational but are [723] becoming so. Certainly given the present level of the Columbus Plan, one can scarcely be comfortable that the level of integration that might be desired is accomplished, but neither would I conclude that because the Columbus Plan is new and has not yet demonstrated its capacity to insure that every school will have a reasonable degree of integration, that it will not happen. We are working mightily to insure that it does.

* * * * *

[740] Q. [By Mr. Lucas] What did you say the total number was of transported, not—excluding special education?

A. Ten thousand eight hundred and ninety-eight.

Q. So, roughly, nine thousand students are transported on a regular basis not related to any special physical or mental handicap; is that correct?

A. That's correct.

Q. And not related to the Columbus Plan itself?
[741]

A. That's correct.

Q. Has that level been fairly constant since you've been Superintendent, Dr. Ellis?

A. Yes, except for the Columbus Plan students which has increased dramatically to the one thousand from zero.

Q. So it would be fair for me to say, then, that the Columbus System, since the time you became Superintendent, has averaged transporting nine thousand students a year other than special education programs?

A. Yes.

° ° ° ° °

[755] Q. Is the Innis Road Elementary School opened now?

A. It is.

Q. Is the Cassady Elementary?

A. It is.

Q. In considering what you'd do about attendance at those schools, was one of the alternatives you considered the Princeton pairing?

A. We did not use that terminology, but that was one of the alternatives.

[756] Q. Was that option presented to the Board?

A. It was.

Q. Was it rejected by the Board?

A. The Board of Education selected the other option which was presented as an equally desirable option.

Q. Who prepares the proposals for you?

A. Generally speaking, the Division of Administration. They are the ones that handle the boundary lines and

work with them on an intimate basis. I do not work with boundaries on an intimate basis.

Q. Mr. Carter was the gentleman in charge of that, except he's on Sabbatical at the present time; is that correct?

A. That's correct.

Q. And did he work on the Innis Road and Cassady proposals?

A. Yes.

Q. All right. In other words, they originated before he left on his Sabbatical?

A. Yes.

Q. Who is the individual in charge of that department today during his absence?

A. Philip Fulton.

Q. Mr. Fulton also worked on a proposal?

A. I don't know if he worked on it or if he worked [757] with it after it was completed. It occurred about the time that a change was being made.

Q. What about the boundaries at Walnut Ridge, Eastmoor and Independence, did you present two sets of alternatives to the Board at that time?

A. Yes, sir.

Q. And what were those alternatives?

A. Well, they're hard to describe verbally, but they simply provided the geography in two different ways, and we attempted to look at ways in which we could insure when those buildings opened that they would enhance the possibility for integration as much as possible, and I presented to the Board of Education two options that seemed to me to be very reasonable to divide the territory and insure that each school would open with some degree of integration.

Q. All right. One option called for a substantially larger degree of integration in the two schools, did it not, or the three schools? I'm sorry.

A. Yes.

Q. And another option provided for some black and white attendance at each school, but it was substantially different from the first option?

A. It was somewhat different.

Q. And did the Board make a choice of the options [758] or make a choice of the option which provided for less desegregation?

A. The Board made a choice that would select the one that would have the least amount of transfer, and there was less racial balance in the schools.

Q. And when did that take place?

A. April or May of '75.

* * * * *

[760] Q. Let's go back to the Innis Road-Cassady Elementary proposal. Will you describe that in a little bit more detail?

A. Basically we looked at two options. One was maintaining the present kindergarten through grade six organization that does exist in almost all instances in the Columbus Public Schools, and that was the alternative that was selected, the maintenance of the present organizational pattern for the school system.

[761] As another alternative, we looked at the possibility of making one a K - 3 center and another a grade four through six center which would in effect have created a large district and would have had the population in both of these schools be representative of a larger area.

Q. At your deposition you testified that both alternatives were educationally realistic and acceptable alternatives, did you not?

A. They were to me.

Q. If you paired those two schools, what would have been the racial composition? What was your projection?

A. Roughly 51 percent - 59 percent non-white.

Q. By not pairing, did you end up at Cassady with 552 black students and 66 white?

A. That's approximately correct.

Q. I am no mathematician, but how far off did the other alternative in terms of percentages leave you?

A. Well, I can give you where we are today. Innis Elementary School has 154 minority children out of 545 or 28.3 percent minority, and Cassady Elementary has 66 white students, 552 black students, or an 89.3 percent minority population.

[762] Q. [By Mr. Lucas] What are you reading from?

A. From Plaintiffs' Exhibit 468.

Q. What date is that data from?

A. The data that I am reading from is from the current HEW form which was provided to the Plaintiffs, and I don't recall the number.

Q. '75-76 school year?

A. Yes, current school year.

Q. And you have what for Cassady?

A. Cassady, 66 white and 552 black.

Q. What percentage does that give you?

A. Eight point three percent minority.

Q. Thank you. Cassady Elementary School came into the district from another district, did it not?

A. Yes, from the Mifflin School District.

Q. And you were in the process of establishing attendance boundaries for the Columbus Board's operation of that school; is that correct?

A. Could you repeat that, please?

Q. You were in the process of establishing the attendance boundary for the operation of that school, were you not?

A. We maintained the present attendance boundary when the school came into the system, but there was tremendous overcrowding in the area. The Mifflin School [763] District had been financially floundering. They were

overcrowded. We had to assign pupils out of the district to a nearby temporary facility, so that we were engaged in projecting a construction program and the establishment of boundaries for that area.

Q. The situation with the Mifflin District was a total merger, was it not?

A. The total Mifflin District was merged to the Columbus District, yes.

Q. Did the State Board approve the transfer of the Mifflin District to the Columbus District?

A. I believe that the Mifflin District was transferred through the County Board of Education. There is a very complicated transfer law process, and there were several parcels of land that were transferred in a unit. Part of it became litigated, and part of it was transferred, and part of it that the State Board approved, and part of it the County Board approved, and I would suggest that if you want a definitive answer on that, you should get a battery of lawyers to respond.

* * * * *

[765] Q. [By. Mr. Lucas] Now, you mentioned that Columbus had this tremendous influx or tremendous increase in its enrollment historically, some of which, most of which may have occurred before you came. Is Columbus greatly different from any other medium-sized city school system in its experience of a rapid increase in enrollment during the period of time when it occurred in Columbus?

A. I think it is.

Q. All right, can you tell me the period of time that you think this rapid increase in enrollment occurred in Columbus?

A. If I may refer to a document, please?

Q. Sure.

A. The document that I have didn't contain the information that I thought it did, but I can respond to your question nevertheless.

In 1940 or immediately at the end of World War II, Columbus had about 140 or had 40 square miles of territory [766] and has expanded to today where the school district has about 160 and the city has considerably more, like 175 or 180. That's a four-fold growth in area, and there was an even greater growth in the number of pupils.

The growth was heaviest in the '50's and in the '60's, when the war babies swept through the school system. Now, we are not unique in that we had the great influx of war babies because almost every district across America experienced that. Where we are unique is that we were expanding rapidly with territory, and we were having the war-baby boom sweep through the district as well. Very few districts in the country had both factors impact the district.

Q. Have you made any study of that particular phenomenon?

A. Of which phenomenon?

Q. The one you are describing, the impact of annexations and the baby boom?

A. No, because there are very few districts that experienced a similar situation, and studies just do not exist. There are many studies with the single phenomenon of the war-baby boom, but when you juxtapose that with the rapid expansion of territory, you get a fairly unique situation.

Q. Is the uniqueness the fact that you have more [767] land mass involved, or is the uniqueness the fact that you had X amount of enrollment responsibility, increasing enrollment?

A. The uniqueness is that most American cities fail to expand their boundaries to any substantial amount.

Most American cities—in fact, many American cities were ringed by suburbs, and a different economic pattern developed. The shopping centers developed, and many of the shopping centers, if not most, were in the suburbs, and the cities badly deteriorated.

Columbus is fortunate in the sense that we have expanded outward and that we have annexed large amounts of territory, and, during that period of time, there has been a tremendous expansion of pupil population, so the uniqueness is in the two factors coming together. Very few cities in America have experienced that. There may have been others, but it is not a widely studied phenomenon because it is so unique.

Q. Would the fact that Columbus is not ringed in make it easier for Columbus in terms of desegregation or more difficult?

A. In what sense do you mean easier, sir?

Q. Well, many cities have claimed that because they were restricted and could not deal with the suburbia growth areas, that it made it difficult or impossible to [768] have effective or stable desegregation processes. Are you familiar with that?

A. Yes, sir.

Q. And I take it from what you have just said that Columbus did not have the problem of being hemmed in or ringed in as other cities may have had. Can we agree so far?

A. We can agree so far.

Q. My next question, does the fact that Columbus was not hemmed in create an added problem that made it more difficult for Columbus to desegregate? Is that your position?

A. No, my position would be that the process of desegregating, if a district is required to desegregate, is not simply one of whether or not you are hemmed in, but rather where may people flee to get away from something

they consider to be undesirable? Therefore, any city that is required to desegregate, and where there are convenient sanctuaries to which they may flee, is faced with a very considerable problem. It is not just simply being hemmed in. It is a question of where may people move if they wish to leave for whatever reason they wish to leave?

Q. Why people consider desegregation undesirable and therefore flee; is that your thesis?

A. My thesis is that if people find anything to be undesirable — and desegregation could be one and, in fact, [769] in some cities is one. If there is an easy or convenient way for them to leave the city and if there are convenient suburbs or territory or other areas nearby, they frequently will avail themselves of that opportunity. Therefore, if you are speaking directly to the question of the effects of ease, which was your question, not mine, and if ease meant that it would be effective, which I assume is part of your question, a desegregation plan that is required, if it is found to be required, is most apt to be effective when a very wide geographical area is included so that the phenomenon of flight of the middle class, both black and white, is reduced. If that does not occur, I think that James Coleman's evidence which is fairly recent is indicating that desegregation plans may have well produced resegregation which is a serious liability of starting out to cure an ill and ending up with a worse one.

Q. I don't want to get into an extended debate, but are you aware that Professor Coleman has now conceded that there is no basis, in fact, for his statement that white flight was increased by desegregation in 20 major cities that he reported on?

A. I am aware of the fact that Mr. Coleman has been seriously questioned. He acknowledged that some of the research on the 20 cities was not as substantial as it ought to be. If you read on with his arguments, he states [770] that his essential thesis is correct and can be demonstrated.

Q. Where he said despite the fact that the evidence he used didn't support his thesis, he still believed it?

A. No, sir, that's not the proper characterization of what the man said. [771]

Q. We'll get into that with another witness.

I still, with our early starting hour this morning, I still am failing somehow to understand your point. Has Columbus' situation today with the racial pattern in the schools been somehow aggravated or been made more difficult to deal with the fact that Columbus has been hemmed in like other cities have been hemmed in?

A. I think it has made it a better city, a better school system in many respects in that it has been an advantage to the district with respect to integration or desegregation, or whatever term you chose, rather than a disadvantage.

Q. So it would be fair for me to say that Columbus has had a unique advantage and was not faced with similar difficulties that other communities may have been faced with in terms of the desegregation process?

A. I would not agree that it had advantages or that it was not a difficult process. Columbus was inundated with pupils and territory. In some years, 60 different boundary changes were made. You've have to be a genius to attempt to — to remember all those particular boundary changes. There were years when we were simply scrambling madly to insure that a child had a roof over his head. It was a regrettably difficult situation. Each September, you just didn't know where the children were going to be put, [772] because there were too many, and the building's weren't ready and you were at temporary quarters and temporary rooms and it was a monumental problem.

Now, I was not here at the time, but I participated in many staff conferences, and these administrators and Board members of Columbus and the residents of Columbus, in my judgment, have done a masterful job of facing

a major problem of merely insuring that a youngster had a roof over his head.

Q. Let's see, these youngsters were in a school somewhere and had a roof over their head before annexation took place, did they not? They were not out in the streets?

A. Well, it was a scramble. There were times — in fact, we've had people complain that they did not, in fact, have a roof over their head, but they had a piece of canvas and they were afraid, and we've had complaints that an airplane flying over would cause a problem, and that may seem ludicrous, but it was a very, very difficult situation to insure that adequate housing was provided for the vast number of students that this district had.

* * * * *

WILLIAM C. CULPEPPER

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS

[1139] Q. [By Mr. Atkins] Would you state your name and address for the record, please?

A. William C. Culpepper, 1049 East Long Street.

* * * * *

[1140] Q. When did you first become active in real estate matters?

A. 1948.

Q. And in what capacity was that, sir?

A. As a sales person.

Q. In 1948 when you became a salesman in realty matters, was it possible for a black realtor to become a member of the Columbus Board of Realtors?

A. No, absolutely not.

* * * * *

[1141] Q. And in 1950 when you obtained your broker's license, did you attempt to join the Columbus Board of Realtors?

A. No.

Q. Why?

A. Because I was told by older brokers that the door to the realtors was closed to me because I was black.

Q. You were told this by older black brokers?

A. Right.

Q. Did you know any black brokers who were in the Realtors, Columbus Board of Realtors in 1950?

A. None, no place in the country that I knew.

Q. Did you in 1950 join an association of black realtors?

A. Yes, I did.

Q. What was its name?

A. The Columbus Association of Real Estate Brokers.

Q. And is that the same group that sometimes is popularly referred to as the Realtists?

[1142] A. Realtists, this is true.

Q. So there were white realtors and black realtists?

A. Right.

Q. Now, in 1950 when you first began practicing as a broker, where was it possible for a black broker to get listings?

A. In an area that had been decided by prior brokers would be acceptable, would be an all-black area.

Q. Let's see if we can be a little more specific. What part of the City of Columbus might you then have been able to get housing listings in?

A. Well, let's see. When I first became a broker, I believe the dividing line between black and white was Ohio Avenue.

Q. That was the race line in 1950?

A. Right.

Q. And it was impossible to get listings outside that area?

A. That's true.

Q. And that would be true both with respect to the City of Columbus and with respect to the suburban communities of metropolitan Columbus, would it not?

A. True.

* * * * *

[1143] Q. Yes, I will. In 1950 was it possible for a black realtist to participate in the multiple listing service available to the white realtors?

A. No, it was not possible.

Q. Now, in 1952-1953, what listings then became available to blacks?

A. Well, I would say that from Ohio Avenue to Taylor and from Taylor to Nelson Road.

Q. Was it around this same time that the Eastgate area opened up?

A. Later Eastgate, in the early '50's to mid-'50's.

Q. Now, was Eastgate opened up for listings to blacks prior to or after Hilltop was opened up for listings to blacks?

A. I would think about the same time. They would be in the same general time period.

Q. Both around 1953-'54, in that period?

A. Yes, right.

[1144] Q. And when did Driving Park become available as an area for black realtists to obtain listings?

A. About the mid-'50's.

Q. '55, '56, around there?

A. Yes.

[1145] Q. And this will be the area south of Livingston Avenue, maybe?

A. True.

Q. And when did the Shephard addition become available to black realtors?

A. About the latter '50's and early '60's.

Q. 1959, 1960; is that true?

A. Yeah, in right there.

Q. And when did the St. Mary's of the Springs area become available for the first time to black realtors?

A. Let's see. From mid-50's to '60's or the latter '50's to '60's.

Q. So it wasn't until the beginning of the 1960 period that black realtors could expect to have listings —

A. Yeah.

Q. — throughout that area?

A. Early '60's.

Q. And when did the Linden area first become available to black realtors?

A. About early '60.

Q. 1960, '61, '62?

A. Uh-huh, right.

Q. And was that all the Linden area or was it only part of it?

A. Well, it came in steps, —

[1146] Q. What do you —

A. — steps from the early part. We were told that the — that the dividing line would be up to 17th Avenue, from 11th to 17th.

Q. And then when was —

A. And then from 17th to Hudson.

Q. Okay.

A. And later from Hudson to Weber, but there was always that line, we was told, that — "Don't go beyond it." If you did, you won't be able to obtain financing.

Q. All right. Now, let's go back to the 11th area, to the 17th Avenue area. Would that have been in the — I think you said the early '60's, '61, '62, around there?

A. Right.

Q. And subsequent to that, the area from 17th Avenue to Hudson became available; is that your testimony?

A. Right.

Q. And that would have been '62?

A. Right, in there.

Q. '63?

A. Uh-huh.

Q. And then the area from Hudson to Weber, farther north, became available and that would have been what, '64, '65, around there?

A. In the — let's see, yeah, in that period.

* * *

[1167] Q. What was the first personal experience you had with a suburban listing?

A. Well, I call it suburban, but yet it was in the City of Columbus. I sold a property at 806 Josephine back in 1966, and we had a cross burned in front of the property.

Q. In front of the house on Josephine?

A. Yes. We couldn't get a lender in town to make the loan, so I made a trip to Chicago, and I was able to get the Supreme Limited Life Insurance Company to make the loan. I couldn't get a lender to handle it personally, so I had to go into FHA and learn how to process the loan myself. They took me to the basement of the FHA, and I was briefed there how to put together an FHA, my first FHA loan, but they did insure it. Supreme Limited Life Insurance Company did make the loan.

Q. And did you subsequent to that have particular [1168] experience with another suburban community in metropolitan Columbus?

A. Right.

Q. Which one was that?

A. We sold a few properties in Westerville, Worthington. I did have a listing in Arlington at one time.

Q. Upper Arlington?

A. Upper Arlington.

Q. What happened to that one?

A. Well, I had all kinds of pressures on me to cancel the listing by realtors, mortgage bankers, presidents of banks, to cancel the listing, but I stood my ground. I didn't cancel it.

Q. What did you do with it?

A. Well, I showed it several times to various people at night after 8:00 o'clock, after sundown, where we couldn't be seen. I didn't get a sale, but later — it was a \$50,000 property, and I understand that 25 whites who lived in the Upper Arlington area formed a corporation and bought the property.

Q. Was this corporation in existence prior to the discovery by Upper Arlington that you had the listing for the property?

A. I don't think so. I understood it was formed for that specific purpose.

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MICHAEL MCLAUGHLIN

called as a witness on behalf of the
Intervening Plaintiffs, being first duly sworn,
testified as follows:

REDIRECT EXAMINATION BY MR. ARNOLD

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[1244] Q. [By Mr. Arnold] You have previously identified this document marked Plaintiffs' Exhibit 349 entitled "Housing the Region" as one that you were familiar with and had dealt with?

A. That's correct.

Q. I will call your attention to a statement on page 15 entitled "Racial Migration." Are you familiar with that?

A. I have read through this several times.

Q. Are you or are you not familiar with the underlying data which support that?

A. That's correct, I am.

Q. Would you read that, please? [1245]

A. Suburbanization was also the trend for the Negro population during the last decade as shown in figure 8. Although these rings are too large to judge the even dispersal of Negroes throughout the region, they do indicate an increasing internal mobility. Where 13 percent of all the Negroes in the region live within Ring No. 1 in 1960, that proportion had fallen to 2.7 percent in 1970, but this mobility was limited to certain identified areas and land adjacent to those areas. In 1960, for example, 73.6 percent of all Negroes in this region were concentrated within 21 contiguous census tracts in the near northeast and east side of the central city of Columbus. In 1970, this changed only slightly. 71 percent of all Negroes now live in 23 contiguous concensus tracts. See figure 9.

Q. Is that consistent with your knowledge of the change in population between '60 and '70?

A. Yes, it is.

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CARL F. WHITE

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ARNOLD

[1291] Q. [By Mr. Arnold] Please state your name and your address, please?

A. Carl F. White, 3090 Blue Ridge Road, Columbus, Ohio 43219.

Q. What is your occupation, Mr. White?

A. I'm Executive Director of Housing Opportunity Center, located at 700 Bryden Road, Suite 208.

Q. How long have you served in the capacity of Executive Director of the Housing Opportunity Center?

A. I've been Executive Director since the opening of the Housing Opportunity Center, which was the fall of 1969.

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[1319] Q. In your position with the Housing Opportunity Center, have you been involved with any efforts to contact the School Board with regard to the problem of segregation in schools?

A. Yes, we have. In 1975 we met with Mr. Ellis and Mr. Merriman about the impact which would take place if the Cassady Elementary School boundaries were changed and a new school created. We recommended that the Innis Road School become a K-through-3 school and that the Cassady Elementary School become a 4-through-6 school in order to try and keep a racial balance within that school district.

Q. Now, you say we. Was this when —

A. This was the PTA.

Q. As a PTA member?

A. As a PTA member and then as a concerned parent and then as a person from Housing Opportunity Center, we did make these requests.

Q. Have you also had correspondence with the Columbus School Board regarding the problems of open housing and the effect of segregated housing on the school system?

A. Yes, we did send letters to the Columbus School Board. We did send letters to the Columbus School Board. We mailed a letter on April 28, 1971 to the School Board, at which time we talked about the Board and their position [1320] about building new schools. I have that letter here.

Q. Would you read that letter, please?

A. "Gentlemen: The Housing Opportunity Center notes with interest the School Board's recent appointment of the Task Force on Racial Discrimination to study racism

in the schools. We noted that one of the first areas that came up was the suggestion that new schools be built so as to accomplish integration. We also noted that the suggestion was made that the School Board may move rapidly to secure open housing agreements from developers.

"The Housing Opportunity Center believes such efforts are admirable. However, we do not believe that they will accomplish the task of integrating the suburbs so as to make the schools from which such children come integrated.

"It seems obvious that the School Board is going to have to do more than to get lip service paid to existing law with respect to discrimination in housing.

"It would also seem that the School Board has an affirmative responsibility not to take actions in the future which are likely to perpetuate segregated enrollments in the Columbus Public School System. Specifically, we think that the School Board should not construct any new schools which will not result in their being integrated. This would apply both to all-white or black schools built in the suburbs or in the inner city.

[1321] "We would therefore appreciate hearing from the School Board and being advised what steps the School Board intends to take with respect to dealing with the problem of our segregated suburbs and the location of new schools in those areas."

Q. What response did you have to that letter?

A. None to this letter.

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FRANK GIBB

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. STEIN

[1584] Q. [By Mr. Stein] Repeat your name and address for the record, please.

A. My name is Frank C. Gibb, and I reside at 376 East Fourteenth Avenue, Columbus, Ohio.

Q. What is your occupation, sir?

A. I am Chief of Legal Operations for the Ohio Civil Rights Commission.

* * * * *

[1598] Q. I hand you what's been market for identification purposes as Plaintiffs' Exhibit No. 223 which is a letter from you to John Ellis, I believe, and ask you to read the first paragraph of that letter.

A. "Dear Sir: You are hereby advised that in the event of and after a preliminary finding by the Commission that unlawful discriminatory practices have been and are being engaged in by the respondent and in the event and after failure of attempts to conciliate the above matter by informal meetings of conference, conciliation and persuasion, a public hearing will be held at a place and time to be set after the failure of such attempts as set forth in the enclosed certified complaint and notice of hearing."

Q. What is the date of that letter?

A. October 18, 1972.

Q. And it has enclosed with it a complaint and notice?

A. That is correct.

Q. I believe paragraph 3 contains the particular charges of this complaint. I wonder if you might read those for the Court?

A. "That an investigation initiated on the charges of [1599] the Columbus Area Civil Rights Council and the Northwest Area Council for Human Relations, complainants herein, and conducted by the Commission pursuant to and in accordance with Ohio Revised Code Section 4112.05(B) disclosed or tended to show the following facts:

"A. That respondent controls the placement of its teachers and other professional employees.

"B. That respondent specifically assigns black teachers and other black professional employees to schools within its jurisdiction which are in areas of high black population proportion or which have a high black student enrollment.

"C. That in over 40 of respondent's schools located principally in areas of high white population proportion or which have a high white student enrollment, few or no black teachers or other black professional employees are employed.

"D. That as a result of respondent's pattern and practice of assigning its black teachers and other black professional employees by race, the opportunities of such teachers and professional employees for advancement and other job-related benefits are severely limited.

"E. The discriminatory patterns and practices alleged herein existed on June 1, 1972 and continue to date."

* * * * *

[1607] Q. As a result of your personal involvement in this matter leading up to that hearing in 1973, was a conciliation agreement entered into between the Ohio Civil Rights Commission and the Columbus Public Schools?

A. There was an involvement of some information that I conveyed to the Commission which led to the agreement, yes.

Q. What type of information did you convey to the Commission?

A. Some principles, along which it was indicated to me that settlement might be possible without hearing.

Q. I hand you what's been marked as Plaintiffs' Exhibit 229 and ask you what this document is?

A. This is a conciliation agreement and consent order, in the matter of Columbus Board of Education and Superintendent of Columbus Public Schools.

Q. Is this before the Ohio Civil Rights Commission?

A. Yes.

Q. Does it indicate in the upper right-hand corner that it was approved by the Commission on July 20, 1973?

A. Yes, it does.

Q. Is it, in fact, signed by members of — by the President of the Columbus Board of Education, as well as the Commissioner for the Civil Rights Commission?

A. Yes.

[1608] Q. What were the general broad areas of employment contained in this conciliation agreement?

A. Generally, over a two-year period, sufficient transfers and other assignments of teachers by race would be made to assure that all schools were within a range of 7½ percent, plus or minus the racial proportion which existed in the entire Columbus Public School System for teachers. An additional one year was granted in the case of four heavily impacted schools.

The interim goals were set up requiring, with the exception of the four schools, that 50 percent of the goals be achieved by the first year, and by that I mean the first assignment. After the execution of the agreement which was in September, 1973, with one third being required the first year for the four heavily impacted schools.

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MYRON SEIFERT

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[1669] Q. [By Mr. Lucas] State your full name and occupation, please.

A. My name is Myron Seifert, School Historian of the Columbus Public Schools.

THE COURT: How do you spell your last name?

THE WITNESS: S-e-i-f-e-r-t.

Q. (By Mr. Lucas) Mr. Seifert, how long have you held that position?

A. Eleven years.

Q. What are the duties of your position as Historian?

A. We establish a museum, per se, and, in addition, we have a research facility. It is the school history [1670] research facility.

Q. Do you have a staff that works under you?

A. No, I do not.

Q. Do you maintain certain files and records under various headings and categories concerning the operation present and past of the Columbus Public Schools?

A. I do.

Q. And these are records obtained from within the school system and from independent research on your part; is that correct?

A. That is correct.

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Q. Mr. Seifert, you have written a document which is entitled "Early Black History in the Columbus Public Schools"; is that correct?

A. That is correct.

[1671] Q. And this is a historical analysis of the operation of the Columbus Public Schools with respect to black students and black teachers; is that correct?

A. In part. It is a documentary largely from newspaper sources.

[1672] Q. All right. Do the other sources include Board minutes and annual reports to the Board?

A. That's correct.

Q. And you maintain the supporting documentation for this early black history in the Columbus Public Schools? You have supporting documentation which went along with it?

A. Yes, indeed, I have.

Q. All right. And I believe you at some point in time, under the direction of Mr. Porter, furnished to Mr. Montgomery copies of those documents?

A. I have made all available, all resources, and that is the policy that we maintain.

Q. Very good. Let me show you a copy of that. It bears Intervening Plaintiffs' Exhibit No. 351, and the Original Plaintiffs' Exhibit No. 51-A, capital A, 1. I'll ask you if you can identify that as the document we've been referring to?

A. That is correct?

* * * * *

[1685] Q. Now, you have quoted on numerous occasions in this report from reports in the Ohio State Journal. Was that a newspaper regularly published in the City of Columbus?

A. That is correct.

Q. All right, would you read at page 11 of your report a reference to Reverend Poindexter who I believe you called a past master of public relations?

A. That's correct.

Q. You quoted from a report in the Journal dateline April 6, 1869. Would you read the excerpt you have quoted?

A. This is a letter to the editor of the Ohio State Journal. Morning Journal it was called then.

"In your issue of Wednesday morning last, the public are informed that the Columbus Board have resolved if practicable to so alter the building at present occupied as a school house by a part of the colored children of Columbus as to make to accommodate the whole of them. If not found practicable to thus alter it, then they propose to erect a new building. Such alteration is not practicable, and it is to be hoped the building committee [1686] will so find and determine. The little piece of ground not already

covered by the old building is entirely too small for necessary yard privileges. And playground, there is none."

Q. From your examination of the information at that time — I am sorry, if you will just turn to page 12, I think it answers my question. Read the first sentence at the top of page 12 which is a continuation of this letter.

A. "To compel our little ones, residents in the south end, to travel to the north end and then to crowd them into such a building as that will be when altered is not to carry out the school law. Any who will go to the trouble to read the school law of Ohio will find it is the design of the good people of our state, as provided for in the State Constitution and enacted in their legislature, to secure to all our youth who will it the advantages of a good common school education."

[1691] Q. Mr. Seifert, would you turn to Page 15 and return to the section entitled Both Whites, Negroes Petition Board in 1869. Would you read the first paragraph there.

A. "The race issue in Columbus in 1869 was some times a two-way street. The February 23, 1869 Minutes of the Board of Education contain an insertion that white citizens in the neighborhood of the Sixth Street School viewed the school a negro school "as being an annoying and disturbing element to the neighborhood" whereupon the Board instructed the building committee to "abolish said school as speedily as possible and open a school in close proximity to the other colored schools."

Q. From your review of the records, do you recall where this particular school was located on Sixth Street? Was there any connecting street nearby that you could help us with on that?

A. No, I am fuzzy on the location, Mr. Lucas.

Q. I believe the next paragraph indicates that that decision was reversed a month later?

A. Yes.

Q. At least that is my interpretation of it; am I correct?

A. Yes, that's right.

[1692] Q. Then again, in the third paragraph, in March of 1869 the Board vacillated again?

A. Um-hmm.

Q. With respect to the erection of a colored school house; is that correct?

A. That's right, yes.

Q. Finally, however, what did the Board authorize?

A. Authorized "either to build a third story on the old house or, if that is impracticable, to erect a two-story frame."

Q. There was also a petition, and I think this is what you referred to in the two-way process, to establish a negro school at some convenient location in the southern part of the city?

A. That's right.

Q. That was in November of 1869; is that correct?

A. That's correct.

Q. Up until that time, or at least through that time, the negro students in that portion of the city were having to get to the other schools in the northern portion of the city; is that true?

A. Yes.

Q. Is that your understanding?

A. Um-hmm.

Q. You have to say something for this lady here.

[1693] A. "Prior to the year 1871 futile attempts have been made to establish adequate schools for negro children, and in this year the active efforts of a few of the leading negro citizens brought the subject prominently before the public.

"May 23, 1871 the Board decided to reconstruct the school building on the corner of Long and Third Streets and establish it as a negro school."

Q. It was called the Loving School at that time?

A. It was called the Dr. Starling Loving School.

Q. Dr. Loving was a member of the Board at that time?

A. He was a member of the Board of Education and also a physician.

[1694] Q. Now, there's a reference to an entry by the Clerk of the Board. The original title of the Board was Board of School Directors; is that correct?

A. Yes.

Q. All right. There's an entry of May 9, 1871, in the Board minutes. Does this refer to the same construction that you've just talked about at Long and Third?

A. I would assume, not knowing the exact location, I would assume.

Q. The minutes reflect that the school house and lot on the southeast corner of Long and Third Streets —

A. Yeah.

Q. — be appropriated for the use of the colored children for schools; is that correct?

A. That's right.

Q. Dr. Loving voted no, did he not, he thought the site was unhealthy?

A. Yes.

Q. And they named the school after him; is that right?

A. That's right.

Q. Your report at page 17 indicates a recommendation by the Superintendent of Schools as reflected in the Ohio State Journal of November 20, 1872. What was that recommendation?

A. The establishment of a school at the Montgomery [1694A] School House who live a great distance from the Loving School.

[1695] Q. Did you indicate what happened with that recommendation?

A. An exasperating legal quarrel arose with a man who claimed ownership of the lot on which the Montgomery Building stood. The difficulty grew out of mistakes in deeds involved in a prior exchange of lots. Eight years passed before the argument was settled, and the school for Negro children was not opened at the Montgomery School until April 1, 1880.

Q. All right, there was a protest in 1876 on the part of white parents, if you will turn to page 19 and read the section about protesting Negroes in East Friend Street School.

A. It was not unusual for white parents to object to the admittance of Negroes to their children's schools. In 1876 when the mixed school question arose, there were instances of parents protesting such action on the part of the Board of Education. The following letter which was published in the October 3, 1876 Ohio State Journal is typical of the protest. Do you want me to read that?

Q. Yes. This was addressed to the Superintendent of Schools, was it not?

A. That is correct.

"Dear Sir: We the undersigned citizens and parents who send children to the East Friend Street School [1696] respectfully remonstrate against the introduction of colored children into said school building and ask the Board of Education, if need be, to direct that said colored children be withdrawn and provided with school privileges by themselves. We further request that early action be had in the matter."

Then there is an insertion of the names on the petition.

On the motion, the petition was referred to the committee on teachers.

Q. All right, if you will refer to the section entitled "Negroes Are Divided on Mixed School Legislation; Most For It," refers, does it not, to the legislation proposed in 1878 to strike out the color line?

A. That's right.

Q. If you will look at page 20, it refers, does it not, to a meeting at the Second Baptist Church, representatives of the black community, does it not?

A. That's correct.

Q. Does it set forth at page 20 a resolution submitted I suppose at that meeting and then sent on to the legislature?

A. That's correct.

Q. Would you read the second paragraph of the resolution?

[1697] A. "Resolved, that we, the colored people of Columbus, are emphatically and irrevocably in favor of the change, for the double reason that separate schools are a grievous injury to the educational interests of the colored children, and a needless oppression of the too heavily burdened taxpayer; and this detriment to the educational advancement of colored children under the present system is serious, and more so than a generous public would" — I am not sure about the next word.

Q. "brook."

A. "... brook if honestly made aware of it and the additional cost to the taxpayer to maintain it, and in the present paralyzed condition of the industries of the State, and the conviction of the people that they are overtaxed, were those having in charge the education of the children, to incur the expense necessary to put colored children in separate schools or even an approximate footing with the white children, the separate or present system would not last a day."

Q. The next paragraph.

A. "Resolved, that in many localities where colored children are too few to form a separate school, they are kept out of school altogether, and, except in a few localities, they are entirely excluded from high school privileges all over the State; the objection to proposed [1698] change

that it would turn five or six-hundred colored teachers out of employment, proceeds on the supposition that legislation must provide all trades or professions employment. Certainly, if colored school teachers or any teachers, why not all trades and occupations? Worse.

[1699] Q. I believe that's far enough, unless you think there's something that makes that incomplete?

A. No.

Q. You've just read that black children were excluded from high schools all over the state. You have a section beginning at Page 26 wherein you named the first negro graduates from high school in Columbus.

Would you read the beginning of that section?

A. In 1878, Miss Mary E. Knight completed the high school course and became the first negro in Columbus to earn this distinction.

* * * * *

[1701] Q. All right. There is a reference, I believe for the first time in here, to the Columbus Dispatch in the report at Page 28. It refers to two stories that appeared in the Columbus newspaper on September 3, 1878.

Would you read the report from the Columbus Dispatch?

A. P. Skury, J. Johnson and Daniel Trent, colored citizens and taxpayers, as alleged in their communications, stated that they lived north of Long and east of 20th Street and desired to send their children to Douglas Street school claiming that Loving School was two miles away, too far for their little folks to walk, and not as good [1701A] a school as provided for white children. They also stated that they sent their children to Douglas Street School when it opened last year, and they were sent away.

[1702] This was never reported to the Board. These persons have been offered streetcar fare, street is in parentheses, on the Long Street Road in all kinds of weather

during school term, but refused to accept it. They are near the street railway and would have to cross it to get to the Douglas building. The matter was referred.

Q. All right. You also quoted from the Columbus Statesman. Was that a newspaper in general circulation at that time?

A. That is correct. It went by two or three names, the Ohio Statesman, the Columbus Statesman and the Central Ohio Statesman.

Q. All right. Would you read just the first paragraph of that?

A. School privileges for colored children.

A communication was read from P. Scurry, J. Johnson and Daniel Trent, the same trio that we referred to, asking that the children of colored parents be admitted to the Douglas Street School. The petitioner recited that there was plenty of room in that building, yet notwithstanding this, the colored children were compelled to walk, some of them as far as two miles. Last year, their children had presented themselves at the Douglas Street building but were refused permission to enter, even after the fact that it was advertised in the papers that all were to be admitted [1703] there. It was a hardship, the petitioners said, to compel their children to walk all the way to Loving School when the other was so much nearer their home. They therefore asked for some action on the premises.

On motion of Mr. Beck, the matter was referred to the Committee on teachers.

Do you want me to read the next, too?

Q. Yes, the next paragraph.

A. It is said that facilities have been provided for the colored children — there are three dots indicating that this is not a complete quote — but parents have failed to improve the opportunity offered. There are also buildings in the vicinity where they had lived owned by the Board and where the children could be accommodated so that it is unlikely another school will be opened.

Q. All right. There's reference to another site for a school operated by the Columbus Board of Education for black children, and the reference I make is in your report, page 31, indicates — if you go back to page 30 and begin with the sentence, "In 1879 it was alleged."

A. In 1879, it was alleged that the Fulton School building was, quote, in a crowded condition, end of quote, and the Board was faced with the problem. As a result, the Mt. Airy School, A-i-r-y, was created to serve both mulatto and white pupils.

[1704] Q. And the details were reported in the December 3, 1829, Ohio State Journal?

A. That's right.

Q. Would you read them, please?

[1705] Q. Would you read them, please?

A. "Mr. Beck, from the committee on rules and regulations, reported as follows on the resolution as to the admission of colored pupils in the schools:

"Whereas, the Fulton Street building are in a crowded condition and cannot accommodate more pupils without great inconvenience; therefore

"Resolved that the Committee on Sites together with the Superintendent be instructed to rent a room south of Town Street for the accommodation of the colored children, who live in said district, south of Town Street of the B, C and D Primary grades.

"Second — That a school for colored children of the same grades, east of Washington Avenue, be opened in Mt. Airy school building."

Q. All right.

A. The report was signed by all members of the committee.

[1706] Q. In 1880 Dr. Loving made his annual visit to the [1707] Loving School. I believe you have this under

the heading "Dr. Loving Cites Bad Conditions at Negro School?"

A. Yes.

Q. Would you read that section, beginning at the top of Page 33?

A. "On his annual visit to Loving School in 1880, Dr. Loving lamented the environment in which the Negro youngsters were schooled. 'It was a saloon-infested area, surrounded by such unhealthy moral atmosphere,' he contended."

"In his annual report to the board for that year, he noted:

"Gentlemen:

"Your committee beg leave to make the following report respecting our visits —

Q. This is addressed to the Honorable Board of Education, Columbus, Ohio; is that correct?

A. That's right.

Q. Go ahead.

A. Did you want me to proceed?

Q. Yes, please.

A. "Your committee beg leave to make the following report respecting our visits to the Loving School during the spring examinations: . . .

". . . It is certain that no school in the city is [1708] surrounded by such an unhealthy moral atmosphere as the Loving School."

It was the custom then, as now, for school board members to visit various schools. It was always an annual affair, and back in the 1880's.

Proceeding: "Saloons . . . lie on every hand and make it at once one of the worst places for a public school, in the city. This in connection with the poor architectural design of the building. There are no conveniences for teachers or pupils in the way of a washroom, and the crowding of the rooms with scholars. All these things sug-

gest the necessity of a change. We most respectfully ask your attention to these points, and your favorable consideration of the same . . ."

[1709] Q. All right. In 1881 did a delegation of Negro citizens approach the Board of Education with reference to requesting desegregation of the schools and consideration of that factor, particularly for the future development of new schools?

A. This is on page 35?

Q. 37 and at the top of 38.

A. Yes. Reverend Poindexter and a number of his Negro friends attended one of the Board of Education meetings in 1881 for the purpose of inducing the Board to integrate colored and white in all Columbus public schools and particularly those schools that were on the drawing board for future development.

Q. Would you say that has been a rather consistent request of representatives of the black community with respect to new construction and to desegregation of the schools in Columbus?

A. Yes.

Q. Over the years?

A. Yes.

Q. Starting as far back as — what was that date again?

A. Well, at this point, yes. I wouldn't go so far as to say that there was no — it was just a blanket deal.

Q. What was the date?

[1710] A. 1880. This has been the philosophy at least from 1880. That would be my opinion.

Q. If you would turn now to page 39 and refer to the discussion that took place in the Board of Education over the proposal to set up a separate school for colored youth in the Fulton Street School, would you read the statement of Mr. I believe it is Schuller, S-c-h-u-l-l-e-r?

A. "The undersigned, a member of the committee on sites, to which was referred the practicability of locating

a separate school for the colored children in the southeastern part of the city, begs leave to present the following minority report: Although in theory and principle in full accord with the report of the majority, yet he considers it unwise to unite at present the two antipodal races in so-called mixed schools, for by the prevalence of a certain prejudice that cannot be wiped out by legislation, in such schools the colored children will be exposed to humiliation and insults, the results of which would be worse than continuing separate schools, namely non-attendance. Of this prejudice the colored people themselves are well aware and are unwilling to suffer thereby, as is shown by the fact that when left at their option, they continue to maintain with great sacrifices separate colored churches, with preachers of their own color, and to unite in separate colored lodges and societies, and even more than that, moved [1711] by selfishness and not by their avowed principles, some colored men draw a color line and deny to men of their own race the same privileges they extend to the white. An instance of this kind occurred but a few years ago in a barber shop held by a colored man in our city.

"The law also takes cognizance of this question and prohibits the intermarriage of white and black persons. Parenthetically, see Revised Statutes of Ohio so and so.

"In view of these facts, the undersigned considers the Board of Education justified to establish separate schools for colored children and recommends that the frame building on the Fulton Street lot be used as a school house for colored children in that section of the city. As the building is in good condition and the grounds are large, no expenditure of money would be involved.

"Respectfully submitted, J. B. Schueller."

Q. All right, the next section of your study — let me go back. I believe the proposal with respect to the Fulton Street School was not adopted, was tabled; is that correct?

A. Yes.

Q. The next section is headed "Attempt to Assign Negro Students to Districts in Which They Live Fails." Would you read the questions that were posed at the Board meeting in 1891?

[1711A] A. These questions were raised at the Board meeting in 1881, but none of them were resolved.

[1712] Q. I believe the questions come first.

A. How do you require students to attend the school in the respective districts in which they live? How many of our schools should be integrated and should the whole city compose the Loving School District as far as the negro students are concerned?

These questions were raised at board meeting in 1881, but none of them were resolved. The method of the board — Shall I proceed?

Q. No. If you would just turn now to the actual report of excerpts from the board minutes, the statement of the board treasurer.

A. Did you want the resolution read, Mr. Lucas?

Q. No. Just read the statement of the board treasurer and then Mr. Loving's statement.

A. Resolved that the Superintendent of Instruction be and he is ordered to require —

Q. No, no. Just read the statement of the board treasurer. It appears — I think it is the fifth paragraph down.

A. This is on 41, isn't it?

Q. Yes. If you think it is incomplete without reading the resolution, please feel free to do so.

A. Well, there is a little contention here among board members. Maybe I better read the whole of it.

[1713] Resolved that the Superintendent of Instruction be and he is ordered to require the school children that may be enrolled irrespective of color or race to attend school in the respective district in which they reside.

Mr. Jones — Now, I am not sure who Mr. Jones is. I don't think he was a board member. Mr. Jones said some provision must be made for colored children, the board having refused to furnish a building in the south end.

There are many colored children there that are deprived of the school privilege. It is not legal and it is not right that such a state of things should exist. The question must be met, and let us meet it now.

The resolution means equal school privilege for all, a mere guarantee of the legal right of a certain race.

Now, Mr. Neil thought the resolution would break down the Loving School. Mr. Neil was a member of the board. I can't remember the gentleman's name, whether he was a member of the board at that time or not.

Mr. Schueller, another member, was in favor of the resolution. He wanted mixed schools all over the city and not in one part.

Mr. Corzilius, the board treasurer, asked how much territory the special district, the Loving School, contained. Mr. Loving stated the whole city composed the Loving School District.

[1714] Mr. Stewart said — I think he was a board member also — that he did not think that the adoption of the resolution would abolish the colored school. The motion, however, was lost.

Q. Would you read the section on Page 42, "Negro Children Denied Education at Sullivant School — Parent Protests"?

A. Tradition dictated that all negro children attend Loving School regardless of where the child lived. As late as 1881 when the color line was supposedly broken in the public schools of the city, there were many instances in which negro children were denied admittance to mixed schools.

A report published in the September 6, 1881 issue of the Ohio State Journal was typical. Did you want me to read that?

Q. Yes.

A. Mr. Stewart presented the following petition:

"Gentlemen:

"I am a citizen of the United States of the State of Ohio, resident of the 10th Ward, City of Columbus, Franklin County, Ohio. I sent my children, aged respectively 9, 11 and 13 years to the Sullivant School September 5, 1881, the school to which my white neighbors send their children, and they were denied admittance and told by the principal that they must go to the Loving School.

[1715] I object to this as discrimination which involves oppression and violates the Constitution of the United States. I understand it to be the right of my children to attend school in their own proper districts and demand of you gentlemen sworn to do justice to all, irrespective of color or race, that you maintain my children in the right of schooling. Will you do my children justice, or shall I be compelled to secure it as the end of a law suit?

I petition justice. I demand justice.

It is signed by Willis Mitchell.

[1716] Q. Looking at page 43, does it indicate that there was a motion that it be referred to the Committee on Teachers?

A. That's correct.

Q. And then recites some argument by board members?

A. Yes.

Q. And I believe there was a motion offered in substitution for the resolution; is that correct?

A. That's correct.

Q. What was that?

A. It was also referred.

Q. Was the motion to admit Mr. Mitchell's children to the Sullivant Building?

A. Yes.

Q. And was it objected to?

A. That's right.

Q. And referred to the Committee on Teachers; is that right? Isn't that what it says, that it was referred to the Committee on Teachers?

A. Yes, it was referred to the Committee on Teachers.

Q. And did there come a time in your study when the Loving School was closed and the children reassigned to other schools in the district?

A. There was, but I can't document that offhand.

Q. All right. Would you refer to your report, [1717] page 44?

A. 44. "During the summer of 1881, Mr. Twiss" — Mr. Twiss was a high school principal — "surprised the Board by suggesting that the Loving School property be sold. Almost two months later, in late September, 1882, the Board initiated action to close the school.

"Records reveal that from this time until the selling of the property, attendance progressively became worse at the Loving School.

[1718] Q. Do the minutes go on to reflect that the school was sold and closed?

A. I assume that it did, but I —

Q. I believe it appears at Page 45.

A. Forty-five.

Q. Just read it to yourself, and if that's correct —

A. Yes.

.

[1719] Q. Well, it simply skips over, and you have a section that begins, "Attempt to Annul Mixed Schools and Set Up Separate Schools for Negroes Fails."

A. Yes, I see.

Q. Obviously, as I've indicated here, some members of the Board of Education made efforts to re-establish

separate negro schools in Columbus, and in March, 1883, for example, board member Gunning, of the Douglass School Committee, introduced a resolution for the readoption of separate schools for colored children.

His colleagues refused to support him, however, so the measure failed in committee.

I think that answers the question.

Q. All right. I show you a document which has been marked Original Plaintiffs' Exhibit 51-E-9.

I don't believe this very bulky exhibit has been copied. It has been available, and Mr. Porter copied some sections. I don't know whether he copied this.

There's a notation at the top, "From Historian's Records" and I believe that handwriting is Mr. Montgomery's?

A. Yes.

[1720] Q. Are you familiar with that?

A. This is mine.

Q. All right. Would you read that, please? Read it aloud, if you will.

A. This is from the Columbus Dispatch:

Members of the Board of Education who favored a separate school building for colored children — I'm not sure of that next, sec, is that sic? Is that supposed to be —

Q. What's the title on that?

A. It's "Clever Scheme to Separate Racism in Columbus Schools."

Q. All right.

A. Would you indicate what this is? Is that s-i —?

Q. It says — looks like see to me, but your opinion is as good or better than mine.

A. Yea. Well, the heading on this is, "Clever Scheme to Separate Racism in Columbus Schools."

Members of the Board of Education who favored a separate school building for colored children — now, that next is — I don't know. That's see. I think we both agree it's see. It might be seemed. Seemed, could that be right?

seemed to have stolen the march on those members who favored a continued mixture of the races, announced [1721] the December 7, 1907 Columbus Dispatch. The Law Department of the City rendered a decision to the effect that the board had no legal right to establish a separate school for colored children, then, "but there will be one, the newspaper said, and "again, and no law will be violated." That's the end of the quotes.

* * * * *

[1879] Q. I am going to refer you now to the minutes of the Board of November 11, 1907, page 343 marked Plaintiffs' Exhibit — original Plaintiffs' Exhibit 51-E-7A. This is a very poor copy, so you will have to do the best you can.

A. My eyes aren't too keen either.

Q. First of all, sir, do you recognize that as a form in which minutes were kept in that period?

A. This is a form used in the Board minutes of that period as far as I can ascertain.

Q. Okay, and they were kept in handwritten form at that time?

A. That is correct.

Q. Can you locate in those minutes the motion of the Sites Committee for the purchase of certain lots, certain pieces of real estate?

A. Yes, I can.

Q. Can you read the motion?

* * * * *

[1881] A. This is a poor, poor copy, or my eyes are very, very poor, Mr. Lucas.

Q. Does it say Chairman of the Sites Committee, Board of Education?

A. Yes. My Dear Sir: I herewith submit to you — you will have to help me. Proposition on Lot Nos. 6 and 8.

Submit it to the Judge, would you please, Mr. Lucas, and see if it is legible.

Q. Perhaps I can help you with it. If you feel I am less than helpful, please say so.

It looks like Mr. Morrison's subdivision to be considered. Let me ask you if this is clear. I think I can read that, but perhaps —

A. Size of lot, 105 by 140, line on the north side of Hawthorne. The item above it, Lots 6, 7 and 8, it appears. Can you tell me for this? Can you decipher this for me, please?

Q. That's the \$1,300.

A. I mean above my fingers.

Q. William Morrison Subdivision is what it looks like to me, but I don't know.

[1882] Q. The map does show the location, does it not?

A. Yes, it shows the location.

Q. That's much easier to read. What is the location of those lots? Just give us the streets, the boundaries.

A. Bounded by Champion Avenue on the east, alley on north, Hawthorne Street on south. What is this, do you know?

Q. It looks like an alley.

A. Alley on the west. On motion of Mr. Thompson — your eyes are better than mine. I can't see that. I am sorry.

[1883] Q. That's all right. This one is particularly bad.

MR. LUCAS: Your Honor, we will propose on this particular document to type up what we think it says and submit it to Mr. Porter. It is quite a visual problem.

THE COURT: Very well.

Q. But the lots that are marked out on the map are six, seven and eight?

A. That's correct. I can see that.

Q. Thank you, sir.

A. Thank you.

Q. Are you familiar with the Ohio State Journal?

A. I am.

Q. All right. I show you what's marked as Original Plaintiffs' Exhibit 51-E-7B from the Ohio State Journal, Tuesday morning, November 12, 1907, an article entitled "New School Site to be Purchased." Would you read that, including the heading?

A. New School Site to be purchased. The Board of Education plans for a building on Hawthorne Avenue near Champion. Janitors want pay raise, \$10 a month. Obviously that's not the same story.

Q. Would you read just the first part?

A. The site for what will be the best equipped school in Columbus will be purchased from J. S. Starbuck within a few days by the Board of Education. The school will be [1884] located on the north side of Hawthorne Avenue between Champion Avenue and Mingo Street, I assume that it. Is that Mingo?

Q. M-i-n-c-k is what it appears to be.

A. Minck Street, perhaps.

Q. The site consists —

A. The site consists of three lots which have a frontage of 105 feet on Hawthorne Avenue and a depth of 140 feet.

[1885] A. (Continuing) On recommendation of the —
Q. Finance and building.

A. — finance and building committees at the meeting of the Board last night, instructions were given for the purchase of the site, the consideration to be \$1300. The erection of the building will be begun as soon as possible.

Q. Okay. Thank you.

A. I know the problems you have in making copies from newspapers. I've done so many of them.

Q. All right. I show you Original Plaintiffs' 51-E-23, a page from the minutes of the Board, dated August 31, 1908, page 587, and ask you to look at the second to the

last paragraph from the bottom. Let's see if you can read it, if you can hold it in the light?

A. Mis. - - what is that, Wood? Mr. Wood or H. W. Wood? H. V. Wood - I'll take a guess at it.

Q. All right.

A. - moved to name the proposed building at the corner of Champion Avenue and Hawthorne Avenue, the Champion Avenue School which -

Q. Was agreed -

A. - which was agreed to, I assume that is.

Q. All right. Thank you.

I'll show you Exhibit 51-E-24A, Original Plaintiffs', and I have two copies, one of them an excerpt from the [1886] historian's records, and the balance of the article from the newspaper records.

Since it's easier to read the copy - the excerpt from your records, would you read that, please?

A. This is date line, January 6, 1910, the Columbus - no, the Ohio State Journal.

Negroes to have fine new school head. Champion Avenue structure will be for use of colored children, sub-head.

Expected to provide places for ten teachers and a janitor of that race, the second subhead.

Although no definite statement has been made by members of the Board of Education, the east side people believe the new school building now in the course of construction on Champion Avenue near Long Street will be used exclusively for colored children with colored teachers and jobs. The colored population in that section is large and it is likely that all the scholars in the new building, which is to have ten rooms, will be of that race. Structure is located within three squares of the 23rd Street School. It is just under roof and it will not be ready for occupancy until next September.

At present, there are only six colored teachers employed in the Schools. There are four colored janitors. It is proposed to have Negro care for the Champion Avenue [1887] school.

The colored population of the city is estimated to be between 28,000 and 30,000.

Q. All right. If you can read from the copy from the journal, page 10, which, correct me if I'm wrong, appears to be simply the balance of that article?

A. Yes, it is.

Q. Can you try and read from "Opposition in the Past"?

A. All right. Strong sentiment has been worked - worked up. Now, I've read it - worked up in something - the northwest section of the city. Would that be correct?

A. Yes.

A. Can you make -

Q. Against.

A. - against segregation of pupils -

Q. Whenever.

A. - whenever the subject has been - is that remembered?

Q. Mentioned.

[1888] A. - mentioned. There is some colored leaders, however, who have deprecated opposition to a separate school for their children, I suppose it is.

Q. That's "colored" up there?

A. For colored children.

The next line's almost deleted. I can't make out the beginning there. You have to drop down. -

Q. You have to get to the lights, that's right. "They point out that there is -"

A. They point out that there is no opportunity of employment of colored -

Q. Girls.

A. - girls - something about on graduation, I can see.

Q. Who are graduates.

A. — who are graduates from schools and —

Q. Colleges.

A. — and colleges. Employment in stores — is that institutions or what is that word?

Q. In factories, I believe.

A. — in factories is limited to them.

Q. Are —

A. Is that limited?

Q. Is barred to them

A. Is barred to them, because certain entertainment,

[1889] I get that.

Q. A feeling entertained against.

A. — a feeling entertained against such — something about the white employees.

Q. Associations.

A. — associations by white employees. They would either enter —

Q. Excuse me, but they must either.

A. — they must either enter domestics — domestic employment or remain idle at home.

Q. According.

A. According to those — What's that line, colored leaders who are —

Q. Entering.

A. Who are entering no objection to the operation of a school — what's that word?

Q. Exclusively.

A. — exclusively for the colored children. It is the —

Q. It is their argument.

A. It is their argument that —

Q. Desirable.

A. — desirable teaching —

Q. Positions.

A. — positions are to be provided for more colored —

[1889A] Q. Can be provided for more colored girls if colored schools are established.

A. Um-hmm.

[1890] Q. Do you agree with that? Don't let me put any words in your mouth on that.

A. Well, it looks like it might be there. I guess I'll have to go back to school again and learn to read, Mr. Lucas.

Q. I think we both may need new eyes.

A. Is there some more there you want me to — I think this is more legible, maybe.

Q. It's down here (indicating).

A. Down here (indicating).

Law against segregation. This is a state law — there is a state law against segregation, but it is understood that — would you like for the Judge to look at this?

Q. I don't know if he'd have any better luck than we would. That's strict adherence.

A. Strict adherence.

Q. To this law. Strict —

A. Strict adherence to this law.

Q. Can be avoided.

A. Can be avoided if — something about —

Q. Schools.

A. — school are — is that constructed?

Q. Yes.

A. — constructed —

[1891] Q. At such colored pupils —

A. Such colored pupils as wish are permitted to attend. White — that doesn't make sense.

Q. White children could not be barred from such schools if their parents sought to send them; is that correct?

A. That's correct, as far as I can ascertain.

• • • • •

KARL TAEUBER
called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[1729] Q. [By Mr. Lucas] Would you give us your full name and occupation, please?

A. Yes, my name is Karl Taeuber. I am a Professor of Sociology at the University of Wisconsin.

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[1730] Q. Would you give us some of your major population and migration studies, publications in this area?

A. Yes. I am co-author of two books. One I forget the exact title. One of them I recall is *Negroes in Cities* with a subtitle *Residential Segregation and Neighborhood Change*.

[1731] The migration book, the title is simply *Migration in the United States, An Analysis of Residence Histories*.

In addition, there are a number of journal articles, chapters in books.

Q. Have you done particular studies in the area of racial concentration, population and the changes in that concentration?

A. Yes, I have, both in the books and in many of the individual articles and chapters.

Q. All right, can you list some of those for us, please?

A. Yes. In the American Journal of Sociology there was an article in 1965 on the changing character of Negro migration. There are a number of articles on residential segregation, one with the title, Residential Segregation in Scientific American in 1965. Population Trends and Residential Segregation Since 1960 in the Journal of Science. The Effect of Negro Distribution on Racial Residential Segregation in the Urban Affairs Quarterly. Negro population in Housing, a chapter in a book in 1969.

[1732] A. (Continuing) Indexes of racial residential segregation for 109 cities in the United States, 1940 to 1970, published last year, the black population of the United States, a chapter forth coming this year in a publication called "The Black American Reference Book."

Q. Have you done studies with regard to the relationship between housing segregation and school segregation?

A. Yes, I have.

Q. Can you identify some of those, please?

A. Yes. There is an article in the Wayne Law Review which I wrote called "Demographic Perspectives on Housing and School Segregation." There is testimony I prepared for what was called the Mondale Committee, a Senate-select committee, I believe, on equal educational community in the late 1960s or around 1970 or '71, I believe, and another article, "The Demographic Context of Metropolitan Education," published in 1967, and —

Q. Was that revised and reprinted at a later day?

A. Yes, that appeared as a chapter in a book of a couple of years later.

I also have been involved in research project at the Institute for Research on Poverty at the University of Wisconsin concerned with the relationship between residential and school segregation.

Q. Have you also served as a consultant with the U.S. [1733] Commission of Civil Rights?

A. Yes, I did, in the 1960s and on occasion, more recently.

Q. All right. Do you serve as a consultant from time to time with the U.S. Bureau of Census?

A. Yes, I do.

Q. And in what particular areas have you consulted with the Census Bureau?

A. In connection with the 1970 Census, I was asked to consult their program of publications concerning racial and ethnic information.

Currently, I'm consulting with them about a possible project for release of some census data from earlier censuses to permit more historical analysis of similar topics.

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[1740] Q. [By Mr. Lucas] Dr. Taeuber, in your book *Negroes in the Cities*, you have developed and utilized what you called an index of segregation. Would you describe to the Court what exactly that index is, and what does it purport to show?

A. Yes. The index was applied to the census data in an effort to make possible certain kinds of formal comparisons of trends in racial residential segregation. Previous work had made use of maps shading in blocks or census tracts to show the racial composition of the cities, [1741] the distribution of black population as compared to the distribution of white population. Such maps were used in an attempt to compare one city with another, but this depends on visual interpretation of the degree of concentration shown by one map versus another.

What I attempted to do was to provide a summary statistical index of the degree of segregation. Now, this index is like a scale that goes from 0 to 100 where zero represents the situation of no segregation by race. No segregation means in the census data that every single city block would have the same percentage of whites and blacks. If there are 20-percent blacks in the city, then every block would have 20-percent black, 80-percent white. That would be zero segregation, and the index value would be zero.

If every city block is completely occupied by black families or completely occupied by white families, that would be complete segregation. The index value would be 100.

Measures in between 0 and 100 were obtained for every city. No city is completely segregated. No city is completely unsegregated.

The specific formula for calculating the index determines the percentage of the black population or of the white population that would have to be relocated in order to obtain a zero segregation level, so that an index of 90 for [1742] a city would mean that there is a 90-percent dissimilarity in the way blacks and whites are distributed and that to transfer to the desegregated pattern would require moving the 90 percent say of the blocks that are in heavily black residential blocks into blocks that are predominantly white.

As I say, this is a statistical technique for calculating that percentage. The index then refers to the system, the actual observed system of residential location of blacks and whites in a city for a given area.

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[1744] Q. [By Mr. Lucas] Did you calculate the index of residential segregation in the City of Columbus for the years 1940, '50, '60, and '70?

A. Yes, I did.

Q. Can you tell us what index you determined the degree of segregation in housing in Columbus?

A. Yes. For 1940 for the City of Columbus, the index was 87.1. For 1950 the index was 88.9. For 1960, 85.3. For 1970, 84.1.

Q. Was your comparison between white and non-white [1745] in those figures?

A. Yes. All of those figures compare the distribution of white households with that of non-white households. That is the only way, the only racial division that was given in the Census for 1940, 1950 and 1960.

Q. All right. Was there a more detailed breakout for the 1970 Census with respect to race and other minority groups?

A. Yes. For 1970 the Census provided additional information for city blocks on a special census tape, and

it is possible to obtain these tapes and use one's own computers to obtain more detailed information.

In this case, in addition to the division between whites and non-whites, the non-whites can be divided into blacks and other races. The census terminology "other races" means principally Japanese, Chinese, Filipino, American Indian.

Q. Spanish?

A. No Spanish unless they happen to identify a Negro say as some Puerto Ricans, some of the Caribbean peoples do, specifically Spanish are classified under whites. It is a very special kind of definition that the Census Bureau has been using for many years. They call it race, but it is basically a mixture of color and origin. [1746]

Q. All right. Did you calculate the index for white and black in the index of residential segregation in the City of Columbus for 1970?

A. Yes, I did. That value was 86.2.

Q. I believe the figure when you simply used white and non-white was 84.1?

A. Yes. This is the typical pattern that when the other races' population is excluded and we consider only blacks, not the total non-whites, then we typically find a somewhat higher degree of segregation. This is true in Columbus and in virtually every other city. In fact, in every other city for which I have done this calculation the index is higher comparing only whites and Negroes than when we compare whites and the combination of Negroes plus other races.

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[1747] Q. All right. Before we get to the school segregation, can you tell the Court what type of analysis your research has led you to with respect to determining what difference, if any, there may be between the dispersal pattern of ethnic groups in communities as opposed to the dispersal or non-dispersal pattern of black citizens in communities in the United States?

A. Yes. I made a number of studies using the census data which, in addition to providing information on whites, blacks and other races, also provides information on persons classified by the country in which they were born or the country in which their parents were born so that we can obtain from the Census that information on a number of ethnic groups from various European origins, Italians, Germans, Poles, Mexicans, and the like.

In addition, there is information for certain states and cities on either persons of Spanish surname or [1748] persons who speak Spanish in the home. The Census Bureau uses several ways of trying to identify the Spanish population.

Now, for each of these groups, there is information on a census tract basis so that the distribution of these groups among residential neighborhoods may be compared and a segregation index may be calculated which compares, for instance, the pattern of distribution of persons of English origin with the total group of say native whites or total group of everybody else in the population. These comparisons show that currently, say 1960, 1970, the segregation indexes, residential patterns for each of these ethnic groups other than the black population, these groups are less segregated residentially from the native white population or from each other than are the blacks. Now, the Spanish origin populations are typically white segregated, but not quite as segregated as the blacks. The populations of the European groups, European origin, are much less segregated. The indexes may be 20 or 30 or 40. For black-white segregation, the indexes are typically 80 or 90. There is some difference from one time period to another in the character of these comparisons.

Q. Does it change from generation to generation?

A. Yes, it does. The European groups during the periods of heavy immigration in the late 19th Century and the [1749] period 1900, 1910, 1920, were more

segregated one from another and from the native population than they were subsequently. For each of these groups of European origin during the period of mass migration of the group, a particular group, say the Southern Europeans in the early part of this century or the Northern and Western Europeans in the last decade of the 19th Century, during each period of mass migration, the measures of residential segregation were initially high but declined census by census to these lower levels.

[1750] A. (Continuing) Now, back in 1900 or 1910, the black population, which was not represented to a great degree in most cities in the country, was segregated residentially pretty much to the same degree statistically as were these European ethnic groups, but in subsequent years, the European measures declined, the black-white segregation measures increased. So that during the period of rapid black movement, in this case, not from other countries, but from America's rural areas to its cities, the black urban segregation increased, and as I mentioned, even by 1970, is still at high levels, higher levels than were observed for the ethnic segregation of European groups, even back in the turn of the century period.

Q. Dr. Taeuber, in your work in sociology, have you run into the — I don't know if attitude is the proper word, but shall we say the popular beliefs that ethnic neighborhoods are homogeneous in certain ways and that this sort of ethnic Italian neighborhood, Jewish neighborhood, and so forth, the same phenomenon that is observed when you look at the black community?

A. Yes. There has been considerable discussion in sociological writings of these concepts and of the comparison between blacks and the earlier immigrant groups.

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[1751] Q. Dr. Taeuber, directing you to your earlier testimony that you've given, what is the difference between the black ethnic neighborhood and the Italian or

other European ethnic group neighborhoods discussed in the popular literature and is analyzed by the reality of the census data?

A. Well, I'll concentrate on the reality of the census data which shows that, first, the degree of segregation of these ethnic groups was never as great in the past as has been in the case per black-white segregation in the cities of the United States during the last 30 years. In other words, the indexes at their peak for these ethnic groups were perhaps around 50 as compared to measures of 80 and above which commonly occur for black-white racial segregation.

[1752] This indicates that although there were Little Italys, German communities, Chinatown, Jewish neighborhoods, Catholic neighborhoods and the like, these neighborhoods, for the most part, were neither completely homogeneous — in other words, within these neighborhoods there may have been — there is often a concentration of one kind of population, but it is not complete. Many people with other characteristics also live in these neighborhoods.

In addition, many of the people with those characteristics, many Germans or Jews or Catholics or Italians or Chinese, live in other parts of the city, so that the segregation in the middle, indexes of around 50, rather than close to the 100 level which occurs if the areas are completely one group or completely another group.

Now, the change through time for these groups other than the black population has been for a high degree of dispersal so that many of the second generation, the third generation, even the first generation as they live in the city longer move away from these identified areas of heavy concentration into areas that are much more mixed. These cities have many areas where there's some, say, overrepresentation of Italians or Catholics or Jews. Perhaps a group is 10 percent of the total population, and in some

census tracts some neighborhoods would have 20 percent, others would have 5 percent.

[1753] In the case of blacks and whites, it is common in every city in this country to find areas that are 99 percent and 100 percent of one race and, of course, zero percent of the other.

Q. Dr. Taeuber, the explanations, two explanations which have been suggested for residential segregation, and I believe you've just touched on one of them in part, have to do with questions of choice and economics, and if I may articulate, the choice is further than you've already discussed it. Have you had occasion to examine the factor of choice, that is, all blacks like to live together, as to whether or not there is evidence for or against this proposition?

A. Yes, I have.

Q. And what have you looked at, what types of information have you examined, and if you would give us your conclusions from that examination?

A. I would say there are three types of information.

One, to follow up on the comment on ethnic groups, looks at what happened to these groups, say Italian origins, in relation to what those groups were seeking at the time. In other words, there were, say, churches where the European language was spoken, there were neighborhood stores with a particular kind of food and with people who spoke the language, there were these communities, the little Italys, [1754] that sort of area.

There were efforts on the part of the established members of these groups, the church leaders, the business leaders, to try and sustain this ethnic identity and the ethnic character of the neighborhood, and yet, the people dispersed, as I have described, so that the cultural tradition, the religious tradition, the language traditions, the patterns of life did not lead to a complete and a continuing residential concentration. There was a great deal of residential dispersal despite these other factors.

[1755] In the case of the black population, even back in 1910, 1920, 1930, as the black populations were growing, all of the major, organized groups were—nearly all of the major, organized groups were pleading for more residential dispersal for less concentration of black population.

They were concerned with the patterns of discrimination attempting to overcome them. There was not the same focus that there had been in these ethnic communities for trying to keep people attached to the community.

There were attempts to diminish this sort of inward turning focus of the group upon itself.

This suggests to me that, in the case of choice, that the black groups, as indicated in their organized expressions, were very concerned about this concentration and seeking to overcome it.

It was not a free choice. It was viewed as one imposed upon them at the time, so this is one kind of evidence.

Another kind of evidence is based on surveys by the Gallup Poll, the Lewis-Harris Poll, the National Opinion Research Center at the University of Chicago, the Survey Research Center at the University of Michigan. Many of these have been summarized in an article by Thomas Pettigrew in a publication of the National Academy of Sciences about three years ago.

[1756] These show that the majority of black population, when asked what kind of neighborhood they wanted to live in, preferred one that is racially mixed. They do not express a preference, for the most part, for living in an all white area. They do not express a preference for living in an all white area. This was true in the 1950's. It was true in the 1960's. It was true in the early 1970's.

So this again is a measure of choice by going out and asking people what do they want?

A third kind of measure comes out of the statistical information on who actually lives where, and I have asked this for a number of cities and find that the financially better off black population in cities leads the movement

away from the concentrated black areas. The better off, economically better off blacks, the better educated blacks, are more likely to live in areas that are somewhat racially mixed and that are at the fringes or beyond the heavily black areas that are found in all of our cities.

This suggests that these people who have economic alternatives available to them seek to avoid living in completely 100 percent black areas.

[1757] There is a whole set of corresponding evidence by economists and others that there are pretty much — there is a black housing market that functions very much like the white housing market in that the well-off people within the black population seek better housing, they seek to buy home owned housing to get more space, to get single family housing, to move away from the congested areas in the same way that the white population does, but this seems to occur largely within a constrained area so that there is an ocean of a dual housing market where blacks are making the same kinds of choices but with constraints imposed upon that choice.

Q. Have you compared the data and the degree of dispersal of upper economic blacks versus the degree of dispersal of upper economic whites to lower income whites?

A. Yes. I made a calculation from the 1970 Census data for the Columbus area to indicate the way in which this general pattern applies within the local community.

Q. Let me ask you first, Dr. Taeuber, does this particular facet hinge on both the choice question and the question of economics as a determination of the residence?

A. Yes, it also — in talking about an actual pattern, one also gets into the third kind of factor that you didn't mention, which is the discrimination one. Choice and economics and discrimination affect all of the observed [1758] distributions, so the attempt to talk about them separately is one of these attempts to analytically circumscribe

the world, but one can't help talking about all three of them at once.

Q. You say you examined certain census data with respect to the stature.

A. Yes.

Q. What did you look at for your source of information?

A. I used the 1970 Census Tract Volume for Columbus, Ohio, published by the Bureau of the Census. Within that I used the tables that show families by race, white and black, and by income. The census question is: What income — what was your total family income in 1969?

And I also then looked at how many families of each race, of each economic level live in the city and how many live elsewhere in Franklin County. I sort of lumped that together as a shorthand way of calling the suburbs.

Q. What was the result of your examination?

A. Okay. Among whites, even at the very low income levels, white families with economics less than a thousand dollars a year or with less than three thousand, four thousand, five thousand dollars, white families with those low incomes, about 25 to 30 percent of the Franklin County total lived outside of the City of Columbus.

Now, the percentage living outside the City [1759] increased as the income moved up to five thousand, six thousand, up to ten thousand and over, so that for ten thousand and over, something like 47 percent of the families with that income level lived outside of the city, so that at the high income levels it was nearly half of the families live in the city, half in the suburbs. At the lower income levels, it was more like one-fourth or one-third.

Now, for black families, the greatest proportion living in the suburbs was found for those with the highest economics, ten thousand and over, but this percentage was six percent, so that the black families with the highest economics were less than one-fourth as likely to be found

in the suburbs that were white families with the lowest levels of income, and for black families with low income, this ranged down to about one percent, so for black families, additional income increased families that lived in the suburbs, but the maximum was only six percent at the upper income level identified in the census table.

This shows — in light of the underlying question, “What does it show about choice and economics,” it shows that in each group, the people with greater economic ability are more likely to live in the suburbs, which in general, in Columbus and in other cities, are regarded as having more desirable housing, but that the degree to which [1760] this pattern of getting into the suburbs obtains for blacks is quite different than for whites, so some of the choice factors are similar, some of the economic factors are similar within the group, but when you make comparisons of whites with high income, then we find radical differences. Blacks with low income and whites with low income do not live within the same places. Whites are more likely to live in the suburbs.

Q. Within the City of Columbus, did you examine the pattern of residents of blacks to determine whether or not it was concentrated in certain tracts or dispersed other than the use of the index itself?

A. Yes. Well, I looked through the Census Volume myself and I also examined a number of maps such as the one that appears here in Court. I don’t know if this has an exhibit number, but —

Q. All right. Is the pattern of residents of black in Columbus similar to the pattern in other communities in terms of whether or not it is dispersed on a contiguous nature?

MR. PORTER: Objection.

THE COURT: Overruled.

A. Yes, it is similar in that the pattern is one of a high degree of concentration to certain areas that are almost

entirely black occupied and surrounding areas that taper off [1761] to some degree of racial mixture, and finally, large portions of the city that have virtually no black residents at all.

Q. All right. Turning now, Dr. Taeuber, to the — let’s go back again to the economic factors. Has there been research by other scholars as well as yourself into the question of whether or not the economic availability to black families determines their place of residence?

A. Yes, this has been looked at by many scholars in a number of separate studies.

Q. All right. And have they drawn conclusions from their studies that you’re familiar with?

A. Yes, there have been conclusions from these studies.

I might mention that some of them are of the character you describe. Other are much more complete in that they also consider where people work and the size of family they have and many other factors, and in all of these studies there is an indication that the location of black population is determined partly by these factors, and the same way as for whites, but that in addition, there is a great degree of racial concentration of blacks that can’t be explained by these factors.

[1762] In the simplest case of the income comparison you mentioned, the blacks with a medium income or paying medium levels who rent or own homes of a medium value are not living interspersed with whites at the same economic level or paying the same amount for housing, and the poor whites and the poor blacks are not interspersed. The rich whites and the rich blacks, as I indicated in the city and suburban example, are not interspersed. This is obviously true within the city simply by the degree of concentration of the black population.

Q. Now, you mentioned your 6-percent figure for black, \$10,000 and over.

A. Yes.

Q. Is that accounted for by a lower proportion of black families which have incomes in that range?

A. This applies to the families that have that income. It's a percentage of all those who do have high incomes.

Q. The 6 percent is not realized to the number of blacks with that, but it is a percentage of all those groups; is that correct?

A. Right. Of the — if we call them the wealthy blacks, 6 percent live in the suburbs. Of the wealthy whites, 40 percent of them live in the suburbs.

Q. If people were originally presented with the value [1763] of the housing they could afford instead of according to skin color, what would happen to the levels of residential segregation in most American cities?

MR. PORTER: I object to the question.

THE COURT: Overruled.

A. The level of segregation would be, on my index, more like 5 or 10 or 15 rather than 70 or 80 or 90.

[1777] Q. All right. Now, going back, if you will, to Section 266 which refers to schools, what effect, in your opinion Dr. Taeuber, does the racial composition of schools with respect to pupils have on housing choices and housing location?

A. As the FHA Manual indicated, many of the families seeking housing of school-age children, these people in particular consider not only the house and the physical — other characteristics of the neighborhood, but also the character of the schools that their children will most easily be able to attend, and typically this is the local public school. The people, as I indicated before, through the listing services or through the transmittal of information from realtors and others typically are informed as to the name of the school and often as to the racial character

of the school or other features of the desirability of the school.

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[1778] Q. (By Mr. Lucas) Dr. Taeuber, I show you the realtors' multiple-listing service manual, Columbus Board of Realtors, April 9, 1976, and ask you if the cards located therein or reprinted therein show schools?

A. Yes, the standard form includes a space for grade school, junior high, high.

Q. Is that the sort of information you have been referring to?

A. Yes, that is the kind that is available, whether or not it is printed in a book, but it is available to the people doing the selling, whether they are realtors or private individuals. It is frequently communicated in advertising. It is frequently used, as I indicated, as a basis for housing to characterize the residential neighborhood.

The character of the local school is one of the most important features of the neighborhood, and it is used that way, described that way. It is known to the people involved.

I might mention this is true not only for the people with school-age children, but for other families who might be in the family formation stage who might eventually have school-age children. Because it is so important to so many families, it also thereby becomes important to [1779] everybody else because it helps define the general understanding of the desirability of the neighborhood. As the FHA Manual indicated, as President Nixon's statements in his report to the Congress indicated, there is continuing concern as to the racial composition of the local school in the neighborhood, as well as to features of whether there are parks, whether there are industries and other inductive features.

Q. What effect does the change of the faculty from white to black have on identification of an area insofar as it affects housing choice?

A. In most American cities in the last 30 years, black population has been increasing. This has meant that additional housing has to be found for the population, and there has typically been an expansion at the periphery of previous areas predominantly Negro. Now, this expansion occurs in a small area at a time. It is not typically a scattered process where if a thousand new black families come into a city in a year, they locate scattered around the housing vacancies as would a thousand white families who came to the city. They typically locate in certain areas that are widely understood by blacks, by whites, particularly in the housing industries, to the areas that are available under the sanctions of good real estate practice for sales, rental, of formerly white occupied housing to blacks.

[1780] Now, the precise boundaries of these areas, how much of an area opens up in a given unit, is often determined by school boundaries and the character of the local school, and, in some cases, the response of the School Board by putting in black faculty as a few black pupils move into the school. If a black principal or black teacher is appointed there, but not out in a predominantly white area, this is an indication, a confirmation of the general understanding that this area is going to become all black.

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[1786] Q. [By Mr. Lucas] Did you examine material with reference to the number of annexations which have taken place in the Columbus area?

A. Yes, I was provided with a list of something like a hundred and ninety separate annexations to Columbus during the period since 1954.

Q. All right. Did you examine that annexation in turn with the effect on the population figures as reflected in the U.S. Census.

A. The report that I was presented did not show population figures, and I have not made a specific effort to determine how much of the population in each of the census years was in territory annexed during the preceding decade. Such figures are shown in the census reports.

Q. How does Columbus differ, if any, from other communities in terms of its total population growth or decline?

A. Well, Columbus City continued to grow. The general pattern in the U.S. has been for the metropolitan populations to continue to grow throughout.

Let's take the period from World War II on. They've been growing very rapidly in nearly every metropolitan area. There are exceptions in particular economic factors, Scranton, coal mining areas. They had difficulty. But in general, metropolitan areas have grown. [1788]

Now, the cities have been a mixed picture in that many of the larger eastern and midwestern cities were densely settled and did not annex additional territory or very much territory during this period, and many of these cities showed either a net out migration or an absolute loss in population. In other words, the out migration was greater than the natural increase, so that many large cities in the east and midwest have actually declined in population, many of them during the 1960s, some of them even back during the 1950s.

Now, Columbus does not show this pattern. It had a substantial annexation and had lots of vacant land as do many of the southern cities which could still be built upon within the city limits, so not all of the additional housing was accommodated beyond the city boundaries.

So, in this sense, Columbus is somewhat unusual. Much of the metropolitan growth that is quite common

nationally and in other metropolitan areas occurred in Columbus with the expanding boundaries of the central city. This is a pattern that's true of many places, but the majority do not have that kind of extensive, continuing annexation.

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[1791] Q. [By Mr. Lucas] Did you prepare a segregation index for the Columbus Public Schools?

A. Yes, from these same data sources, the 1963-64 through 1975-76 years, with the exception for 1966-67 data, which no data appear on these lists. I have the index for pupils for elementary junior and senior high schools.

Q. Did you use minority versus non-minority?

A. Yes, I did.

Q. And in Columbus, are the other minorities a very small number?

A. There are very few minorities other than the Negro pupils.

Q. All right. What is the index segregation at the elementary level in 1960 through '64 of the Columbus Public Schools?

A. The index was 76.

Q. What was it in 1970?

A. In 1970, it was 80.

Q. And in 1975? [1792]

A. In 1975, 70.

Q. What was the index at the junior high level in February of '63-64?

A. That was 63.

Q. All right. And 1966, is there a change between '66 and '67?

A. Yes, from '66, the figure was 61 the '65-66 year, and in the '66-67 year — excuse me. The —

Q. '67-68, I believe.

A. Yeah. We switched from a spring date to a fall date on which there is some confusion there. In the '65-66

year from the data on those exhibits the index was 61, and from the '67-68 year, the index was 69. This was an increase of eight points over that two-year period.

Q. Did you look at any of the school construction data to determine the reason for that jump?

A. Yes, I —

MR. PORTER: Objection.

THE COURT: Overruled.

A. Yes, I examined the school by school changes and noticed that one junior high school that had a mixed racial composition was closed, and I believe four additional junior high schools were opened for predominantly one race pupil enrollment.

Q. All right. And what was the figure — let's pick [1793] the same break points — 1970?

A. 1970, the figure for junior high pupils was 66. For 1975, the figure was 56.

Q. All right. At the senior high level, what was the figure in February of '63-64?

A. The figure then was 55.

Q. In 1970?

A. In 1970, the figure was again 55.

Q. In 1975?

A. The figure was 54.

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CROSS EXAMINATION BY MR. PORTER

[1817] Q. [By Mr. Porter] Your index is a measuring device; isn't that right?

A. That's correct.

Q. And it takes a set of given facts and it measures them; isn't that correct?

A. That's correct. [1818]

Q. No conclusions with respect to the cause which may underlie it; isn't that right?

A. That's right.

Q. Now, if I understand correctly from what you have said here today and what you have said on other occasions, there are basically three causes for residential segregation. They are economics, choice and residential discrimination or discrimination in housing; am I right about that?

A. Well, yes, racial discrimination. Yes, those are the three general categories of causes.

Q. Just so we understand each other, it is your position and your testimony that those are the three causes for residential discrimination; is that right?

A. Those are the three types of causes of residential segregation.

Q. And then you proceed in this case and elsewhere to say, well, choice has the following problems associated with it, that it is really not free choice in many situations and so forth. Am I not correct about this?

A. Yes.

Q. But the fact remains that choice remains one of the three factors which determines this; is that not so?

A. Yes.

Q. And the same thing is true with economics; is that not so? [1819]

A. Yes.

Q. And finally, the last one which you refer to as racial discrimination, you list a group of practices which affect racial discrimination; am I right about this?

A. Yes.

Q. All right. They are racially motivated site selections and attendant assignment policies in public housing; is that correct?

A. Are you quoting from me there?

Q. Yes, I am.

A. Which document?

Q. I am quoting from your most recent article in the Wayne Law Review entitled Demographic Perspective on Housing and School Segregation by Karl E. Taeuber.

A. That's it, thank you.

Q. And I am reading from page 840.

A. Right.

Q. That is the first one, is it not?

A. Yes.

Q. And the second one is racially motivated site selection, financing, sales and rental policies of other types of government subsidized housing, for example, Federal Housing Administration and Veterans Administration insurance programs; is that correct?

A. Yes. [1820]

Q. The third one is racially motivated site selection, relocation policies and practices and redevelopment policies and urban renewal programs. That is the third one, is it not?

A. Yes.

Q. And the fourth one is zoning and annexation policies that foster racial segregation; is that correct, sir?

A. Yes, sir.

Q. The fifth one is restrictive covenants attached to housing deeds; is that correct, sir?

A. Yes.

Q. And the next one is policies of financial institutions that discourage prospective developers of racially integrated private housing?

A. Yes.

Q. That's the next one, is it not?

A. Yes.

Q. And the next one, seven, is policies of financial institutions that allocate mortgage funds and rehabilitation loans to blacks only if they live in predominantly black areas; is that correct?

A. Yes.

Q. The eighth one is practices of real estate industry such as limiting the access of black brokers to [1821]

realty associations and multiple-listing services; is that correct so far?

A. Yes.

Q. The next one is refusal by white realtors to co-broke on transactions that would foster racial segregation. Is that the next one?

A. Racial integration it says.

Q. I am sorry, that's correct. And the next one is block-busting, panic selling and racial scaring; is that correct?

A. Yes.

Q. The next one is racially identifying vacancies overtly or by nominally denying codes, for example, advertising housing according to racially-identifiable schools or other neighborhood identifiers; is that right?

Q. Yes.

Q. The next one is refusing to show houses or apartments or refusing to encourage blacks to consider housing in white neighborhoods. That is the next one, is it not?

A. Yes.

Q. The next one is reprimanding or penalizing brokers and salesmen who act to facilitate racial integration. That is the next one, is it not?

A. Yes. [1822]

Q. And the last one is racially discriminatory practices by individual homeowners and landlords. That completes the list, does it not, Dr. Taeuber?

A. Yes, it does.

Q. You believe, if I understand what you have written, which is a little presumptuous of me, but to the extent I understand it, what you are saying is that there is a unit — and I believe that's your word — a unit of problems which have caused the residential segregation that exists in this community, and that it has to be dealt with as a unit. Isn't that right?

A. Unity, I intended to refer not primarily to any focus on residential segregation, but the common linkage between the economic discrimination and housing discrimination and educational discrimination, labor market discrimination, social discrimination.

Q. And that's what I meant to say, too. Thank you for correcting me.

It is all these problems which have produced or rather all of these factors which have produced the problems that exist with respect to discrimination; is that right?

A. Right.

Q. And you feel as a sociologist that the way to handle that is through the so-called unity approach; is that right or not? [1823]

A. As a sociologist, yes.

Q. For example, you say in your book *Negroes in the Cities* at page 20 that it is impossible to pin responsibility for residential segregation on the prejudice or discriminating behavior of any particular group or agency. Does that not appear in there?

A. Yes.

Q. That is your opinion, is it not? That is your opinion?

A. In the context. I hate to have to live forever without the context in which a particular sentence appears. If I state my opinion now, I would insert the word full. Pinning full responsibility on any one agency, that's impossible.

Q. I think you also stated in this publication at page 196 that if there are sizeable really homogeneous clusters, then public institutions such as schools, libraries and parks, as well as stores, theaters and other places of business may service only one racial group solely because of the residential segregation. Did you not say that?

A. Yes.

Q. Now, if I understand correctly, it has been your experience or it is your opinion, I guess is more accurate, that during the period of the '40s — excuse me, during the [1824] period of the '50s, the in-migration of blacks in the '50s primarily settled in established residential areas. By that I mean buildings, homes, that were in existence. Am I correct about that?

A. Are you referring to the black in-migration?

Q. The black in-migration?

A. Yes.

Q. If I understand correctly, it is your opinion that in the '60s the in-migration is of a slightly different type, that it is more dispersed than the in-migration of the '50s; is that correct?

A. No, I don't recall making that statement here or writing that any place.

Q. Well, do you agree with it? I assure you I didn't make it up. I thought I got it from out of your stuff, but maybe I didn't.

A. This has been true in a number of places where, as I indicated, the segregation measures decline, but I have not made a specific study as I did for the 1950s of the location of migrants.

Q. For my purposes — let me explain where I am going and see if we agree. You have identified and we have just gone over a number of factors which cause people to live where they live, in this case, blacks. What I would suggest to you and ask you if it isn't a fact that you [1825] cannot predict specifically what piece of real estate will be occupied five years from now by any particular minority group?

A. It cannot be predicted with perfect accuracy, but a lot of money has been made by predicting it with reasonable accuracy.

Q. Well, the efforts, the efforts, I would suggest to you, are efforts such as yours that appear in your book — isn't that true — includes this type of efforts?

A. No. [1826]

A. No, I made no effort to examine which particular properties will turn over. I know the general process, but not the particular dynamics and particular tiny segments of the real estate marketing in particular cities.

Q. Well, I misunderstood you, then. I thought you testified that a community developed — the black community developed from some kind of a fixed location and then expanded out. Isn't that what you said?

A. At any given census point, there is a cluster or several clusters of predominantly black areas. There are areas surrounding them that are less heavily black, and there are further white areas outside of those. Now, those areas — what I have done is to — for example, say, let's take the area that has blacks, all these census tracts that have blacks, and let's identify, say, as of 1950 all of the surrounding predominantly white tracts, and then I'd say, "What are the characteristics of all the peripheral tracts that, given this peripheral expansion process, are subject to racial turnover, which one of those did turnover," in the sense of not which one was at northeast or along this street or that street, but in the sense of, "Was it the ones with the better housing or the worst housing?"

I've made no attempt — I've never made any attempt to try and predict the dynamics, the specific dynamics in the way an investor would make in the local [1827] real estate market.

Q. Okay.

A. It's been the character — what are the characteristics of the blacks that move into these surrounding territories, and which of these surrounding territories acquire the blacks and which don't, I say, in the sense of is it the better areas, the worst areas, the slums, is it the ethnic neighborhoods?

° ° ° ° °

[1828] Q. [By Mr. Porter] The point I simply wish to make and ask you if you would not agree is that the growth or the residential pattern for blacks in a community will vary between the community based on whatever the peculiarities are within the particular locality.

Would you agree with that?

A. Yes, I would.

Q. For example, if I suggest to you that the growth in the City of Columbus has not been to the west but has been to the east and north, would this come as any particular surprise? to you? I suppose you would say, "Well, I don't know which way it's going to go. It could go any way." Right? [1829]

A. Are you talking about which way it has gone or which way it is expected to go within the next few years?

Q. Which way it has gone.

A. That would be roughly accurate, but there is some western projection. [1830]

Q. But I would suggest to you, Dr. Taeuber, there wasn't any in 1950. How do you account for that?

A. I'm not sure what the contradiction is. Are you referring to the 1950s?

Q. Yes.

A. There wasn't any black?

Q. There was a very small black community, according to the census tract, in the City of Columbus west of the river in 1950?

A. And what's the question about it?

Q. That is not — has not developed as a periphery part of the black community?

A. It's not at all unusual for there to be somewhat isolated pockets, if you will, that are there for historical reasons, either old residential areas, some times areas of poor housing, sometimes around a particular institution, particular historical reasons why there is such a settlement, and as the black population expands, part of my view

is that it is deliberately channeled in certain directions and that it doesn't just scatter in every which direction, it doesn't fill in all the peripheral tracts. It fills in certain ones and not others, and there are specific historical and institutional and specific reasons why the movement occurred in a certain direction and not in some other direction, and so I have no explanation as to [1831] why it does or doesn't fill in toward one particular concentration of blacks.

Q. You would agree, would you not, that it would — the development would depend on a myriad of facts and circumstances; isn't that true?

A. Yes, yes.

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[1839] Q. [By Mr. Porter] You did not know that fact. Directing your attention now to page 240 of your book *Negroes in the Cities*, I am going to hand it to you with the Court's permission and ask you to look at Table A-5 headed Estimated Effect of Annexation on Segregation Indexes, and I would ask you to take a look at it, please, and then I want to ask you a couple short questions.

A. Okay.

Q. Now, first off, I would assume that the reason for the selection of the list by you at the time was because it represented a city where there had been substantial [1840] annexation; am I correct about that?

A. Yes.

Q. Isn't it true that the area shown by cities annexed, that the largest area is in Dallas, Texas?

A. Yes.

Q. What is it, please?

A. 193,000.

Q. And what is the next one?

A. Columbus.

Q. What is it, please?

A. 76,000.

Q. And as of what time is that, Doctor?

A. This is 1950 to 1960.

Q. Isn't it a fact that then it drops to — what is the next one, please?

A. 62,000.

Q. Thank you. Approximately how many cities are listed there, Doctor?

A. 24 cities are listed.

* * * * *

[1840] Q. [By Mr. Porter] You were asked to look at the multiple listing of Columbus, some page or two of it, and asked some questions or asked about the identification of schools on that. Do you recall that this morning?

[1841] Q. Do you happen to recall whether or not — strike that.

I'll hand it to you, Doctor, and it's opened to page 281. Is that the page that you were looking at with Mr. Lucas?

A. I don't know.

Q. In that multiple listing classification, does it say anything about race? It doesn't does it?

A. Well, it's — I'm looking through the form before I answer.

No, there's no obvious place for any specific indication of race.

Q. Is there anyplace on there that deals with racially restrictive covenants?

A. No apparent place, no.

* * * * *

[1848] Q. [By Mr. Porter] Now, I wish to direct your attention, please, to the school segregation index in the City of Columbus. First off, I would like to ask you if you did the — if you have the papers before you which show those results with respect to Columbus by year or school or however it is done?

A. Yes, I do.

Q. May I see it, please?

A. Yes, sir.

Q. I would like you, Dr. Taeuber, since I don't have a copy of this — do you have a copy in front of you?

A. I have a handwritten version.

Q. All right, that's what this is. I would like to put into the record, please, what these figures are. [1849]

Q. (Continuing) Would you start with —

MR. LUCAS: Can we mark the document as an exhibit so that it will be complete?

THE COURT: All right.

MR. PORTER: C? What is it?

MR. LUCAS: Excuse me. Mr. Porter, why don't we make it Plaintiffs' Exhibit 505?

MR. PORTER: Fine, 505.

Q. Now, if you would, please, give us the elementary school figures starting at the bottom of your list down through the fall of '75.

A. Year by year?

Q. Please.

A. Beginning with 1963-64, the index is 76, and then 78, 80.

And then a year is skipped, and then the index for 1967-68 is 79, 81, 81, 80, 77, 76, 76, 73, 70.

Q. Would you do it, please, for the junior high school?

A. Read what's on the exhibit?

1963-64, 63.

Next year, 63, 61.

Skip a year, and then 69, 68, 67, 66, 67, 66, 64, 62, 56.

Q. The senior, please? [1850]

A. Senior, beginning with '63-64 school year, the index is 55, 54, 53.

Skip a year, and 50, 53, 56, 55, 57, 58, 57, 56, 54.

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REDIRECT EXAMINATION BY MR. LUCAS

[1865] Q. [By Mr. Lucas] Mr. Porter read — had you read or read to you, I believe, extensively from an article you wrote about the causes of housing separation, and he had you enumerate choice, economics, and I believe you used the term “discrimination,” and he had you — or he read to you a number of specifics from that particular article of racial discrimination. He did not, however, ask you to read from page 841 of that article. Is there an additional section which he failed to read to you? Do you have a copy?

A. Yes.

Q. What is the title of the section on 841?

A. The Section 3 of the article is the relationship between housing and school segregation.

Q. All right. If you would turn to page 843 and read the paragraph from your article beginning “However.”

MR. PORTER: If the Court please, I’m going to object on the basis that —

THE COURT: Yes?

MR. PORTER: — it’s beyond the scope of [1866] cross-examination.

THE COURT: Overruled.

A. I wrote: “However, the cause-and-effect relationship between residential and school segregation can be viewed the other way as well. The racial composition of a school and its staff affects the racial composition of housing within the school’s attendance zone. This is especially apparent in neighborhoods experiencing racial change. The changing racial composition of the school’s pupils and staff serves as a signal to the public — realtors, homeseekers, residents, et cetera — that school authorities expect the school to become all black. Families with children, and everyone else, too, may use school attendance zone lines to make their housing decisions.”

Q. Continue, please.

A. “Several factors contribute to the influence school attendance zones may have on patterns of residence. One factor is that residential neighborhoods rarely have precisely defined boundaries; schools provide local administrative boundaries which are widely known. A second factor is that young couples with young children account for much of the extraordinary residential mobility of Americans. Choice of location depends on available housing but also on perceptions of neighborhood amenities. Among these, the perception of the local school looms large. If it is [1867] identifiable as a black school, whites tend to move away or stay away. If schools were not racially identifiable, or if predominantly black schools were not perceived as inferior schools, then school attendance zones would play only a minor role in residential choices and in the behavior of the real estate business.”

Q. And the third factor?

A. A third factor is that schools, their staffs and attendance zones, are subject to direct administrative control. Assignment of a black principal and the shifting of a school attendance boundary are highly visible deliberate acts that may imply racial consequences to homeseekers, landlords with vacancies, and banks with funds to loan.”

LUCIEN C. WRIGHT

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ADKINS

[2037] Q. [By Mr. Adkins] Would you state your full name?

A. Lucien C. Wright.

Q. And your address, please?

A. 1304 East Long Street.

Q. Mr. Wright, are you an employee of the Columbus Board?

A. Yes, sir.

Q. And what is your position?

A. At the present time, I am Director of Human Relations.

Q. When did you begin your employ with the Columbus Board?

A. September of 1935.

[2038] Q. In what capacity?

A. As a teacher at Mt. Vernon Avenue School on the corner of Mt. Vernon and Ohio Avenue.

Q. How long were you a teacher at Mt. Vernon?

A. Eight years.

Q. In 1943 did you assume another position with the Columbus Board?

A. Yes. I was made Principal at Felton Elementary School.

Q. And how long were you at Felton as Principal?

A. Twenty years.

Q. In 1963?

A. I was transferred to Garfield School. In the meantime from '59 to '63 I had a double assignment, Leonard Avenue and Felton, and then in '63 I was transferred to Garfield and Clearbrook Elementary Schools.

Q. In 1963 were you simultaneously Principal of Garfield and Clearbrook?

A. Yes, sir.

Q. And how long did you remain in that position, sir?

A. I remained Principal of Garfield and Clearbrook until '68. In the '67 school year I was relieved of my double assignment. Someone else was assigned Clearbrook, but I kept Garfield until April 1 of 1968.

Q. And in 1968 you assumed what position?

[2039] A. Director of Intercultural Education at the Board of Education.

Q. Is the Department of Intercultural Education the same as the Department or Office of Human Relations which you now head?

A. I understood at the time in talking with the superintendent, who was the late Harold Eibling, that I was to assume the responsibility of working with the Intercultural Council. It did not meet. I assumed the Chairmanship of the Task Force, Administrative Task Force, plus a lady that came in with me, Mrs. White, assumed the responsibility in the volunteer role. Later on we asked that the name be changed to Human Relations instead of keeping the intercultural name. This was around '71.

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[2042] Q. During the time you were teaching in Mt. Vernon, the eight years that you were at Mt. Vernon, can you recall whether the student body at Mt. Vernon was a racially integrated or predominantly black or predominantly white student body?

A. It was predominantly black.

Q. During the time that you were there, was the teaching faculty a racially integrated teaching factory, or was it also predominantly black?

A. It was all black.

Q. It was a hundred percent black?

A. Yes, sir.

Q. And during the time you were teaching — or you were principal at Felton, was it a predominantly black student body, also?

A. Yes, it was. When we — when we started in '43, about, I think, ten or — I'd say ten or twenty, not being able to count for sure, of the students stayed until leaving the sixth grade, but the staff assigned at the time was 100 percent black.

Q. In 1943, when you became principal at Felton, that was in September, 1943, I assume, right?

A. Yes. Yes.

Q. In 1943, in June of that year, had the teaching staff at the Felton Elementary School been a hundred percent black?

A. No, sir, it was a hundred percent white.

Q. So between June of 1943 and September of 1943, the teaching faculty went from a hundred percent white to a hundred percent black?

A. That's correct.

Q. And was the principal at Felton in 1943, that school year that ended in June, also white?

A. Yes, sir.

Q. And was the rest of the administrative staff at Felton white?

A. Well, she was only — she was the only principal there at the time.

Q. She was the only principal?

A. Yes, sir.

A. And in September of 1943, the school was converted from a hundred percent black administrative staff and faculty — from a hundred percent white administrative faculty and staff to a hundred percent black?

A. That's correct.

[2044] A. Yes.

Q. Between June and September, 1943, did Felton become a predominantly black student enrollment?

A. I would say prior to that time the area had almost completely changed. Knowing the policy at the time, that was the way it was done. A school was changed administratively and teaching staff. Felton was the last school that this type of program was worked.

Q. Now, did something particular happen in 1943 that caused a decision to be made to change Felton from 100-percent white staff and faculty to 100-percent black staff and faculty? Do you know of any particular thing that happened?

A. Only the almost complete change of enrollment at the school. That's the pattern that I noticed in Mt. Vernon and Garfield.

Q. You say Felton was the last school at which that happened?

A. Yes, sir.

Q. By that you mean the complete transfer from 100-percent white to 100-percent black?

A. Yes.

Q. Did the same thing happen at Garfield?

A. It had happened, yes, around '32 or '33. I don't know the exact date.

[2045] Q. But at some point a previously all-white administrative staff and faculty in June at the end of one school year was succeeded by a totally all-black staff and faculty in September of that same year?

A. Yes.

Q. Did it also happen at Mt. Vernon?

A. Yes, it did.

Q. Do you know of other schools at which that happened, Mr. Wright? At Mt. Vernon would it have been around '28 or '29?

A. I think around '28 or '29. I am just remembering. I think Garfield was around '32. In '37 Pilgrim was changed from a junior high to an elementary and the staff was changed. Then Felton in '43.

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ROBERT W. CARTER
called as a witness on behalf of the
Intervening Plaintiffs being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[2268] Q. [By Mr. Lucas] Would you state your full name and occupation, please, sir?

A. My name is Robert W. Carter. I am presently a full-time graduate student at Ohio State University in the doctor program of educational administration.

[2269] Q. I believe at your deposition you indicated you were employed by the Columbus Board of Education, did you not, sir?

A. I am on a sabbatical leave from the Columbus Board of Education.

Q. And are you an employee of that Board?

A. Yes, sir.

Q. Thank you. How long have you been employed by the Columbus Board of Education?

A. I have been employed for a period of 19 years.

Q. In what capacity have you been employed, if you'll start from your earliest and bring us forward, please?

A. I was employed in the year 1957 as a teacher and later as a teacher-counselor in a junior high school.

In 1963, became administrative cadet and went through the administrative cadet program.

In 1964, received an appointment as assistant director of administrative services, central office.

In 1969, appointed executive director of administration, central office.

Q. When did you first begin to deal with the question of setting school attendance patterns?

A. During the 1964-65 school year.

[2325] Q. Were you responsible for the assignment of black principals to black schools?

A. That was the responsibility of the Superintendent.

Q. Were you aware of a pattern of assignment of black principals to schools with predominantly black enrollments?

[2326] A. I was aware, yes, sir.

Q. Did you make any recommendations with respect to changing that pattern?

A. Recommendations were made from the Deputy Superintendent's office regarding the assignment of principals.

Q. Did you make that recommendation?

A. I have had inputs to those recommendations.

Q. Is it a recommendation in favor from you or against?

A. They have been in favor, yes, sir.

Q. In favor of change?

A. Yes, sir.

Q. And when did you make that recommendation?

A. Of change of assignments?

Q. Yes.

A. Is that what you mean?

Q. I am sorry, I can't hear you.

A. Change of assignments?

Q. Assignments of principals so that there would no longer be a pattern of black principals and black students.

A. We made annual recommendations on the assignment of principals.

Q. In the course of making the annual — I take it they are reassigned annually?

[2327] A. Yes.

Q. So each and every year you have an opportunity or the Board has an opportunity or the Superintendent, whoever is responsible, to make a change, each and every year; is that right?

A. Yes, sir.

Q. And each and every year there has been a pattern of assignment of black principals to black schools; is that correct, since you have been with the System?

A. There has been modification of that policy in recent years.

Q. But it is still a pattern that is visible and readily so in the Columbus School System, isn't it?

A. We still have black principals of black schools.

Q. Is there a pattern to it, not just an occasional situation where that occurred? Do most of the predominantly black schools have black principals?

A. I can't speak matter of factly on the question of pattern. I would say from my general knowledge of assignment, there would be more black principals of black schools than black principals of white schools.

* * *

[2329] Q. Did you make any recommendation that the pattern be changed is my question?

A. No, sir.

Q. Did anyone make any recommendations that they change that pattern, anyone within the staff?

A. Not to my knowledge.

Q. Were there outside recommendations and requests that that pattern be changed?

A. I have no direct knowledge of this recommendation, only hearsay knowledge.

Q. All right, did you obtain any of your information from the public press indicating that organizations interested in the schools had requested the Board to make such changes?

A. Yes, sir.

* * *

[2398] Q. [By Mr. Lucas] All right. You testified earlier this morning that the school attendance boundary lines or organizational changes would be made to improve the opportunity of schools to be integrated. Do you recall that?

A. Yes.

Q. My question, then, very narrower is that, to your recollection, is that the first time that the system had indicated that it would consider the technique of grade organization changes as a method of desegregating?

A. I don't recall specifically that the Board indicated grade organization. They indicated that racial balance

would be considered in the location and placement of schools and in the drawing of boundaries.

Q. Okay. That leads me to my next question.

Was the Innis-Cassady grade organization change proposal that was submitted as one alternative to the Board the first such proposal that you can recall?

A. The grade organization to promote a better distribution [2398A] was the — in Innis and Cassady was the first such option of its kind presented to the Board of Education by me. [2399]

Q. Is it the first once to your knowledge since 1964 by staff? I realize other community groups have suggested that earlier.

A. Yes, for a total school.

Q. Had the system operated one grade centers prior to this time?

A. We had operated in three or four locations a primary center, but the entire attendance area, we always had a home school before, a K through 6 school that was a supporting school. We never had a complete division of primary-intermediate.

Q. You mean system-wide, but you did have some primary schools. For the record, would you define what you mean by primary?

A. Primary is basically K through 3, and these were schools added to relieve the overcrowding of the home base school.

Q. Generally speaking, what you would do is simply divide the home school attendance area and put a portion of the students in that attendance area in a primary unit located within the same geographic boundary?

A. That's essentially how we handled it.

Q. Can you give us some examples of that?

A. Hudson-Hamilton was an example. Then we simply with the '72 bond issue, when we added rooms to

Hudson Street, [2399A] we made it a K through 6 organization, so it now became a self-contained organization.

Colerain-Indian Springs is another example of this where we located a primary center in the Indian Springs K through 6 attendance area.

A third example might be Sixth Avenue Elementary School where we located to relieve the overcrowdedness of Weinland Park and Second Avenue.

Q. When you locate a primary unit within an attendance zone, it is the same thing as expanding the capacity of that particular plant, in effect, is it not?

A. That's correct.

Q. By maintaining the same boundaries, you, in effect, rather than move boundaries out or narrow the boundaries some way or another to relieve the overcrowding, you simply have added on to that unit, that organizational unit for that building?

A. That's correct.

Q. Does that have the effect of containing those students in that particular location?

A. The decisions were made generally because the home base school was at maximum capacity in terms of size. The Board of Education generally wished to build elementary schools not larger than 25 to 27 rooms, approximately 25. This would be approximately 700 students, and the general [2400] feeling was that this was large enough for an elementary school.

We rather than build an addition to the school to relieve the overcrowding, the general trend was to build these primary centers which in turn eventually would become school attendance areas on their own. An example of this is Hudson-Hamilton.

Q. My question to you is does the building of the primary unit at that location within that attendance zone have the effect of containing that particular zone's population?

A. It does not alter the general attendance area of the home school.

Q. Does it have the effect of containing those children within that attendance area?

A. It contains the children in that general attendance area, yes, sir.

Q. From time to time has the Columbus System built what might generally be called replacement schools in essentially the same location for existing older structures?

A. This was a part of the recommendation of the 1972 bond issue program and is, in fact, an activity that is being followed in the '72 program.

Q. And generally speaking in building these schools in the same — first of all, generally in the same attendance [2401] area; is that true?

A. Yes.

Q. And usually, depending on availability of sites, in close proximity to the existing site?

A. Yes.

Q. On some occasions they actually tear down a portion of the old building and build on using whatever green space there might have been and then tear down the balance of the old when they finish the new one; is that correct?

A. That's generally the process.

Q. So it generally results in the relocation of the school at the same site?

A. Yes.

Q. Approximately. All right, at the same time I take it your office would re-examine the question of boundaries, although you were not again involved in determining whether to rebuild at that site? That was made by somebody else?

A. That's right.

Q. Once given that premise, you would redetermine the boundaries of that particular school unit, or would it be assumed that the existing boundaries would be sufficient?

A. We would review the capacity of the new facility in terms of the facility that it replaced, and appropriate adjustments might or might not be made of the general [2402] attendance area.

Q. My question to you would be did you follow the same procedure? Did you do a full-scale census if you were replacing a school on the existing site?

A. Not necessarily.

Q. You might have in some instances, but generally no; is that fair?

A. Generally no, that's correct.

Q. Generally speaking, you would end up effectively redrawing the boundary of that school in the same location?

A. That's correct.

Q. While it might technically be a new boundary, it would still be the old boundary?

A. Right

MR. LUCAS: If the Court would indulge me just a minute.

Q. (By Mr. Lucas) When you build a completely new school in an area where there is not an existing building and you go out and do the full-scale census and draw the boundaries, the boundaries that you select, are they in any way related to some sort of ethnic neighborhood or some sort of homogenous type development? Are they strictly based on numbers of children?

A. We would consider several items in the development of new boundaries. One would be geographic barriers, major [2403] thoroughfares, railroad tracks, those kinds of safety hazards. We would consider the density of the community. We would consider potential for growth in the area so that if we needed to expand, we had to

give that consideration. We would consider the ethnic distribution of the area. I mentioned safety. We would consider the organizational structure of the area.

[2404] Q. What do you mean by "organizational structure"?

A. Whether it was an elementary or junior or senior high school.

Q. Would you say that the drawing of the boundary by the school Board at that time determines the — well, in fact, it determines the attendance area of the schools once that decision is made?

A. Yes.

Q. Does that determine the neighborhood of the school?

A. That would then become the —

Q. Neighborhood for the school?

A. — the school neighborhood, the school community.

* * * * *

CROSS-EXAMINATION BY MR. ROSS

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[2405] Q. [By Mr. Ross] All right. Do you know how long the pairing of [2406] Indian Springs and Colerain Elementary has been in effect?

A. It was in existence when I was assigned to the central office in 1964, and it continues to the present time. There has been an addition of the crippled children's school at Colerain to permit mainstreaming of those youngsters, but it is, in fact, still a primary center to Indian Springs School.

Q. Okay. And which is the home school, Indian Springs or Colerain?

A. Indian Springs.

* Q. Indian Springs? And the reason for this is that there has been a high kindergarten through three student population in Indian Springs?

A. At one time, that is correct.

Q. All right. But is there any reason at this time for maintaining that system?

A. The only reason would be a distance factor. If Colerain School were not located where it is, in all probability, the administration would have to face a transportation problem, and it does not because of the location, proximity of Colerain to the area it serves.

Q. Okay. Would you describe this as a Princeton pairing type situation?

A. No, sir.

Q. How would it differ?

[2407] A. My understanding of Princeton pairing would be the exchange that you would find in — you would find grade levels representing each school in the other school, and the Indian Springs - Colerain —

Q. Difference in grade?

A. I'm sorry?

Q. You said difference in grade?

A. You would find grade twos from A school in B School in grades three and B School in A, as an example. That's my understanding of the Princeton pairing.

Q. Okay. Do you understand it also to include K through 3 and —

A. It could.

Q. — 4 through 6? It could?

A. It could.

Q. It is flexible in that nature. So this particular situation may be one which could possibly be termed as a Princeton pairing, then?

A. No, it's a feeder school. We do not have 4 through 6 youngsters from Indian Springs in Colerain, nor do we have K through 3 youngsters in Colerain. I see a distinct difference.

Q. It's K through 3 in Colerain and 4 through 6 in — sorry — K through 3 in Indian Springs and 4 through 6 in Colerain?

[2408] A. No, sir. The Colerain organization is K through 3 or 4. I'm not sure of the maximum grade level at this point. I believe it's K through 3. And Indian Springs is K through 6, so that the attendance area for K through 3 in Indian Springs is one portion of the total attendance area for Indian Springs. K through 3 in Colerain is the remaining portion of that general attendance area, and the 4 through 6 youngsters come from the entire attendance areas of both schools.

Q. Okay. Now, how many other such pairings are there in the Columbus School System, do you know?

A. We have eliminated that kind of pairing at Hamilton - Hudson, and we've closed Sixth Avenue. I believe this is the remaining satellite.

Q. And you find those particular grade structure arrangements to be educational and sound and feasible?

A. Yes, sir.

* * * * *

MARTIN E. SLOANE

called as a witness on behalf of the
Intervening Plaintiffs, being first duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. JONES

[2409] Q. [By Mr. Jones] Would you state your name, please?

A. Martin E. Sloane.

Q. Where do you reside, Mr. Sloane?

A. I reside in Washington, D.C.

Q. By whom are you employed?

A. I'm employed by the National Committee Against Discrimination and Housing.

Q. In what capacity?

A. I'm the General Counsel.

* * * * *

VOIR DIRE EXAMINATION BY MR. PORTER

[2417] Q. [By Mr. Porter] Mr. Sloane, have you had the opportunity or have you participated in studies involving the City of Columbus or its School System?

A. No, I haven't.

DIRECT EXAMINATION BY MR. JONES

[2429] Q. [By Mr. Jones] Now, let's talk about FHA. Are you familiar with [2430] the policies and practices of the Federal Housing Administration?

A. Yes, I am.

Q. And are you familiar with those policies that were pursued by its predecessor agencies or agency?

A. Well, FHA had no predecessor. The housing home — the Department of Housing and Urban Development —

Q. I meant HUD and its predecessor?

A. Yes, I am.

Q. Would you identify those policies and — well, just identify the policies, if you can.

A. FHA?

Q. Yes.

A. FHA was established in 1934. It was created as part of the National Housing Act of that year, and its policies for the first decade and a half of its existence were policies of open racial discrimination and segregation in housing. It strongly pursued those policies until around 1950 to the point where it actually recommended to private builders and homeowners for filing of a racially restrictive covenant which would exclude racial minorities and all but a very small segment of the white Caucasian population.

FHA also advised its underwriters against insuring loans on houses in neighborhoods where there were inharmonious racial groups living. That's the term FHA used, [2431] inharmonious racial groups.

FHA also warned of insuring mortgages on loans on houses in neighborhoods where children of an inharmonious racial group were attending school in substantial numbers. These policies lasted for the first 15 or 16 years of its existence and well into the post-2nd World War suburban housing boom.

Q. Mr. Sloane, I'd like to hand you what has been marked for identification purposes as Plaintiffs' Exhibit No. 57. Would you just look at that and tell the Court whether or not you're familiar with that document?

A. Yes, I am.

Q. And —

A. This is an excerpt from the FHA Underwriting Manual with revisions to June 1, 1935.

Q. Now, is that the document from which the term "inharmonious groups" originated?

A. Yes.

Q. What effect, Mr. Sloane, did that particular — the policies contained in that exhibit have on the housing patterns that developed in this country?

A. In my opinion, it was a major factor in the —

Q. Why?

A. — in the intensification in the racial segregation and disparities in housing quality for black [2432] people and majority group members in that FHA was a major force in the entire housing industry, and still remains so, but was particularly in its early days. Its policies and practices tended to be followed by other elements of the private housing and home finance industry.

Moreover, when builders who wanted the benefits of FHA mortgage insurance would come to FHA, they were aware that FHA's policies really could be characterized as separate for whites but nothing for blacks, and builders who wanted to do business with FHA quickly got the idea that their subdivisions would have to be white only.

Q. Will you turn to Section 951 in that document, please?

A. I don't think this has a 951.

Q. The third page from the back here.

Would you bear with us just one moment, Your Honor, until we get this organized?

(Off-the-record discussion.)

MR. JONES: Your Honor, apparently there's a page or two missing from the original, so I will hand the witness a copy of Exhibit 51 — 57. I'm sorry.

THE COURT: A page or two are missing from the originals, so you're going to hand him a copy that has —

MR. JONES: Apparently, it was an omission in the statement. [2433]

THE COURT: Very well.

MR. JONES: I'm sure that's all it is.

THE COURT: Does the Defense have this?

MR. PORTER: Yes, Your Honor.

THE COURT: Okay.

Q. Mr. Sloane, I call your attention to Section 951. Would you take a look at that, please, and tell me whether or not you're familiar with it?

A. Yes, I am.

Q. And what is that, sir? Would you read that, please?

A. The entire paragraph?

Q. No, the section beginning, "If the children of people living —

A. If the children of people living in such an area are compelled to attend school with a majority or a considerable number of pupils representing a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist.

Q. Do you have an opinion, sir, as to what effect that particular section has had on the composition of schools in these urban areas?

MR. PORTER: Objection.

THE COURT: Overruled. We'll let him answer that. [2434] I think it is a matter of weight than admissibility.

A. I think the inevitable effect would be to tend toward racially segregated schools in that the message here to underwriters is that if schools are racially integrated the neighborhood is considered less stable and less desirable, therefore, areas where schools are integrated would be avoided by builders.

Q. Do you have next 980?

A. Yes. [2435]

Q. Would you read that, please, under Recommended Restrictions?

A. Part of 980 has to do with recommendations for recorded restrictive covenants to protect the properties. Among the recommended restrictions in this section is "G," prohibition of occupancy of properties except by the race for which they are intended. This constituted FHA's recommendation of racially restrictive covenants which was then proliferated around the country.

Q. Are you familiar with the so-called model restrictive covenants?

A. Yes.

Q. What is a model racially restrictive covenant?

A. Well, I can tell you what it contains. It contains a restriction against an unbelievably wide racial and ethnic groups beginning with black people, extending to people of the Semitic race, as it is called in the covenants, usually restricting against people of Syrian ancestry, Italians, southern Europeans generally, restricting such a wide variety that only a small portion of largely northern European Caucasians are permitted.

Q. Would you turn to Section 284 of the Underwriting Manual that you have in your hand?

A. 284?

Q. Yes. [2436]

A. I don't think I have 284.

MR. JONES: I withdraw the question. There is some mixup on this exhibit, Your Honor.

THE COURT: Take your time and get it straightened out.

Q. [By Mr. Jones] What effect, Mr. Sloane, on the growth of cities and suburban areas have the policies of FHA and to an extent VA had in terms of racial configurations?

A. The policies and practices of both FHA and VA have been very strong factors responsible for the development of residential segregation in metropolitan areas throughout the country. As I mentioned earlier, FHA's policies well into the period of the enormous suburban housing boom of the late '40s and early '50s was one of insisting on racial segregation and racial discrimination. The VA whose loan guarantee program is quite similar to FHA's mortgage insurance program tended to follow FHA's policies and practices and still to a large extent does.

What's more, the policies and practices of FHA and VA tended to be followed by the entire housing and home finance industry so that during the period of — the early period, certainly, of the suburban housing boom and continuing on into the present, the effect of those policies has been to intensify residential segregation in metropolitan areas. [2437]

Q. I would like to ask you now some questions, Mr. Sloane, about the policies pursued by the Public Housing Authority. Will you tell us what the Public Housing Authority is, what its mandate is and what the policies and practices have been? [2438]

A. The name of the particular agency has changed over the years, but most of the time it was called the Public Housing Administration. That agency administers the low rent public housing program. The public housing program was established in 1937 as a part of the United

States Housing Act. It serves people of low income by definition, those who are too poor to afford housing that's produced through the ordinary channels of the housing market. A disproportionate number of people who have been served over the years by the public housing program have been racial minorities.

The policy of the Public Housing Administration differs substantially from policies of FHA and VA. That is, the Public Housing Administration insisted on what was called a racial equity formula insisting that racial minorities get their fair share of public housing units. FHA and VA, as I pointed out earlier, insisted that subdivisions be racially homogeneous, and that meant all white, so that minorities were disproportionately under represented as users of FHA and VA programs. The Public Housing Administration, however, insisted on racial equity.

However, the Public Housing Administration felt it was perfectly permissible if local public housing authorities wanted to operate the public housing program on a racially segregated basis. In fact, over the years [2439] most public housing authorities in the north, as well as in the south, did operate the public housing program on a racially segregated basis. Therefore, while minorities got equity, they got it on a segregated basis.

Over the years the public housing program has produced over one million units of public housing, mostly in central cities, mostly on a racially segregated basis, so that the effect of that program also has been to intensify residential segregation.

Q. This has been primarily in large cities or major cities, has it not?

A. That's right.

* * * * *

[2441] Q. [By Mr. Jones] Tell us what 235 is and what the result of your evaluation was.

A. The Section 235 program is a home ownership program for lower income families. It was established as part of the Housing and Urban Development Act of 1968 and produced a massive volume of housing units for lower income families throughout metropolitan areas.

In 1970 the Commission on Civil Rights conducted a study of the racial impact of the Section 235 program. The study was conducted under my supervision. What we found was that minorities were participating in the program in large numbers. There was a larger percentage of minorities participating in the 235 program than there was a percentage of minorities in the country, but their participation was almost entirely on a central city, older housing basis.

The Section 235 program could be used both for new housing and for existing housing. The new housing was a rather good quality. It was being built almost entirely [2442] out in suburban parts of the metropolitan areas. It was occupied almost entirely by white people, white families. The existing housing — and there were a lot of problems and some scandals with respect to the existing housing that was used under the 235 program. The existing housing was in the central city almost entirely, and that is where minorities were confined.

We also tried to find out why this phenomenon was so. The reason why it puzzled us at the Commission was that one of the explanations offered for why you find very few minorities living in new suburban housing, but rather in old housing in the central city, is that they cannot afford the new housing. This economic justification simply wouldn't work with the Section 235 program, for lower income people, minorities, were, in fact, participating in very large numbers. The incomes were the same for whites as well as blacks. The mortgage limits were the same for whites as well as blacks. Yet the same pattern of whites living in the new housing out in the suburbs and

blacks living in the older housing in the central city prevailed in this program.

What we found out was the major reason was that FHA charged with the responsibility of administering the program had abdicated that responsibility and turned over applicants to real estate brokers and other elements of the [2443] private housing industry, and the traditional pattern of segregation in residence was continued in the operation of this program. We found a pattern of racial steering on the part of brokers, and FHA did nothing at all to interfere.

Q. What is racial steering, Mr. Sloane?

A. Generally it is the practice of persuading by action or inaction people to live only in areas where their race is in majority and dissuading them from seeking housing in areas where their race is in the distinct minority.

Q. It is true, is it not, that the Civil Rights Act of 1968 prohibits that kind of conduct?

A. Yes, it is.

Q. Can you tell us what, if anything, the agencies responsible for enforcement of the Civil Rights Act of 1968 and specifically this kind of conduct has done?

A. Well, there are a number of agencies that have some enforcement responsibility. HUD, of course, is the principal agency, but its enforcement has been limited largely to passive posture of receiving individual complaints, processing individual complaints. To my knowledge, they have not done anything to stop the institutional practice of racial steering.

The Department of Justice, of course, has responsibility for instituting litigation in the event of patterns or practices of discrimination. The Department has [2444] brought a number of suits, individual suits, against brokers in particular for racial steering, but it is awfully difficult for individual litigation to end an institutional practice which is nationwide. [2445]

Q. What is red lining?

A. That is a practice, a particularly insidious practice of mortgage lending institutions refusing to lend in particular areas of the city or requiring much more stringent terms and conditions for loans on houses in particular areas of the city than in others. Usually the connotation is areas where minorities are either in majority or where the area is all black.

Q. Let's go back to the public housing matter for a moment. After the Public Housing Administration was directed to harmonize its policies with the Executive Order, can you describe the types of programs that were initiated and reforms that were set in motion?

A. The Executive Order caused little in the way of a substantive change in the policies and practices of the Public Housing Administration. To be sure, they no longer were overtly and openly permitting local housing authorities to segregate by race, but less overt forms of segregation were tolerated. For example, before the Executive Order was issued, many local Public Housing authorities maintained tenant assignment lists which were separate, one for black and one for white. This was no longer permitted. What was permitted and in fact encouraged by officials of the Public Housing Administration was a form of freedom of choice plan which had been tried in several cities with no success [2446] whatsoever. Nonetheless, the Public Housing recommended to local Public Housing authorities that they switch from segregated tenant assignment lists to freedom of choice so tenants or applicants would theoretically have a choice of projects. The results were in almost perfect perpetuation and continuation of segregated public housing.

Q. Why was that?

A. Because freedom of choice did not work in the area of Public Housing for many of the same reasons it did not work in the area of school desegregation. In fact,

these reasons were recognized by the Public Housing Administration itself four years later in what I thought was a rather eloquent explanation of why they would no longer permit freedom of choice plans in public tenant assignment.

* * * * *

[2449] Q. [By Mr. Jones] During the time of recess, Mr. Sloane, we went out to discuss a little more red lining, and I'm not sure at what point we broke off, so would you just tell us what red lining is, sir?

A. Red lining is a practice engaged in by mortgage lending institutions of refusing to make loans in certain neighborhoods, neighborhoods generally that are racially integrated or predominantly black or, if they do make loans in such neighborhoods, requiring stricter terms and conditions for loans than they would require in neighborhoods [2450] that are predominantly white.

Q. We also discussed this morning, Mr. Sloane, the various policies that had been adopted by the Public Housing Administration pursuant to the Executive Order issued by the President. You had testified with respect to freedom of choice. Was there also a policy pursued which gave applicants a right of refusal without losing their place on the list?

A. Yes. That came several years later. Following issuance of the Executive Order, as I said earlier, the Public Housing Administration advised local Public Housing authorities to switch to a freedom of choice form of tenant assignment. With respect to site selection policies, however, there was no change. Sites for projects intended to be for white occupancy were located in white areas. Projects intended for black occupancy were located in black areas.

In 1964 the Civil Rights Act of 1964 was passed, including Title VI which prohibited racial discrimination in a large number of federally assisted programs, includ-

ing public housing. Several years after Title VI was enacted, the Public Housing Administration made a fairly substantial change in its policies, both with respect to tenant assignment and with respect to site selection. On tenant assignment, they required a form of first-come-first-served procedure. This is [2451] the way it worked. A local housing authority could offer an applicant whose name came to the top of the list for a particular type of an apartment two refusals, no matter what the ground was. If the applicant refused an otherwise appropriate apartment, the third time he went down to the bottom of the list and had to start all over again, which was a change from previous tenant assignment policies which were strictly on a racial basis.

On site selection as well there was a change in that the Public Housing Administration required a balanced site selection policy. That is, for every unit of public housing that was located in minority neighborhoods, there had to be an equivalent unit located outside minority neighborhoods. Now, the policies were maintained for the next five years. In fact, the tenant assignment policy first-come-first-serve is still in effect.

There was a change in site selection policies in 1972 when HUD issued what were called project selection criteria which were aimed for the most part at assuring that sites for public housing and other forms of federally subsidized housing served to reduce racial concentrations. That was the first time that the federal policy was actually in favor of reducing racial concentrations, and that occurred only in 1972.

Q. What effected that policy change, if you know? [2452]

A. Yes. There was a specific incident. A lawsuit was brought against HUD in Philadelphia. The case was called Shannon versus HUD in which HUD approval of a low-income housing project in a racially integrated area was

challenged on grounds that HUD had failed to take into account the effect on the racial composition of the neighborhood and on the vitality of the neighborhood. The Court of Appeals for the Third Circuit agreed with plaintiffs and said that HUD did have that obligation to take into account the effect of its approvals of low-income projects on the racial composition of the neighborhood, among other things, that the Court of Appeals said.

This led directly to two particular sets of regulations: One, the issuance of project selection criteria on a nationwide basis not just limited to the jurisdiction of the Third Circuit which were aimed at assuring that site selections would serve to reduce racial concentrations and also regulations called affirmative fair housing marketing regulations aimed at assuring that HUD-assisted builders would undertake programs to attract minority home seekers to usual subdivision housing in the suburbs from which they previously had been excluded. [2453]

A. (Continuing) But the Shannon case was the precipitating event.

Q. What has FHA done in an effort to comply with the mandate of the law?

A. Well, of course, as I said earlier, in its early years, the first 15, its policies were actively in favor of racial segregation and racial discrimination, including outspoken advice to underwriters, which were put in racial terms, those quotes from the Underwriting Manual that I read from this morning.

In 1947, in response to continuing protests from civil rights organizations and also in response to a specific request from the then Attorney General of the United States, FHA made changes in its Underwriting Manuals and no longer used terms such as inharmonious racial groups but substituted for such terms the term inharmonious user groups. The change was distinctly a cosmetic one, just a change in language. It had no substantive effect at all.

The first real change in FHA policy came following the decision of the Supreme Court of the United States in *Shelley versus Kraemer* which ruled that judicial enforcement of racially restrictive covenants was unconstitutional. That decision came down in May, 1948. At the time, FHA was actively encouraging use of racially restrictive covenants.

Despite the Supreme Court's decision, FHA [2454] continued to encourage use of racially restrictive covenants for nearly two years. It wasn't until February of 1950 that FHA changed its policy with respect to racially restrictive covenants.

What it announced in February of 1950 was that it would no longer insure mortgages on houses carrying racially restrictive covenants if the covenants were filed after February of 1950.

Q. What was the situation with regard to restrictive covenants that were already on file?

A. FHA would continue to insure mortgages on such houses forevermore.

Q. So this was in effect a grandfather clause?

A. That's exactly right.

For the next 12 years, FHA's policy could be characterized as one of neutrality. If a — officially one of neutrality. If a builder chose to discriminate on the basis of race in sales of houses which were provided with the aid of FHA mortgage insurance, that was perfectly acceptable to FHA. Officially, if a builder chose to sell houses without regard to the race of the home seeker, that was acceptable to FHA as well. However, there were many instances that came to the attention — to my attention and other staff members' attention at the U. S. Commission on Civil Rights suggesting strongly that the official policy was [2455] not quite the unofficial policy carried out in practice in the field, but that builders were still encouraged to sell houses, if they were going to use FHA mortgage insurance to sell houses to whites only.

The real change in FHA policy came after the issuance of the Executive Order on Equal Opportunity and Housing, which was issued in November of 1962, and that Order constituted a direct command from the president to the FHA Commission to take action necessary to prevent discrimination in the operation of its programs, and FHA then was in the legal position of advocating open occupancy for nondiscrimination in housing.

The manner in which FHA chose to comply with that presidential command was the most passive manner imaginable. Their enforcement efforts were limited to receipt of complaints, individual complaints and processing of individual complaints and making efforts to secure a house for an individual complainant if they found that the complaint was justified. That was the full extent of FHA's enforcement activities.

The 1968 Fair Housing Law, the Federal Fair Housing Law, was another command to FHA as well as all other federal agencies to prevent discrimination. FHA still, by and large, carries out its enforcement responsibilities through the receipt and processing of individual complaints. [2456]

So that FHA has been under increasingly strong mandates for equal opportunity, certainly, since 1962, which is 16 years ago.

From my experience, the enthusiasm with which they are carrying out their current equal opportunity mandates falls far short of meeting the — of matching the zeal with which they carried out their racial segregation policies during the first 15, 16 years of their existence.

* * * * *

[2460] Q. [By Mr. Jones] I would like for you to assume for the purpose of this question, Mr. Sloane, the following facts. I would like for you to make these assumptions against the background of your knowledge on the extent to which restrictive covenants have excluded blacks

from residential areas, the various programs and policies of FHA have had the effect of excluding racial minorities or, specifically, blacks from certain residential areas and the failure of other federal [2461] agencies to comply with various statutory and constitutional requirements with respect to enforcing rights are concerned.

I would like for you to assume the following: That in 1952 the Columbus School System constructed five elementary schools in areas that contained restrictive covenants; in 1953 the Columbus Public School System constructed three elementary schools in areas that contained racially restrictive covenants; in 1954 the Columbus School System constructed one elementary school in such an area; in 1955, four schools were constructed in areas that contained racially restrictive covenants; in 1956, five were so constructed; in 1957, six; in 1958, two; in 1959, five; in 1960, five; in 1961, five; in 1962, three; in 1963, six; in 1964, two; in 1965, two; in 1966, nine; in 1967, three; in 1968, three; in 1969, one.

I would like for you to further assume that the same Public School System that constructed these schools in these areas also adopts and pursues a policy of geographic neighborhood assignment of children.

I would ask whether you have an opinion as to the effect of this kind of policy on the residential patterns that would surround these schools I have mentioned and the schools themselves?

A. First, I do —

MR. PORTER: Excuse me just a minute. Is the [2462] question completed?

MR. JONES: Yes.

MR. PORTER: If the Court please, could I have the last sentence or two read?

THE COURT: Yes.

(Partial question read.)

MR. PORTER: I object to the question.

THE COURT: Do you want to make a record?

MR. PORTER: Yes. Thank you, Your Honor. I am not clear in my mind as to which question is being asked in the first place. If he is being asked as something within his expertise of housing as distinguished from schooling, I am not clear about it. I think that is not the purport of the question, however. He has not been qualified in any way that I know of with respect to school construction and school programs. [2463]

MR. PORTER: (Continuing) The other thing that I would like to also object to is the recitation of the presence of restrictive covenants. I don't know whether in the first place there is in evidence that there were at some point in time restrictive covenants in the areas where these schools were built.

The other thing is that in 1947 or '48 they were held, I think, illegal, and I think that characterization is wrong, the inference.

THE COURT: The Court, relying on what I consider the rather marked changed in rules of evidence in this area, particularly 703 and 705, I believe the question is proper and leaves you to your cross-examination, so I will overrule the objection.

Q. (By Mr. Jones) Can you remember the question?

A. Yes, I do. Well, first the fact that there are restrictive covenants in the area which exclude racial minorities necessarily would mean that the schools in the area would be white. The fact that the schools are white, there is a reciprocal effect. The racial identification of the schools as white also has an effect in perpetuating the whiteness of the residential area which feeds into the school. Even if restrictive covenants after awhile were somehow expunged from deeds, the whiteness of the school and the whiteness of the residential neighborhood would have [2464] reciprocal effect perpetuating each other.

Q. What, based upon your experience, Mr. Sloane, as one associated with the U. S. Commission on Civil Rights, one who has conducted numerous studies, studies that you referred to in your earlier testimony on housing segregation in this country and testimony you prepared for Congress that led to the enactment of various pieces of legislation, including Title VIII, what is your opinion as to the lasting effects of policies that I described in the hypothetical question?

MR. PORTER: Objection.

THE COURT: Overruled.

A. The lasting effects are considerable. Residential patterns that develop over decades, sometimes generations, tend to perpetuate themselves. It takes a considerable effort to make a dent in the residentially segregated patterns that exist.

Since the Federal Government through its many agencies bears such a large part of the responsibility for the development and hardening of the patterns of residential segregation in the metropolitan areas, it would seem to me that these federal agencies bear at least as large a responsibility to make a similar effort at undoing what they in large part have done. So far I have not seen anything resembling that sort of a major effort [2465] emerging.

Unless there is a major effort, the patterns of residential segregation will perpetuate themselves because that's the way residential patterns go on. Similarly, patterns of school segregation imposed upon the patterns of residential segregation with the key element of geographic attendance areas will similarly go on.

* * * * *

CROSS-EXAMINATION BY MR. PORTER

[2466] Q. [By Mr. Porter] What are you saying is your understanding of the hypothetical question that was asked to you and your reply to it?

A. What was my understanding of the question?

Q. What was your understanding of the question that Mr. Jones asked you and your reply?

MR. JONES: Objection.

THE COURT: I am going to allow it if you can answer it.

THE WITNESS: Certainly.

THE COURT: Overruled.

A. My understanding of the question was, given a situation where schools, a number of schools were built in residential areas where the houses carried racially restrictive covenants and, number one, what effect would the residential pattern have on school attendance and, number two, what effect would school attendance have on the residential pattern? My answer was that there would be a reciprocal effect of maintaining and perpetuating an all-white neighborhood, all-white school.

Q. Well, you are accepting as given, and maybe properly so, that these eight schools that are identified or were constructed in 1952 were constructed on properties that [2467] had racially restrictive covenants; is that right?

A. Not necessarily on properties, but in neighborhoods where the houses carried racially restrictive covenants. That was part of it. I didn't understand the question to be —

Q. That's all right, I accept that. You don't know and you are not suggesting that the Glenmont Elementary, James Road Elementary, Kingswood Elementary, Oakland Elementary, South Mifflin Elementary, Weinland Park Elementary, Westgate Elementary and West Mound Elementary were actually built in areas where there were restrictive covenants? You are simply assuming for the purposes of the question that Mr. Jones has stated the facts correctly; is that right?

A. I don't recall any names of schools were given; just numbers of schools. No, I don't know anything about those schools.

Q. So to the extent that this record reflects that the schools that he has identified by number opened with predominantly black student bodies, what would that indicate to you so far as these restrictive covenants in the area were concerned?

A. If these schools opened that way under the set of conditions that Mr. Jones gave in his hypothetical, I would be flabbergasted. I couldn't see how that could happen. If we are talking about schools that are located in residential [2467A] areas which carry racially restrictive covenants that exclude black people and attendance is on a geographical basis, it would seem inevitable to me that those schools would open with white people. [2468]

Q. Well, if I tell you, as a matter of fact, that the Beatty Park Elementary School, which was one of the three schools built in 1954, opened 90 percent black, there is something the matter; isn't there?

A. I would think so. I'm not in a position to dispute the facts.

Q. And if I told you that in the same year Eastgate Elementary opened and it had a substantial black enrollment, then there is something again wrong with that?

A. I would again be very surprised.

MR. JONES: What school again? I'm sorry?

MR. PORTER: Eastgate.

A. (Continuing) I would assume one of the facts given in the hypothetical just wasn't present.

Q. Or more?

A. Yes.

Q. Depending on what this record shows; is that right?

A. One or more of the essential facts just isn't there.

Q. All right. Now, as an expert, would you agree that as time has gone by, since 1947, the effect or the viability that you find in these covenants has diminished?

A. Since the Supreme Court decision?

Q. Yes. [2469]

A. It has some, but it has by no means — the effect has by no means disappeared for a variety of reasons. They still are, by and large, recorded on deeds. There are a good many people who still honor them. For one thing, most people aren't lawyers and may not know that these covenants are judicially unenforceable.

Secondly, most people are accustomed to living up to what they say they're going to do. I would agree that, in effect, the effect has been diminished — certainly that there is less effect today than there was in 1947, the year before the Supreme Court decision in Shelley versus Kraemer, but they still have some lingering effect.

Q. And to the extent that a given area has had — had restrictive covenants in some time in the past and that area is now, according to the census information, predominantly black, that certainly would be an example of an area where the covenant had lost its viability for whatever the reason?

A. Yes, I would agree, yes.

Q. It is my impression from reading your testimony in Dayton and Cleveland that there are two key elements to your position, and I would like to discuss these with you just a little bit.

The first is that, talking as we are now on the subject that we've been talking about, the first is that residential patterns are slow to change racially; is that [2470] right?

A. Oh, yes, that's — at least that.

Q. At least that.

And that is true whether or not there are restrictive covenants, right?

A. That's largely true, yes.

Q. It is a — if I would understand your position, it is because there are a whole number of factors which bear on the question of the development or the living conditions within an area and these are slow to change, money markets are slow to change, the community is slow to change; is that right?

A. Well, discriminatory practices are slow to change, too.

Q. All right.

A. And also recognition of the extent of equal housing opportunity does exist is slow to come.

Q. And the other thing that seems to me, Mr. Sloane, to pervade or is a dominant theme in your opinion or position, is that the Federal Government, for whatever the reason, the Federal Government has not, as a matter of policy in your opinion, actively enough pursued equal housing or open housing; is that right?

A. Let me answer it this way: Yes to that, but perhaps even more important, even when policies of Federal agencies [2471] have been at an acceptable level, the bigger with which those policies have been carried out in the field, in the practice, have been severely wanting.

Q. That is part of what I'm trying to say.

A. Yes.

Q. That while there may be, in your opinion, there may be a stated policy, it has not been sufficiently aggressively pursued; is that correct?

A. Yes.

Q. And this has nothing to do with schools, does it? I mean, this is simply national housing policy, right?

A. Well, as I testified earlier, part of the instructions to underwriters in the FHA underwriter manual back in the '30s and the 1940s had to do with the racial composition of schools, and according to that underwriting manual, racially integrated schools were a minus factor for underwriting purposes.

Q. Okay. I will talk about that in a minute, but let's go back to my question.

I stated your position correctly, did I not, that as a national policy, the Federal Government, in your opinion, has not pursued open housing to the extent that it should; is that right?

A. That's right.

Q. All right. Now, let's go back, and if we may, [2472] please, take these pieces of FHA and VA and put them into a time frame, okay?

Now, if I understand it correctly, the FHA started in 1934, am I right?

A. Right.

Q. And, according to your testimony and the testimony of others here in this case, in about 1935 or 1936 there appeared in the FHA manual or appraisal manual these things dealing with injection of certain things into the neighborhood? I've forgotten exactly the term. Is that right?

A. Well, those were there from the very inception of FHA. [2473]

Q. Okay. And they continued down past Shelley versus Kraemer in 1948 until 1950, right?

A. As I testified earlier, in 1947, there were — there was a change in language in the Underwriting Manual from inharmonious racial groups to inharmonious user groups.

Q. And if I understand what you've said here, and it's consistent with what you have said elsewhere, that that language was eliminated in 1950; is that right?

A. Yes.

Q. All right. So that as of 1950, if an outsider was to look at the Federal Government's guidelines and policies with respect to financing under the FHA, he would not find this language which you've identified; is that right?

A. No, it would be the outward appearance of neutrality on racial discrimination.

Q. And I believe it was your testimony here and elsewhere that they did, in fact, pursue or at least pay lip service to a position of neutrality; is that right?

A. That was the official policy, yes.

Q. All right. Now, if a school board — strike that. Strike it.

And it's also my recollection from your testimony elsewhere that the FHA and VA loans from 1950, in the 1950's were in excess of 40 percent of the new housing market; is [2474] that right?

A. At certain periods during that time, yes.

Q. All right. And I think you have also testified elsewhere that this financing was almost entirely in the suburban parts of the metropolitan areas; is that right?

A. Yes.

Q. And then in the '60s, the piece of the FHA-VA market was approximately 30 percent? It was down, right?

A. That's right, yes.

Q. And would I be correct in assuming that it still is primarily in the suburban rather than — in the suburban parts of the metropolitan area?

A. In the 1960's?

Q. Yes.

A. Yes, for the most part. In the latter part of the 1960's, there was a concerted effort on the part of high FHA officials to turn FHA's attention to the central city.

Q. And today, according to your testimony, in Cleveland, I think it was, it is now approximately 15 percent?

A. FHA's share?

Q. That's correct.

A. I think so, yes.

Q. All right. So that since 1950, there has been no policy of encouraging or recommending these racial covenants or this racial policy so far as neighborhoods are [2475] concerned? That's right so far; isn't it?

A. No, I'm not sure if I can agree with that.

Q. Okay. I did get cumbersome.

A. No, as I testified earlier, the unofficial policy carried out in the field —

Q. Wait just a minute. Let me ask the question.

A. I thought I was responding to one.

Q. Let me ask it. Let me bring it down.

After the change in FHA policy or the elimination of this language out of these manuals in '47 and then in '50, then in 1962 there was an affirmative Executive Order or an Executive Order by the then president which affirmatively dealt with equal opportunity in housing; is that right?

A. That's right.

Q. And then, in 1964, two years later, there was the Civil Rights Act; isn't that true, which dealt in part with this?

A. No, the Civil Rights Act of 1964 didn't really cover FHA.

Q. I had understood or read your testimony in another case to indicate that Title VI of the Civil Rights Act of 1964 had played a part in this picture.

A. Title VI has an exemption of contracts by way of insurance or guarantee, and other than the new subsidy [2476] programs which came later, FHA's financial assistance is solely by way of mortgage insurance or a contract of insurance and was exempt from coverage under Title VI.

Q. All right. And then, in 1968, there was the Federal Fair Housing Law; is that right?

A. That's right.

Q. So that to the extent that a school system built a school building after 1950 it built it upon a federal policy that did not — did not encourage racial discrimination, did it?

A. No, I'm sorry, I don't think that's right. It built it upon a federal policy carried out by local insuring officers in Cleveland, Columbus, Dayton and every other major city in this country which continued to be discriminatory, and the demonstration of that is that the United States Commission on Civil Rights estimated that as of 1959, nine years after FHA officially had stopped discriminating, less than 2 percent of the post World War II FHA housing had been occupied by minorities.

By 1967, which was five years after the Executive Order on Equal Opportunity was signed, that percentage

had risen only to 3.3 percent. This, it seems to me, is a practical suggestion that the policies which officially were announced in Washington were not being carried out with very much enthusiasm, and that discrimination was continuing with [2477] respect to FHA housing.

Q. Well, let's put it a different way.

If Dr. Novice Fawcett was going to put a building up in the Columbus Public School System in 1952 and somebody said, "Hey, you'd better look at the FHA rules," he's not going to find anything in there such as existed prior to 1950, is he?

A. No. [2478]

Q. And he's going to be told if he inquires or his people inquire that the Federal Government is neutral upon the subject; is that right? Is that what your testimony was?

A. He'll be told by whom? If he goes down to the FHA insuring office, he might not be told that.

Q. All right. Now, Mr. Jones asked you about a model restrictive covenant. Do you remember that?

A. Yes.

Q. And you identified one; am I right?

A. I told him what the model covenants contain, generally.

Q. Do you remember testifying to Mr. Jones in Cleveland on Wednesday, December the 10th, —

A. Yes.

Q. — 1975?

And you were asked the question by Mr. Jones:

Did your research and investigation into the practices of FHA, Mr. Sloane, reveal whether or not that agency provided developers with language or model restrictive covenant terminology or an inclusion in the local documents?

A. Yes, I remember that.

Q. Do you remember that question?

A. Yes.

Q. Do you remember what your answer was? [2479]

A. Yes.

Q. What was it?

A. I had always assumed that FHA had provided a model covenant and everybody I talked to was operating under that assumption. My search did not reveal one. I couldn't find it.

Q. Yes, I think that you said:

I personally have not discovered one?

A. That's right. Everyone, including FHA officials, said, "Oh, yeah, we used to be able to provide a model covenant," but I haven't been able to find it. The model covenant I told Mr. Jones about earlier was just a model covenant and was not used.

Q. Are you familiar, or I assume I guess to be more accurate, I guess I should assume that you are not familiar with the Federal Housing — the Public Housing projects in the City of Columbus?

A. No, I am not.

Q. You don't know, so that the record is clear, you don't know whether or not the seven or eight or nine non-senior citizen public housing projects in the City of Columbus, you do not know where they were built, what their racial composition was when they opened up or what it is today, do you?

A. No, I don't. [2480]

Q. Nor do you know whether or not the school buildings predated the construction of the public housing facility, do you?

A. I don't.

Q. All right. I understand that your employment by the Government, the Federal Government, specifically, the United States Civil Rights Commission, ended in 1973; is that correct?

A. That's right. [2481]

Q. So that Exhibit 511 which you have read from dealing with the Federal Civil Rights enforcement in 1974

was a document which was prepared after you left?

A. That's right. This is one in a longer series of similar reports. The first three or four were done under my supervision. This was not.

Q. Do you have the full report there?

A. No, I don't.

Q. May I have it, please?

I am going to hand you the full book, Mr. Sloane, and open it to page 119, and I would ask you to read that paragraph because I believe that it differs from my recollection of your testimony.

A. HUD does not yet collect data on racial and ethnic composition of neighborhoods in which single-family housing sales are made. Thus it is not possible to assess the extent to which sales made through HUD's single-family housing program perpetuated or combated segregated residential patterns. It appears that HUD does not yet collect data on the racial and ethnic composition of the population for which HUD's programs are targeted, and thus it seems that HUD cannot measure the extent to which minorities are proportionately represented in its programs. It also appears that HUD does not collect racial and ethnic data on private housing and does not make systematic use of [2482] census data to survey the nation's racial and ethnic housing patterns.

Q. Thank you. Do you agree with that?

A. Do I agree with —

Q. That statement?

A. That HUD does not collect data on the ethnic and racial composition of neighborhoods, I believe that's so. HUD does collect racial data on the houses which are acquired by people.

Q. Do you agree with the statement "And that it is not possible to assess the extent to which sales made through HUD's single-family housing program perpetuated or combated segregated residential patterns"?

A. I don't think that would be so in that certainly those data are available through census, I believe. That's just a single page. As I understand it, all they are saying is that HUD does not itself provide data on the racial composition of neighborhoods. It doesn't say those data aren't available elsewhere.

Q. I also noticed in your testimony in Cleveland that you attribute to the FHA the — I think your language actually was that the FHA was instrumental in making racially restrictive covenants more popular and prevalent than they were prior, and I suppose prior to 1934; is that right? [2483]

A. That's right.

Q. So that to the extent that there were school buildings, for example, built prior to 1934, it would be your understanding as a housing expert that they were in less use — restrictive covenants were in less use prior to that time than they were subsequent to it?

A. That's right, generally.

Q. To the extent the school buildings were built between 1934 and 1950, they would have been built during the time when these restrictive covenants were in wide use; is that right?

A. That's right.

Q. If there weren't any buildings being built by the Columbus Public School System during that 16 years, then it is of no significance, is it, the restrictive covenants?

A. Restrictive covenants are of no significance?

Q. So far as the construction of school buildings are concerned?

A. I am not following your question.

Q. I am not sure what it was at this point. I think I just have another question.

MR. PORTER: I have no further questions. Thank you.

ROBERT L. GREEN
called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[2525] Q. [By Mr. Lucas] State your full name and occupation, please.

A. Robert L. Green, Dean, College of Urban Development and Professor of Educational Psychology at Michigan State University.

* * * * *

[2563] Q. Dr. Green, based on studies — perhaps we should go back then.

The College of Urban Affairs in Michigan State University, does it study the entire interdisciplinary relationship of urban areas, schools, housing, demographic movements, things of this nature?

A. Race, ethnic, social movements.

Q. All right. One of the areas of study at the University and at the College of Urban Affairs deal with migration patterns of whites and blacks?

A. Yes.

Q. And does the University also deal with questions of housing choice and why people make those choices?

A. Yes.

Q. Does the University also deal with the conditions of schools and the perception of conditions of schools?

A. Yes.

[2564] Q. And I believe you were the first director of the Department when it was a department at the University, and then Acting Dean and then Dean as it became a college; is that correct?

A. Yes.

Q. Now, based on your knowledge and working with your faculty and your staff, is there any data to support, other than just your personal opinion, is there any data to support the idea that whites moving into a community and finding that schools are black in an area where they would be looking at a house would have any sort of perception of those schools?

A. Yes. We have a young geographer on our staff, Professor Joe Darden, who has done extensive research on residential desegregation and perception of whites in selecting communities, schools and so forth, and whites moving into any community normally would view and will view schools that are predominantly black and neighborhoods that are predominantly black as communities in which they would not want to raise their children, but it's specifically schools.

As a matter of fact, if I could move it one step further, blacks who move into a community with resources and means accomodate the views very often of the white community and they, too, will very often see predominantly black schools as being less than desirable in which to raise [2565] their kids, especially blacks with means and education, but it's definitely a white view, a view that's held by whites. Schools that are predominantly black are perceived as being lacking in resources, lacking in having instructional personnel that's well-trained with the years of experience and exposure to the classroom and typically see these schools as schools which they would not want to have their children raised due to inferior resources and personnel. Whether it's true or not, that's a perception.

* * * * *

[2567] Q. Dr. Green, let's assume for the sake of this question that Columbus has rebuilt a number of its black schools on the same sites or nearby and has spent a fair amount of money refurbishing schools and so forth. Does

this fact get communicated or does the factor of race in terms of in migrating individuals, does the factor of race tend to obscure such physical facts?

A. Oh, yes.

MR. PORTER: Objection.

THE COURT: Overruled.

A. The fact of race does obscure the development of new sites because race is yet seen as being the most powerful factor in the choices that individuals historically have made regarding where their children will be educated.

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CROSS-EXAMINATION BY MR. PORTER
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[2568] Q. [By Mr. Porter] And your testimony for the most part here today deals with your opinions within your field of expertise generally and not with specific reference to Columbus, [2569] although you would not exclude Columbus from the generalities; is that right?

A. That's correct.

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DAVID HAMLAR

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS

[2660] Q. [By Mr. Atkins] Would you give your full name for the record, and address, please?

A. David D. Hamlar, 2626 Kenview Road South, Columbus, Ohio.

Q. I believe you are a doctor, are you not, Mr. Hamlar?

A. Yes, sir.

Q. Dr. Hamlar, you are now a member of the Columbus Board of Education, are you not?

A. Yes, I am.

Q. How long have you been a member of the Columbus Board?

A. This is my sixth year of this term. Two years before.

Q. And the prior two years were back in the —

A. '66, '67.

Q. And this term began in 1971?

A. This term started in '72 — '74.

[2661] Q. I am sorry.

A. '74.

Q. And have you, during either your first or the present term, been an officer of the Columbus Board?

A. Yes.

Q. Which positions have you held, sir?

A. I have been president, vice president.

Q. And during what period were you president?

A. Last year.

Q. Was that for a one-year term?

A. One-year term.

Q. What was the period, if you can recall, when you were vice president?

A. It was the previous year.

Q. Dr. Hamlar, I believe in a deposition taken by Plaintiffs' counsel Mr. William Davis on April 12, 1974, you were questioned relative to certain resolutions offered by you as a member of the Columbus Board. Do you recall that deposition?

A. Yes, sir.

Q. The indication was that on May 1 of 1973 or May of 1973, you introduced a resolution to the Columbus Board seeking certain assistance from the State Board or the State Department of Education. Could you describe briefly the substance of the resolution?

[2662] A. Well, the idea of the resolution was to ask for any advisory assistance or money that could be made available to help desegregate Columbus Public Schools.

Q. What was the action taken by the Board on the resolution?

A. On that particular resolution, we decided not to do that, and we — there were several resolutions presented by me towards the asking for assistance, monetarily and advisory, but I can't recall specifically whether they were in committee meetings or in the voting Board members, which I had introduced resolutions in both concerns, but we always in committee meetings determined whether it would be advisable to bring in a resolution form rather than have the Superintendent put it in resolution form. If we don't have enough votes to carry, we automatically just dismiss it.

Q. Now, according to the deposition in April of 1974, the indication was that that particular resolution on a 4-to-3 vote was defeated or rejected, whichever term would be more appropriate, by the Columbus Board. Does that comport with your recollection?

A. Yes.

Q. And was the vote at that time, as far as you can recall, a vote that split essentially along racial lines of the Board?

A. Yes.

[2663] Q. And since that time, has the Columbus Board passed any other resolutions seeking from the State Board of Education, the State Department of Education, the State Superintendent of Public Instruction, assistance in desegregating the Public Schools of Columbus?

A. No.

Q. During the period that you have served on the Columbus Board, has the Columbus Board passed resolutions relative to instructing the Superintendent to use the Princeton pairing plan to effect desegregation in Columbus?

A. You say have we passed a resolution instructing the Superintendent?

Q. Yes.

A. No, sir.

Q. Were resolutions or orders, whatever form they take, during your term passed by the Columbus Board instructing the Superintendent to use the cluster plan to desegregate public schools in Columbus?

A. No.

[2664] Q. Do you recall a resolution that was offered by another member of the Board seeking to set up a site selection advisory committee? Do you recall that?

A. Yes.

Q. And was the purpose of that resolution to provide a mechanism for preventing sites being selected whose construction — on which construction would result in racially segregated schools?

Q. Yes. It was explained to me — that's the way I understood it.

Q. Did the Board pass that resolution, Dr. Hamlar?

A. No.

Q. Has the Board passed any resolution similar to that since then?

A. You mean similar to site selection?

Q. Yes.

A. No.

Q. Has the Board during the term you have served on it, either your first or your second term, instructed the superintendent to redraw school attendance boundaries so as to desegregate the public schools in Columbus?

A. I must say not in those terms, but boundaries were to be considered under our last resolution in providing more integrated educational experiences, as it's been put in resolution form.

[2665] Q. That resolution dealt with new schools that were being constructed, did it not?

A. Yes, sir.

Q. But as far as you can recall, the Board has not during your first or second term instructed the superintendent to review the boundaries in existence in the Columbus Public School System for the purpose of redrawing them where needed to desegregate the schools?

A. It's been inherent in some of our plans, but not specifically to do that. As a matter of fact, there have been occasions it has been stated that no boundaries would be done, that it would be unnecessary gerrymandering to do such a thing.

Q. You mean that no boundaries would be redrawn for the purpose of desegregation?

A. Specifically, yes, I would say that, but boundaries were to be considered where necessary, where new schools were to furnish better integrated educational experiences.

* * * * *

HOWARD OWEN MERRIMAN

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR ATKINS

[2956] Q. [By Mr. Atkins] Would you state your full name and address for the record, please?

A. Howard Owen Merriman, 3627 Olentangy Boulevard, Columbus, Ohio.

Q. Mr. Merriman, I believe you have a Ph.D., do you not?

A. That's correct.

Q. In what field is that?

A. Educational Administration, research, evaluation, research management.

Q. When did you begin your employment with the Columbus School System?

A. In 1964.

* * * * *

[2970] Q. You mentioned that as a part of your — the positions you have held with the Columbus School System you have had certain kinds of responsibility for development functions. You said your title was at one point Executive Director of Development, and then it became Special Associate for Development, or was that —

A. That's correct.

Q. Okay. And what did you do?

A. Ran the building program.

Q. All right. Did you plan the building program as well as run it?

A. Ran the building program to implement promises made.

* * * * *

[2972] Q. Okay. So for every new school that was built, you or somebody on your staff reporting to you had to develop a racial profile of the potential area you served, is that right?

A. We had to collect as much information as we could on locating the school if there were options opened for locating it. Some of the schools, new schools specified in Promises Made were being located on Board-owned sites, and the sites had been determined prior to the 1972 bond issue.

Q. Do you recall, Dr. Merriman, what the specific Board vote was that created this policy, the policy attempting to site new schools so as to enhance where possible integration?

A. Specifically, no, but my primary reference point is in the document to which I have referred called Promises Made wherein the statement of the Board policy is spelled out.

* * * * *

[2986] Q. Was it your understanding that the Board policy was such that you were constrained from choosing

a site whose attendance area would be serviced by either public or school department provided transportation?

A. Please say again.

Q. Was it your understanding that the only attendance areas that were permissible as a part of this to locate the buildings so as to create the integration process were those that the children could walk to?

A. With the exception of the Columbus Plan and the schools where we created capacity over and above the neighborhood area, —

Q. All right.

A. Yes.

Q. All right. Isn't it the case that that there are already the school districts or attendance areas for high schools in Columbus which are sufficiently large; that some of the [2987] students at least need to ride one or another form of transportation to get to their school? That's the case now; isn't it?

A. Yes.

Q. It's also true that some of the junior high districts are sufficiently large that some of the students within them have to use either public or another means of transportation to get to their schools?

A. Yes.

Q. There are even some elementary school districts or elementary attendance areas that are sufficiently irregular to require some of those students to need one or another form of transportation to get to their school; isn't that true, too?

A. Yes.

* * * * *

[3058] Q. [By Mr. Adkins] Showing you a document that has previously been marked Plaintiffs' Exhibit 137 which I believe was obtained during some of the pretrial discovery for this case, obtained from the Columbus

Board, do you know whether or not the first annexation shown there, the Mifflin annexation in 1957, brought with it a school or schools?

A. I don't believe so, but I don't know of my own knowledge. The Mifflin annexation I am familiar with was when the entire residue of the Mifflin district was absorbed by the Columbus District. I believe it was in 1971.

Q. All right now, this Plaintiffs' Exhibit 137 indicates that there have been several interactions between Columbus and the Mifflin district, does it not? [3059]

6-10-57 there were 20 acres or 21 acres annexed by Columbus from Mifflin; then again on 11-9-59, two separate transactions, two separate actions, close to 87 acres; again on June 10, 1963 in two separate actions, 35 acres, thereabouts. Was it the 1963 annexation to which you are referring or was that a later one?

A. No, sir. If you look on the next page of your exhibit, the paragraph indicates —

Q. Paragraph No. 3, right?

A. That's correct, a transfer of the entire district into the Columbus City District on July 1, 1971.

Q. Right. [3060]

A. And that was all the students and all the buildings in the Mifflin District.

Q. At that time, that was South Mifflin Elementary, Cassady Elementary, East Linden Elementary and Mifflin Junior Senior High School; is that correct?

A. That's correct, uh-huh.

Q. Would you look at this Plaintiffs' Exhibit 137. Can you tell me whether any of these other annexations brought with them schools, and if so, which ones, to the best of your recollection?

A. There was a Worthington annexation, and it may have been one of these, and I'm not precisely sure of the dates because I'm not — I wasn't involved in it, but there was a Worthington annexation in the '60s and included

in that transfer was Homedale Elementary and Sharon Elementary Schools.

Q. Homedale and which one?

A. Sharon.

Q. Did either of the ten or eleven annexations involving Reynoldsburg add schools?

A. Not that I recall.

Q. Or Upper Arlington?

A. No, sir.

Q. Or Westerville?

A. The Westerville reference, I believe it's on page 4, [3061] is the, I believe — are the annexations to which I referred earlier, part of those annexations which the Ohio Supreme Court recently decided to uphold the transfer which is to occur July 1st of this year, and that includes — that includes a small, I believe it's an eight-room elementary school on Cleveland Avenue called, it was called Minerva Park Elementary School.

I see no others on this list that contain school buildings that I'm aware of.

Q. What about the southwestern — neither of the southwestern annexations, as far as you can recall, involved any schools as such?

A. No, sir.

Q. Okay. You've indicated that the policy that guided the Columbus Board's annexation was an effort to coincide the school district boundaries with the municipal boundaries; is that correct?

A. That's correct.

* * * * *

W. A. MONTGOMERY
called as a witness on behalf of the
Original Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[1372] Q. [By Mr. Lucas] State your full name and address, please.

A. W. A. Montgomery, 161 East Fourteenth Avenue.

Q. Mr. Montgomery, you have been employed by the original Plaintiffs for some period of time collecting data and investigating certain facts as to the matters affecting [1373] this school desegregation case, have you not?

A. Yes, sir.

* * * * *

[3161] Q. Do you have with you Original Plaintiffs' Exhibit 51?

A. Yes. This is it (indicating).

Q. Would you examine 51E-2-C, please?

A. 51E-2-C is the September 3, 1907 Ohio State Journal, page 9.

Q. All right. Would you read that section beginning "Segregation of Races Up Again"? I am sorry, "Again Up."

A. That particular exhibit —

MR. PORTER: May I have an objection to all of this, please?

THE COURT: Yes. The exhibit that you described is No. 51E-2-B which is headlined "Segregation of Races Again Up." See, there is a B and C subpart of that exhibit.

Q. I am sorry. Give us B first, please.

A. Okay. B is the September 3, 1907 Columbus Evening Dispatch, page 12. There is an article in the upper righthand corner of the page which says in large print, "Segregation of the Races Up Again." There is a line, and it says, "A resolution offered in School Board to establish special colored school," and another line, "Matter referred," and then it gets into a different Board of Education matter. The article states:

"The proposition to establish a special school for colored children instead of allowing them to attend the same school with white children made its periodical appearance at the meeting of the Board of Education Monday night.

[3162] A. (Continuing) John J. Trauger, member from the south side —

Q. Spell that, please, sir.

A. T-r-a-u-g-e-r — brought the matter up and the proposal this time went even so far as to be referred to a joint committee consisting of the sites and judiciary committee.

New paragraph. This places the question in the hands of — it's either E. F. Wood or C. F. Wood, Dr. W. O. Thompson and C. E. Morris as members of the sites committee and J. J. Stoddard, J. C. Brown and Dr. A. Timberman, members of the judiciary committee. Their report on the matter is to be made to the Board in one month.

Q. Is the article in — and I will drop, if I may, with reference to the 51 and just give the letters — ETC essentially the same article?

A. ETC is the Ohio State Journal's account of that Board, and it doesn't seem to differ. It does mention the names of those Board members who have a responsibility, you know, on those joint judiciary and sites committees to look into that question.

Q. All right. Would you refer now to the Board minutes of September 16, 1907, Exhibit 51E-3-A?

A. Yes, I have those Board minutes, and page 295 of those minutes which has the exhibit of that number.

[3163] Q. All right. In 295, there's a motion by Mr. Thompson. Would you read the motion?

A. Yeah. That's from Board Member William Oxley Thompson. He presented the following resolution:

RESOLVED, that the City Solicitor of this city as

the legal adviser of this Board be asked for an opinion as to whether or not this Board has the power under the laws of Ohio to establish separate schools for the white and black races and to compel the children apportioned hereto to attend the schools to which they are assigned.

Mr. Thompson moved to adopt the thing, which was agreed to.

Q. Is Mr. Thompson a member of the sites committee?

A. Yeah, that's the same William Oxley Thompson.

Q. All right. Now, I refer you to the Columbus Evening Dispatch for Thursday, September 17, 1907.

A. Okay. That is marked Exhibit 51E-3-B, and on page 2 of that paper, in large print it says at the top: Favors Separate Schools for the Negro Children. There's a line.

Dr. W. O. Thompson is not unfriendly to them but thinks it for the best. Dr. W. O. Thompson of the Ohio State University — he was also president of that body in addition to being a Columbus Board member —

Q. All right.

[3164] A. — is in line on the side favoring separate schools for colored and white children. Dr. Thompson said he was a friend of the colored people as well as the white, and he believes it is for the best interests of both that they be educated in separate schools. A resolution introduced by him at the meeting of the School Board Monday night asks that an opinion as to the legality of separate schools be secured from the City Law Department. It is not expected that the Law Department will render the decision before the coming election.

Q. I take it things haven't changed.

Would you refer, please, Mr. Montgomery, to 51E-4-A, B and C?

A. Yes. These are the three evening papers, the Columbus Dispatch, the Columbus Citizen and the Ohio State Journal for September 25, 1907.

Q. Is that September 24th perhaps?

A. September 25th, they report about a meeting of about 800 colored people out on the Mt. Vernon Avenue skating rink, on Mt. Vernon Avenue.

Q. That's at 23rd Street?

A. Yes. Like this one Dispatch article is headlined: Colored People Object Strongly to Segregation — or, wait, I reserved that word order. That's colored people strongly object to segregation.

[3165] Q. All right.

A. And all three papers carry substantially the same account, that they had a mass meeting of colored people to object to —

Q. Read what it says, if you will.

A. Okay. I'm reading from the Ohio State Journal, which is 51E-4-B. The historians records of that newspaper article, that's what this exhibit is. Okay.

Protest against colored schools.

Negroes hold mass meeting and make objection to the Board of Education plan. Resolutions condemning the suggested plan to establish separate schools in Columbus for white and colored pupils were adopted last night at the meeting at the skating rink of Mt. Vernon Avenue at 23rd Street were attended by 800 colored residents of the city.

And then they have some proposed resolutions which they were drafting and which was delivered to the Board meeting at the end of the month.

Q. All right. Do you have the minutes of the Board meeting of September 30, 1907, page 306, containing that resolution?

A. Yes. These are those Board minutes. This is Exhibit 51E-5-A, and, let's see, what's the page number on this? 306 of the Board minutes.

Q. All right. Would you read the —

[3166] A. Okay. There is a flag note out in the margin. It says:

Resolutions: Colored mass meeting protesting against any action favoring separate schools.

It reads:

Mr. Keller presented the following resolutions from a committee of colored people which were read and placed on file:

WHEREAS, we have learned from the newspapers of the city that there is a proposed action by the Board of Education looking to the establishment of separate schools for the education of white and colored children, the same being contrary to the letter and spirit of the state — of the statutes of the State of Ohio; and

WHEREAS, such a separation we deem would mitigate against and subject the colored children to undue disadvantages; and

WHEREAS, the continued agitation of this question in the manner aforesaid is menacing the stability of our present commendable and very much appreciated free public school system; and

WHEREAS, the boundary lines of certain school districts in this city having been drawn as to segregate colored children was an act of injustice committed against them, both white and colored, to satisfy the prejudices of [3167] a few; and

WHEREAS, the spirit which prompted such actions by the Board of Education of this city is selfish, narrow and not in accord with the broad Christian spirit which would dominate every American home.

THEREFORE, BE IT RESOLVED THAT, we, the colored citizens of Columbus, in mass meeting assembled appreciate the necessity of entering upon a discussion of this question, yet holding it to be the paramount duty of every man to look well into the questions affecting the welfare of his citizenship, hence we feel it incumbent upon us to state our position on this matter.

[3168] BE IT FURTHER RESOLVED THAT, we condemn any action that the School Board having for its object either directly or indirectly the establishment of the separate schools for the education of colored children and that we are unalterably opposed to class legislation of any kind under any conditions.

BE IT FURTHER RESOLVED THAT, the condition of our people, objectionable or otherwise, is due largely to the treatment which we have received at the hands of American white people. Therefore, we feel that the white citizens of our city owe it to us to give us that benefit which accrues to us as a result of education by contact and by association in the public schools as they now are.

RESOLVED THAT, a copy of these resolutions be sent to the Board of Education and the press.

Signed: Ralph Morman, Robert Jones, Robert Barkus, W. B. Jones and G. A. Weaver, Committeemen.

* * * * *

[3171] Q. Would you refer to 51-E-16-A? These are the minutes of May 11, 1908, page 481 and 483. They contain a protest on behalf of a delegation of black citizens by Reverend E. L. Gilliam?

A. Yes, sir. There is a brief note on that in here. It says the president announced that there was a delegation of colored citizens present who desired to be heard and presented the following communication:

[3172] Gentlemen:

A committee of representative colored citizens desire to have the opportunity to present to your Board at this session a matter of vital interest to them. Signed — there is a name Gilliam and three other names here, and then on motion —

Q. I believe that's already been referred to by Mr. Seifert. Would you refer now to —

A. Wait. There is more.

Q. That's enough. If you will refer to 51E-18.

A. Okay.

Q. Refer now to the minutes of the Board from 1908, June 8, pages 504-505.

A. This is that exhibit.

Q. All right. Does it indicate the appearance of another delegation or committee before the Board?

A. Yes. There is a flag note out in the margin. It says Hawthorne Resolutions protesting against colored Sch.

Q. All right. Read the text, please.

A. The Clerk also presented the following resolution which was read and laid on the table. WHEREAS, it is a known fact that the Board of Education of the City of Columbus, Ohio, has purchased property in the neighborhood of Hawthorne Street and Champion Avenue, a location — the Clerk of the Board repeats it twice here, a location, a [3173] location, near equal distance from the 23rd Street and the Eastwood Avenue Schools which already are as close together as any other two schools in the city and not so crowded as to warrant the building of a new school house in the same neighborhood; and

WHEREAS, it is positively asserted by persons in positions to know whereof they speak that the said Board intends to erect a school house on the aforesaid property, and despite its denial to outline such a district as will cause all or a greater part of the colored children of that vicinity to attend this school and thus virtually establish a public school for the exclusive use of colored children; and

WHEREAS, the laws of the State of Ohio forbids the separation or segregation of the races in the public schools of the State; and

WHEREAS, such separation of the races, even if the laws of the State did not forbid it, always results ultimately in the inferior school equipment for colored children and, moreover, tends to set the races further and further apart

and so to hinder that mutual sympathy and better understanding which close personal contact in the plastic years of childhood helps to cultivate; therefore

BE IT RESOLVED, that we colored citizens of the City of Columbus, Ohio, in mass meeting assembled earnestly [3174] protest against any such action, and especially when contemplated by a Republican Board, several of whose members owe their election to office to colored voters; and

RESOLVED, that if the Board of Education executes its rumored intention, we enter our protest at the polls and in the course of the State and resolve —

Q. Excuse me. Is it the Courts of the State?

A. Courts of the State, and it concluded and resolved that a copy of these resolutions be sent to the Board of Education. Signed Ralph D. Brown and five others, Committee.

Q. All right. The minutes of 1908, of July 31, 1908, 51E-23 reflect the change of the Hawthorne site to the Champion Avenue School changing names as testified to by Mr. Seifert.

Would you refer to Exhibit E24-B, an article from the Ohio State Journal of January 7, 1910 at page 10?

A. Yes, I have that.

Q. Would you read that article, please?

A. It says at the top of the page —

MR. PORTER: Excuse me.

A. In large print —

(Discussion had off the record.)

Q. Go ahead.

MR. PORTER: Excuse me.

[3175] A. Negroes to have fine new school. The Champion Avenue structure will be for the use of colored children. It is expected to provide places for ten teachers and janitor of that race.

.

[3297] Q. Okay. Refer to Original Plaintiffs' Exhibit 51E-28a.

A. I have that.

Q. All right. Does that indicate the filing of a lawsuit?

A. Yes, sir, against the Columbus Board of Education.

Q. And where did you get that particular record? Where does it appear?

A. Franklin County Clerk of Courts' office in micro-film Book 304, page 703. This is case No. 59,9342, Charles T. Smith, et cetera, versus the Board of Education, et cetera, Defendants.

Q. Now, this complaint was not filed until 1910; is that correct?

A. It says here on the 23rd day of July, A.D., 1910, [3298] came the Plaintiff and filed in the Office of the Clerk of Court, so that's the date.

.

[3300] Q. All right. Read on in the text.

A. The Plaintiff further says that on or about the blank day of blank, 19 blank, comma, the Defendant Board of Education and the said Defendant members of said Board, with unlawful intent and purpose of establishing a separate elementary and junior high school for colored children purchased a site for a school building and grounds at the northeast corner of Champion Avenue and Hawthorne Avenue in said City School District, which site is — is the colored — oh, which site — now, this sentence with the blurry print, this sentence may not sound straight, so let me read it to you the way it looks — which site is in the colored reside district hereinabove described. That's what it looks like to me.

That hereafter, such proceedings were had by said Defendant Board of Education and by said Defendants, members of said Board as have resulted in the construction upon said site of a school building and the installment

thereof all of the furniture and equipment thereof necessary to carry on an elementary and a junior high school therein;

[3301] That there is now and has been for a number of years last past a large commodious school house and grounds established by said Defendant, Board of Education — there's clearer print here, the next page — at the southeast corner of Mt. Vernon Avenue and Ohio Avenue in said city school and known as the Twenty-third Street School and an elementary and a junior high school conducted therein by said Defendant Board, which school house and grounds are distant from said Champion Avenue Schoolhouse and grounds hereinabove de — hereinbefore described two and one-half short squares northwest thereof;

That there is now and has been for a number of years last past a large and commodious school house and grounds established by the Defendant Board of Education on Eastwood Avenue in the City School District and known as the Eastwood School and an elementary school conducted herein by said Defendant Board which school house and grounds are distant from said Champion Schoolhouse and Grounds hereinabove described three and one half squares southeast thereof;

That said Twenty-Third Street in the Eastwood Schools wherein are ample and sufficient to accommodate the children of school age residing in that part of the City School Districts and in which the same are located, and especially all such children who reside at what is known as [3301A] the Champion Avenue School District herein-after described, and there was and is no necessity for additional school in the locality of said Champion Avenue School site was purchased and said building constructed.

[3302] The Plaintiff further says that on or about November 22, 1909, the said Defendant, Board of Education, and said Defendants' members of said Board in further — furtherance of said unlawful intent and purpose to

establish, maintain and conduct a separate elementary and junior high school for colored children in said Champion Avenue School building fixed, adopted and established a new subschool district for said school in the following words and figures, and then it repeats that same description that I gave earlier.

Q. All right. Skip that, please.

A. The Plaintiff further says that said Champion Avenue School District was carved out of — they use that word then, carved out of — the school districts, therefore establishing and existing for the 23rd and Eastwood Schools and was and is so bounded and described as its boundary lines are coincident with and describe the boundaries of the colored residential district — the way they drew those boundary lines — where territory hereinabove described.

That a large majority of the boundary lines of said school district are alleys — oh, boy, that's true enough — instead of streets;

That the north boundary line thereof is one of the alleys immediately to the south and contiguous to the lot upon which stands the 23rd Street School Building.

[3303] The Plaintiff further says that the erection and establishment of said Champion Avenue School District in the fixing of the boundary lines thereof was an arbitrary, forced, unnatural and unnecessary exercise of its power and authority to assign youth to the schools established by them attempting to a flagrant abuse thereof, and of its — in their discretion therein, upon the parties, Defendant Board of Education and the Defendant members thereof, on and needs for the sole purpose of carrying into execution and their unlawful purpose of establishing in said school building —

Q. Maybe you misread that.

A. And their unlawful intent of establishing in said school building a separate elementary and junior high school for colored children.

And the Plaintiff further states and in furtherance of said unlawful plan and purpose on or about June 26, 1910, the Defendant, Jacob A. Shawan, Superintendent aforesaid of the school district, made a report to the Defendant Board of Education to the effect that he had appointed, subject to the approval and confirmation, the following named persons as teachers:

And then it names some teachers, and — names some teacher assignments.

Q. Teachers where?

[3304] A. To the Champion Avenue School District. I think they're going to go on to name them as black persons. Should I read on?

Q. You don't need to read all the names.

A. That said Defendant, Board of Education, on or about June 20, 1910, ratified, approved and reaffirmed said appointments of said persons as principals and teachers for the said Champion Avenue School — oh, here it is — that each and every one of said appointees are colored persons of African descent; that no white teacher has been appointed to said school.

Q. All right. Read the next paragraph.

A. Yeah, here's where you leave off, yeah.

And the Plaintiff further says that said Defendant, Jacob A. Shawan, Superintendent aforesaid, has notified all of the colored youth of school age residing within the limits of said so-called Champion Avenue School District to no longer attend the said 23rd Street and Eastwood Schools, —

[3305] A. (Continued) — heretofore attended by them, but, on the contrary, to hereafter attend said Champion Avenue School.

* * * * *

[3309] Q. Would you refer now to Exhibit 51-E-29a.

A. That's what the Appeals Court had to say on this [3310] decision. I have that here. The Appeals Court

was known then as the Circuit Court of Franklin County, Ohio and this is Case 3094, decision rendered the 30th day of December 1912, and I got this from the County Law Library, I think on the 12th floor. They keep Circuit Court decisions there, and that is where I got this.

Q. Did the Court simply hold that it had no authority to interfere with the authority conferred on Boards of Education?

A. Among other things, it held that.

Q. Is that the conclusion of the Court?

A. That's one of the conclusions of the Court. They seem to dodge the issue altogether.

Q. Mr. Montgomery, please. Let's not have editorial comment about it at this point.

* * * * *

[3316] Q. And did you check the racial data on residence for this particular period of time, and was there some unusual data available, unique to that period of time?

A. Yes, there was some unique and extraordinary racial information available on these attendance zones on these different schools at that time and very precise way of measuring the racial composition of these residences.

Q. Did the street directory, the street guide, directory of householders for the City of Columbus for a period of years actually denote colored families with the letter C?

A. They did that for a total of four years only. Then they stopped it.

Q. What four years were they?

A. Well, there was one year before this addition you have in your hand, and then there was that year and then two other years, and that's all I saw of them using "C" in parenthesis to denote colored residents.

Q. Is that a conclusion you drew or is that actually stated on the front of Original Plaintiffs' Exhibit 51E-31?

A. It says here right on page 65 of this directory, the 1911-1912 Columbus Directory, page 65; "C" parenthesis, denotes colored.

Q. Did you examine this for the period 1910-1911?

[3317] A. Yes, from that map 8-E-1 or 31E-30, 30-B, I think that was. I examined all the streets contained inside the Champion School zone within and withoutside of this district, and is is remarkable when you look up all those streets inside of the district. They have C's behind the resident's name. You can look up any street here, and you look outside of the district, and there is only a sporadic and occasional resident that has a C next to his name.

Q. The majority of the homeowners or the people living within the blocks enclosed in the Champion zone, do they have the letter C after their name?

A. An unholy large number of them had the C's next to their name.

Q. That's not a term I can deal with. Is it 80, 90 or 100 percent?

A. A figure between 90 and 100 percent.

Q. And in the other zones, is it less than ten percent?

A. Less than four percent.

* * * * *

[3328] Q. The Board minutes of September 18, 1922, do you have those?

A. Yes.

[3329] Q. Would you read the minutes?

THE COURT: Read what's there.

[3330] A. Okay. It says the official record at the Board of Education showed that on September 13, 1920, Superintendent Francis recommended to the Board of Education that the Champion Avenue School be made an intermediate or junior high school in order that the pupils in this district might be provided with the same

educational opportunities as the pupils living in other junior high school districts. Then it has a report here in the minutes from the Assistant Superintendent in charge of the Champion Avenue School District, and he talks about the Champion School there.

Q. Would you read that?

A. Okay. When the junior high schools have been organized in Columbus, successful teachers in those schools who were continuing their professional training in a satisfactory manner, even though not college graduates, have been retained in the departmental work of these junior high schools. All the teachers in the Champion Avenue School are either college graduates or are normal school graduates now working towards their degree by taking approved teacher training courses during the summer and doing university extension work during the school year. In my judgment the junior high school teachers in the Champion Avenue School meet the same standards in scholarship, training and professional spirit as those of our other [3331] junior high schools. The pupils in the Champion Avenue School have a splendid spirit, and the quality of their work is improving from year to year. The courses of study used in school in both the elementary and junior high departments are the same courses followed in the other grades in junior high schools in Columbus. The work of pupils transferred from Champion Avenue to other buildings compares favorably with the pupils transferred from other schools.

The general conditions of the Champion Avenue School are now very satisfactory. The building itself is one of the best in Columbus. It is provided with electricity. The rooms are large, light and well ventilated. The manual training and home economics rooms are exceptionally good. The playground —

* * * * *

[3332] Q. All right, with reference to the boundaries of the junior high school, would you refer now to Original Plaintiffs' Exhibit 51F-6?

A. Yes. This I obtained from the 1925 manual and directory at the downtown Columbus Public Library. It is a description of the Champion boundaries.

Q. All right, and from your familiarity with the [3333] previous exhibit, are these the same boundaries as have been established for the elementary school?

A. Yes, I would say so.

Q. Have you previously examined it and compared it and made sure; it is not just a guess?

A. Yes, I have plotted these on maps.

.

[3931] Q. Mr. Montgomery, are you familiar with the 1932 boundary change in connection with the Pilgrim Junior High attendance zone and the Franklin Junior High?

A. Yes, sir. I have the materials on that here.

Q. Would you refer to the Board minutes of [3932] August 15, 1932, Exhibit 51G-7(a)?

MR. PORTER: May I have a continuing objection to this, Your Honor?

THE COURT: Yes. It will be denied.

A. Okay, I have that exhibit, and those boundary changes were made in the Board minutes of August 15, 1932 on page 557 at the bottom lower part of the page.

Q. Does it contain a recommendation of the Building Committee?

A. Yes. They are the ones that recommended the change in the boundaries of Pilgrim and Franklin Junior High Schools, and it says here motion carried.

Q. All right, and the change recommended was in the eastern portion of the Pilgrim Junior High attendance zone?

A. Yes, the white residential areas in the eastern part of the attendance zone.

Q. Was there anything in the minutes indicating a protest to this change?

A. Yes. Immediately after these boundaries were offered, it says Mrs. E. W. Moore, 229 Douglas Street, protested against changing the boundary of Pilgrim School, but they still moved for approval and it passed.

Q. All right. Had there been a previous request on behalf of the Eastgate Addition parents in the Board meeting of September 15, 1930 for a change in this area?

[3933] A. Yes. Eastgate is part of that white residential on the east side. Eastgate is a part of it and so is the Shepard community. Eastgate in that 1930 meeting, which I have the minutes here and newspaper accounts, they wanted to allow their kids to go down to the Franklin Junior High School and the action the Board took was unusual. It said they were not lawfully allowed to go there, but it permitted them to stay there then. Here it formally approved that change. It gave legal sanction to it so that they could go down to Franklin Junior.

Q. In 1932 the boundary change?

A. Yes.

Q. Do you have a map, Original Plaintiff's 51G-7(b) showing the original boundaries and the changes?

A. Yes, sir. I got this map here and this has also been worked into one of the examples I cite in No. 8.

Q. All right. Can you tell us what is on the base map?

A. The base map, it has the residential area for what Franklin — let's see — what the boundaries were as of 9-7-1931, in that particular Board meeting, what they were. Then those areas are encircled in purple for Franklin Junior boundaries and green for the Pilgrim Junior boundaries, and the Champion Junior, an area in between these boundaries which is no color attached to it. For the 1932 [3933A] boundary changes I have encircled that part in

red, an inner circle on the green line which shows the eastern part which now went down to Franklin Junior which is further away than Pilgrim, their neighborhood school.

[3934] Q. All right. The Franklin Junior zone is modified by the addition of the northerly strip?

A. Yes. It contains Eastgate and the Shepard Community.

Q. Was there any change in grade structure which took place at this time?

A. I would have to study the minutes closely to examine changes in grade structures. I am not aware of any just offhand.

Q. Okay. Do you have your 1930 Census tract map, 51G-4?

A. 51G-4, yes, I have previously cited from this exhibit.

Q. All right. This does show racial composition, does it?

A. Yes. It shows that Tract 31A which constitutes that eastern portion containing Eastgate and Shepard was more akin to the racial composition of Franklin Junior attendance zone than —

Q. What does the legend show?

A. On the legend it gives markings for five and less than 25 percent, but the proportion of black here is actually closer to five. I have the numbers of population also in this exhibit.

Q. All right. Take your time. The Tract 31A conforms almost — well, in large measure, particularly on the [3935] eastern boundary, to the boundary change for Franklin Junior High which is taken from the Pilgrim zone; is that correct?

A. Yes, sir.

Q. All right. Does it include a portion of any other tract?

A. Just a small — possibly a little corner here of this 8A exerts an extremity on that census tract. It may include a little part of that.

Q. Using the base map, 51G-7(b), and your census data for 1930, did you examine the data by block in the area changed?

A. Well, I don't have block statistics until 1940.

Q. I'm sorry. Did you examine the tract data for 31A?

A. Yes, I did. They are included in this exhibit.

Q. What does the tract data show for that tract?

A. Tract 31A in 1930 has a population of, let's see, 282 Negro which is 6.7 percent of the total population of 4,214 for that tract.

* * * * *

[3939] Q. All right. From your examination of the minutes, were the boundary changes rescinded by the Board?

A. From my examination in detail of those Board minutes, neither these boundaries were rescinded nor was a case, court case filed on this one.

Q. All right. Would you refer to Plaintiffs' Exhibit 51G-8(b) again?

A. 8(b). I have it.

Q. Is there a reference in that particular article to the Eastgate School?

A. That's a headline on page B-1 of the August 23, 1932 Dispatch. The large print says:

The site of Eastgate School is purchased by Board, and then there's a line. It says: New portable structures to be built.

* * * * *

[3940] Q. It's a 1932, October 4, 1932 Dispatch article.

A. Oh! Oh, yes, yes, I have that. 51G-10(d)-2.

Q. Does it refer to the Eastgate portables again?

A. Yes, there's an article entitled, on page 2 of

the August 4, 1932, Columbus Citizen, an article entitled: 100 Residents Before Board and School Row. Eastgate parents want people sent to new portable establishment in addition. In other words, not just elementary grades, they want all of their kids to go to the portables —

Q. Excuse me. Read what it says there, please.

A. Well, just — the headlines stop after: Eastgate parents want pupils sent to new portable establishment of addition, and then there's opposing sets of parents from Eastwood and Eastgate.

Q. All right. Is there anything in the article that indicates what the parents were seeking in terms of portables?

A. The Eastgate parents wanted to send their kids to the portables right in their neighborhood for all six grades, and the Eastwood parents where these kids used to go to school objected to that in this article.

Q. All right. Originally, first and second grades were assigned to the Eastgate portable; is that correct?

A. I think grade three might also have been included. I'd have to check on that. It was just two or three grades. [3941] Whether K was also included, I'd have to check.

Q. All right. Refer now to 51G-10(a), which are the Board minutes of August 21, 1933, page 106.

A. 51G-10(a), that's page 106 of the Board minutes of that date.

Q. All right. Is there any indication there of proposed boundary changes in that area?

A. Yes. It describes a set of boundary changes, and then a boundary line is drawn to separate the attendance zone of the new Eastgate portables. They closed the Eastwood School in 1944 — excuse me — 1954, and the parents to the west of that boundary line sent their kids down to Fair instead of going to Eastwood.

Q. All right. I'll show you the 1937 map, tract book of Columbus and vicinity, Original Plaintiffs' Exhibit No. 51G-10(b), and you'll have to tell me, I think that's 2.

A. That's B sub 2.

Q. All right. Does this indicate the boundaries?

A. The base map — has the boundaries established in 1931 for Eastwood and Shepard Elementary attendance zones.

Q. All right.

A. The overlay atop it has a —

Q. Excuse me. Would you give us the colors for each?

A. Orange-tan color is the Eastwood attendance zone, [3942] purple is the Shepard Elementary attendance zone.

Q. All right. And do you show the X's for the location of the schools?

A. Red X's designates the location of the school sites.

Q. You previously in your testimony referred to the Shepard area in connection with the Franklin Junior High. Is that the same area that we're now referring to?

A. Yes.

Q. That this is at the elementary level; is that correct?

A. Yes.

Q. All right. Now, what does the overlay reflect?

A. There is a boundary line from that description I just read. I drew that boundary line on a map, an overlay, and all this line is a description of a north-south line. It seems to stop from Maryland Avenue down to East Broad Street. It's a north-south line with a little jag in it to conform to some railroad tracks, and to the east of the line those parents attended Eastgate portables in that white residential area, while — and then on the overlay I've indicated that the Eastwood School's closed. I just put something right on top of the site of that school to indicate this thing's closed.

Q. What color is the new boundary shown in?

[3943] A. That north-south line is drawn in blue, and

then I've indicated the location of Fair Avenue School with a red X where there's parents to the west of that boundary line. They go down to school further south.

Q. All right. I refer you now to another exhibit while you're still working with that one, 51H-5(b), entitled "Democracy in Action, Publication of The Vanguard League," and directing your attention to page 4 of that article, ask you to read Items 2 and 3.

A. Oh! On page 4, Item 2 says that, quote: The physical plants — talking about a recommendation of a Vanguard survey. This is No. 2. That the physical plants of the colored school be brought to standard, in other words, the elimination of portables at the Garfield and Mt. Vernon Schools and the improvements of the Garfield School plants.

No. 3: That the Eastwood Elementary School be reopened to relieve congestion in the Garfield-Mt. Vernon Schools.

Q. Is this the same school you're referring to that's just been closed?

A. Yes, sir, but that request was not granted at that time.

Q. All right. Would you read —

A. It says here about Eastwood Schools.

[3943A] Q. — the last paragraph beginning with "The third recommendation was dismissed"?

[3944] A. Oh, it's a report here. The third recommendation was dismissed by a brief explanation. The Superintendent of Schools held at the time Eastwood was closed that there were only 132 pupils enrolled, this making it unprofitable to operate the school.

Q. Go on and read the rest of it.

A. The Vanguard League made very clear that the low enrollment in the Eastwood School was effected by a redistricting order from the Board of Education which threw most of the Negro children formerly in the Eastwood District into the Mt. Vernon area. That happened in 1931.

Q. All right. And the Eastgate Addition drew the white students out of the school which was now closed and zoned them into the Eastgate Portables; is that correct?

A. Well, no, sir. See, to the west of this line, they went down further south to the Fair School designated by this red X. To the east of the blue line, they went to the Eastgate portable school.

Q. That's what I said, the Eastgate line is where they sent them to the portables.

A. Yes, sir.

Q. All right. Is Taylor Street involved in that?

A. Taylor Street, that became involved in the 1937 boundary changes.

Q. All right. Would you refer to Original Plaintiffs' [3945] Exhibit 51G-13(a), the Board minutes of August the 3rd, 1937?

A. I have those. This is page 522, 523 and the top of page 524 of the Board minutes of that date.

Q. All right. What happened to the Pilgrim Junior High as reflected by those minutes at that time?

A. They closed the Pilgrim School. I mean, rather, they converted it. Excuse me. They converted it to an elementary, and they converted Champion Elementary into a junior high with greatly expanded boundaries.

Q. All right. Would you refer to Original Plaintiffs' Exhibit 51G-13(b)?

A. Okay. From these official boundary descriptions, I prepared that map which is — that exhibit shows the new expanded size of the Champion Junior boundaries.

Q. And all that map shows is the meets and bounds of the particular boundary description; is that correct?

A. Okay. Would you want me to say anything about the limits of these?

Q. Well, describe them, if you will.

A. South boundary is Long Street. The north boundary is the Pittsburgh, Cincinnati, Chicago and St. Louis

Railroad Tracks up to — up to where Leonard Avenue intersects those tracks, and then goes diagonally north up to the Norfolk and Western Railroad Tracks, then it proceeds south down to Woodland, and I'd want to — I'd want to quote the official [3946] description from the 1937 boundaries before I attempt anything further, because there's irregular lines here drawn from east-west boundaries.

Q. All right. You did copy it from the minutes; is that correct?

A. Yes.

Q. All right. Would you refer to G13(c)?

A. Okay. Now, that — now, I've put the boundary changes on here for Garfield, Mt. Vernon and Pilgrim, that are included right in here, and I've interposed new Fair boundaries from the other boundary descriptions to show how that relates to this now that the Eastwood School is closed, also, so you have a picture of that.

Q. All right. Would you describe the base map, first?

A. Okay. The base map shows the boundaries of existing schools prior to August 3, 1937.

Q. Now, are these elementaries, junior highs or what are they?

A. It has the Mt. Vernon Elementary boundaries, the Champion boundaries and the Fair Avenue boundaries.

Q. And the different colors?

A. The Fair Avenue boundaries are in turquoise, the Mt. Vernon boundaries are in — are in tan-orange color and the Champion School occupies the area in between.

Q. That fits right within the middle between those [3947] two; is that correct?

A. Yes, no particular color.

Q. All right. The overlay does what?

A. Well, it shows — it shows no change here for the Fair Avenue boundaries in the August 3, 1937, boundary changes, but the boundary changes for Garfield I've described in a violet colored magic marker, and then Mt.

Vernon — the new boundaries for Mt. Vernon are interposed on the overlay with orange, and the new Pilgrim elementary boundaries are put in black.

Q. Now, Pilgrim is converted to an elementary; is that correct?

[3948] A. Yes. You may recall Helen Davis taught in that school from 1937 on.

Q. All right. Pilgrim took over what part of the Champion zone?

A. Well, it took the north part of Mt. Vernon — wait a minute. It took the north part of Mt. Vernon attendance zone and the eastern half of the former Champion Elementary zone.

Q. Champion now becomes a junior high; is that correct?

A. Yes, sir.

Q. All right. The boundary between Fair and the new — the converted Pilgrim Elementary is what street on the east after the dog leg?

A. That's — Taylor Avenue is the boundary and then goes up to the — then it goes up to the alley there. There's an alley north, I think, of — north of this one street on the north. It's drawn in an alley. I'd have to check my descriptions on that.

Q. All right. I'll refer you now to Plaintiffs' Exhibit, Intervening Plaintiffs' Exhibit 376, a document entitled "Which September?" and ask you to read at page 7, Item No. 5.

A. School districts are established in such a manner that white families living near colored schools will not be [3949] in the colored school district. The area in the vicinity of Pilgrim School embracing Richmond, Parkwood and parts of Greenway, Clifton, Woodland and Granville Streets is an excellent example of such gerrymandering. A part of Greenway is only one block from Pilgrim School. However, the children who live there are in the Fair Avenue district twelve and one-half blocks away.

Q. All right. Read the next paragraph.

A. A more striking example of such gerrymandering is Taylor and Woodland Avenues between Long Street and Greenway.

Q. Can you locate that on your map, 51G-13(c)?

A. Between Long Street here and Greenway, yes.

Q. Okay. "Here" doesn't mean anything in the record. You have to sort of identify it in terms of points of the compass. Long Street runs which direction?

A. East-west.

Q. All right. And it is the street which forms the bottom part of the Pilgrim boundary?

A. The bottom part of Pilgrim and Mt. Vernon, the new boundaries with Fair Avenue School.

Q. All right. And so north of the boundary is Pilgrim, south of Long at that point is Fair; is that correct?

A. Yes. The Fair Avenue boundary goes much further north than Long Street. It goes —

Q. All right. Just take your time.

[3950] At Taylor Street, what happens to the boundary of Fair in respect to Long Street? Does it turn?

A. Yes, there's a sharp right angle and it goes steadily north.

Q. Does it form a type of what might be called a chimney?

A. Yes, sir. You got a situation here, in fact, where the white and black children would cross each other's path on the way to school each day, blacks from the southern end of the Pilgrim zone walking up Taylor to get to the Pilgrim School, and then the whites up here in the north part, they'd walk south to go down to Fair. They'd cross each other's path every day.

Q. And you're referring there to the elementary district?

A. Yes, sir.

Q. And PX 376 refers to the west side of Taylor Avenue, colored residents in the Pilgrim Elementary district and then goes to Champion for junior high?

A. Yes.

[3951] Q. And that's the same area that was originally part of the Champion Elementary zone; is that correct?

A. Yes.

Q. The east side of Taylor, white families are in the Fair Avenue Elementary District and then go on to Franklin for junior high; is that correct?

A. Yes, sir. They still go south down to Franklin Junior to attend school.

Q. Your map with respect to the junior high and overlays and your map with respect to the elementaries, do they conform with that description?

A. Yes, yes, they do.

[3953] Q. Would you look at the Original Plaintiff's Exhibit 23.

A. Okay. I believe I have a copy of that with me.

Q. Do you?

A. Yes.

Q. The annual report of the Superintendent of Columbus Public Schools, October 11, 1964, do you have the document?

A. 23.

Q. All right. Would you look in the report — I don't believe the pages are marked, but there is a page appearing after the picture of Monroe Junior High School January 22, 1964, and then another picture of it with another phase of its construction.

A. Yes, there is a page here that says Monroe Junior High, and this would be the next page after that.

Q. Is there a reference to what is called Project '71?

A. Yes. I see where it makes reference after they — yes, I see this.

[3954] Q. It is called Project '71 in the 1960-64 building program; is that correct?

A. Yes.

Q. All right. Does it indicate that Project '71 is related to the Bolivar Arms project?

A. Yes, sir. It describes the survey team estimating the pupil potential of Bolivar Arms at 3,215 school-age children, and then probable enrollment at such grade level for the fall of '64 has been included with these figures that were presented to the Board, it indicates.

Q. And I believe it indicates in April of 1962 as the first official action toward making Project '71 a school building, is that correct, second column?

A. I see, yes. I see that.

Q. And the site tentatively designated was what?

A. It says a tentatively designated site bounded by Monroe Avenue, Leonard Avenue, Galloway Avenue and Atcheson Street.

Q. Does it indicate the site has been recommended for any particular reason?

A. It says after extensive study of the area the site has been recommended because of its close proximity to the source of most of its pupils, Bolivar Arms, and because of its relationship to existing junior high schools.

Q. All right. Do you have the racial data indicating [3955] how Monroe Junior High School opened in terms of racial composition, racial percentage?

A. Yes, sir. Those are contained in Original Plaintiffs' Exhibit 25B.

Q. Do you have a copy of that with you?

A. They are in the box.

Q. Would you refer to it?

A. Okay. Monroe Junior High percentages for early spring of 1964 are listed here as zero percent white pupils.

Q. Would you refer back to Exhibit 23 again and tell how many students the Monroe Junior High was planned to house? I believe it is the last paragraph.

A. Oh, last paragraph?

Q. Yes.

A. It gives the square footage here.

Q. How many pupils?

A. "700 boys and girls of grades 7 through 9 held its first classes even though construction work had not been finished," is what it says.

Q. All right. The boundaries for the Monroe Junior High, what relationship do they have to the old Champion Junior High attendance zone?

A. The new Champion Junior High attendance zone, I have the boundary descriptions of those right here also.

[3956] Q. Do you have 51I-3(c)?

A. Yes. 3(c) is the Champion boundaries for September of '64.

Q. That would be the new boundaries for Champion; is that correct?

A. Yes. The new boundaries for Champion now go over to Alum Creek, and the census information I have right here says that blacks had moved into that area when they moved it over to Alum Creek.

Q. The Monroe Junior High split the old Champion Junior High attendance zone approximately in half?

A. Yes, sir, and it shows the relative proportions. The Champion boundaries went all the way over to it appears to be Alum Creek, and then the northern boundary is the Penn Central Railroad, and it describes its interrelationship here with the Monroe Junior High boundaries.

Q. All right. It moves south across Long Street, doesn't it?

A. Yes. Champion Junior boundaries now go south as far as — to the middle of Broad Street, first time.

Q. And the Eastgate Addition, is that included now?

A. It is now included. I have the census information here for Eastgate. It is Census Tract 252, and it indicates —

Q. That's Exhibit 511-(d)3?

A. Yes. This exhibit is taken from Original [3957] Plaintiffs' Exhibit 49N which is prepared by United Community Council comparing 1950 and 1960 census tracts.

Q. All right. The 1950 figures were what in that tract?

A. Total for Tract 25 in 1950 which included the Shepard community then, but Shepard in 1960 became 25-1 and Eastgate became 25-2.

Q. Give us the total for Tract 25 in 1950 first.

A. In 1950 the total was 798 non-white and 5,113 white for Tract 25 totals. These had substantially changed in 1960, at least for Census Tract 25-2, the Eastgate part.

Q. What was the 25-2?

A. 25-2 in 1960 was 4,800 non-white and 740 white. They pretty well describe here — this closely resembles where those Eastgate portables were in good part.

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CROSS EXAMINATION BY MR. PORTER:

[4003] Q. [By Mr. Porter] Mr. Montgomery, directing your attention, please, to the Eastgate area, you testified that in 1940 that area lay in, I believe, if my memory serves me correctly, Tract 25; is that right? What tract was it in?

A. In 1940 — I have a 1940 Census map here. Shall I consult it?

Q. Please.

A. It was known as Tract 25 in 1950. Whether it was that same number —

Q. That's satisfactory for my purposes. It was Tract 25 in 1950; is that right?

A. Yes, sir.

Q. And it was then, 1960, was in some other tract or some part of that tract; is that right?

A. It was fragmenting two parts, 25 dot 1 and 25 dot 2.

Q. What is your understanding, what does that mean?

[4004] A. That means that it's no longer known as 25 but that it's a new tract number with different boundaries.

Q. Why?

A. Well, that can mean — it indicates, first of all, there's at least two parts of it, and then the outer perimeters, there may be some changes in those, also, some modifications. They say there's some tracts you can't compare strictly from year to year.

Q. Doesn't it mean that there has been a doubling of density if they split a tract into two tracts and make 25 in to 25.1 and 25.2? Doesn't that mean that there is twice the density that there was before?

A. That sounds like a simple assumption, and I'm tempted to make it. It might logically follow.

Q. You worked with the census information with respect to the east part of Columbus and also with the west part of Columbus, if I remember your testimony correctly; is that right?

A. Well, among other parts of Columbus.

Q. And it is true, is it not, that in the east part of Columbus and in the west part of Columbus, between 1950 and 1960, there was a substantial increase in population?

A. Yes, sir.

Q. And did that increase in population include an increase in children; is that right?

[4005] A. You mean concomitant with the increase of other persons?

Q. Or parallel thereto, yes.

A. Yes.

Q. So it meant that the Columbus Public School System at that point in time had more children to educate in 1960 than they did in 1950; is that right?

A. Especially with their annexation rates.

Q. And they built school buildings to take care of those children, did they not?

A. Not always. There are some departures, I found, in my own research from what, you know — what can be convenience for the attendance or the greatest number thereto.

Q. All right. Now, it would be your understanding, would it not, that the Columbus Public School System built a building in the area of Bolivar Arms to serve that housing development; is that right?

A. Well, that's what the Superintendent's Annual Report No. 23, that's what it — that exhibit indicates.

Q. And I think that you said that there was some estimate in there that the school population was to exceed 3000 or something of that sort?

A. I recall some such number as given in there.

Q. And the system presumably was asked to place a [4006] school building there to take care of the children; is that right?

A. There is particular, or at other locations to serve —

Q. I'm speaking about in the area of the Bolivar Arms, if you know?

A. Could you repeat this question again? Let's make sure what I'm answering.

[4007] Q. My question, Mr. Montgomery, if you know, is whether or not the Columbus Public School System was asked to provide school facilities for the children that were going to be living in the area of Bolivar Arms?

A. The City officials, I think that they — there was interaction between various city officials, according to that one Exhibit 23 in the relocation — urban renewal, there, concurrent with their development of this public housing, they did ask school officials to collaborate with them in degree towards the construction you are speaking of.

Q. And the school facilities were provided, were they not?

A. Yes, sir.

Q. And then subsequently for one reason or another Bolivar Arms did not work out as the type of dwelling

units that had originally been proposed and was converted into senior citizen's; is that right?

A. Yes, sir.

Q. So that that school building was subsequently closed, is that right, because of lack of children?

A. Monroe closed?

Q. Felton?

A. I haven't testified any to Felton.

Q. I didn't ask you. Did Felton close?

[4008] A. Yes, I believe it closed in '74, if I am right. I think it did. I would have to check to make sure.

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CLEO L. DUMAREE,

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. ATKINS

[3177] Q: [By Mr. Atkins] Good morning, Mr. Dumaree.

A. Good morning, sir.

Q. Would you give your full name and address for the record, please?

A. Cleo L. Dumaree, 145 West Dominion Boulevard, Columbus, Ohio.

Q. Would you briefly recount your history of employment with the Columbus School Board?

A. I was employed with the Columbus Schools in the summer of 1935. I taught at North High School from 1935 to 1940. From 1940 to 1944 I was Principal of East Columbus and Shepard Elementary Schools. From 1944 to 1947, [3178] I was Principal of Barrett Junior High. From 1947 to 1952, Principal of South High School. From 1952 to 1956, Principal of Central High School. From 1956 to 1971, Assistant Superintendent-Administration. From 1971 to January of 1975, Deputy Superintendent.

[3179] Q. And in 1975, did you sever your relationship with the Columbus Public Schools?

Yes, I did, sir. As of January 11, 1975, I retired.

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[3189] Q. It says you were also responsible for both studying and recommending boundaries for the individual schools. What did that responsibility entail? What did you do in fact?

A. Well, the problem is two-edged. First it would be boundaries for a school that is in existence and possible changes that would need to be made in a school that's already operating. The other side of the problem would be a new building that has been constructed, and, of course, this would involve the streets in the immediate proximity of that school and would have a domino effect of touching into existing schools, because when a new building is built, it is evident that it is needed because of numbers of students and overcrowding of schools that are in existence in that total geographic area, the broad geographic area. So it would mean not only new streets that might be developed by the city, but it would mean the adjustment of some streets [3190] that already had sent their children to another school assignment that was already in existence.

Q. Now, this domino effect or this sort of rippling effect of locating a new school, was this also true of what happened when an existing building had an addition built onto it, a substantial addition, would that have sort of the same kind of domino effect?

A. Yes, sir.

Q. Your responsibility then was to look at these boundaries and from time to time study them to recommend to whomever the changes were needed — who made the decision to change a boundary?

A. The Board of Education.

Q. Did the Board vote on every boundary change?

A. Yes, sir.

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[3201] Q. Well, I suppose then by projection the determinations of pupil numbers in a given district would also then impact on the decision whether and, if so, to what extent, to initiate various forms of facilities to relieve overcrowding at school?

A. Yes, sir.

Q. So that you would have, for instance, been involved in the process by which a decision was made to rent a facility?

A. To rent a —

Q. To rent a facility to relieve overcrowding?

A. Yes.

Q. Would you be responsible for finding the facility that was going to be rented?

A. Not at its outset. This would have been handled by the division working with the building program. They would attempt to identify a site or sites, a building or whatever, and then ask us to take a look at them. Usually one superintendent also would be involved in taking an ultimate look. It might be an area where there was no choice. [3202] It was for temporary facilities, and we would move in that direction, but it was a team approach to a final decision.

Q. All right. Now, you have also been involved and at least partially responsible for the decision as to whether or not at a particular school, because of overcrowding, either actual or projected, a portable unit was needed; is that correct?

A. Yes, sir.

Q. And likewise, you would have been involved and at least partially responsible for the decision as to whether at a particular school an addition was needed to house students in classrooms?

A. That is correct.

Q. And you would have also been at least partially involved or partially responsible for those decisions that had to do with the necessary transporting of students from School A to School B for the purpose of relieving overcrowding?

A. Yes, sir.

Q. And you would have determined whether the students going from A went to B or to C? Would that have been the responsibility of the people reporting to you as well?

A. Again this becomes a team approach. The principal, of course, would be the originating source as to overcrowded conditions, or principals. We would collect the [3203] necessary information, and again we would share this with the Superintendent and the Superintendent's cabinet.

* * * * *

[3204] Q. In earlier deposition you indicated that it was your [3205] belief that the transporting of students which was done by the Columbus School System to relieve overcrowding did not at any point take into account the question of the racial or the impact, the racial impact upon the sending or the receiving school; is that correct?

A. Yes, sir.

Q. And you also testified during one of those depositions that some of the schools had attendance areas that were so large that it was necessary to use or for the school system to provide transportation to get the kids to their assigned schools. That's true also, isn't it?

A. Yes, sir, that would be on a distance factor.

Q. Yes, and mentioned specifically by you at that time were Woodward Park, Glenmont, Dominion, Linden-McKinley and Marburn. Those are schools of which that would be true; is that not so?

A. Yes, sir.

Q. And you also indicated that the Alum Crest School was built at the request of private housing developers to service the Alum Crest Apartments?

* * * * *

[3206] A. That is correct.

Q. And I believe you indicated also that the transporting of students that was done was at some point for some period of time carried out in what would be called an intact manner. That is to say, the students were moved in a group from the sending school to the receiving school, remaining in a group at the receiving school and relating back administratively to the sending school?

A. That is correct.

Q. And that during the period of their attendance at the receiving school, their responsibilities, extra curricular activities, parental associations, were determined not by the school to which they were sent, but by the school from which they were sent. That's correct, too, isn't it?

A. That is not totally correct. The records of the students were kept in their home school. We called their home school. The sending school would be the home school. The sending school would be the home school. Their teachers were a part of that staff. Their records were all maintained there. In most cases the parent-teacher association meetings and school meetings, the receiving school — you have used this term — the receiving [3207] school would also include the parents of children who were coming there in their meetings and would welcome them. They were also welcomed in their so-called home school.

Q. Do you recall, Mr. Dumaree, for what period of time the technique of intact busing was used? What were the years involved?

A. The total time of my assignment as Assistant Superintendent or Deputy Superintendent.

Q. So from '56 through '75?

A. Yes, sir. Not through '75. It would be January.

Q. Until January?

A. Yes, sir. I think it was through the total year, but, to be accurate, it would be January.

* * * * *

[3214] Q. Beginning on page 38 of this deposition, the question to you was:

"In 1956, did you have to your recollection black principals and black assistant principals at that time in 1956?"

And you said: "Yes."

And the question: "Were those principals assigned to predominantly black schools at that time? Student enrollment-wise, I mean."

And you said: "Yes."

And the question was: "Were there any white principals or assistant principals in any predominantly black schools at that time in 1956?"

And you answered: "Principals or assistant principals?"

The questioner said: "Principals or assistant principals in predominantly black schools and by predominantly black, I am talking about student enrollment in 1956."

You said: "Well, that is difficult for me to recapture. I don't know. I don't know. That would have to be re-searched."

[3215] The questioner said: "Were there any —"

And you said: "I can't carry all that," presumably in your head.

The questioner said: "I understand. If you don't know, certainly say so."

"Do you recall if there were any black principals in predominantly white schools in 1956?"

And you said: "I don't recall. I don't recall of any."

You remember that testimony now, do you not?

A. Yes, sir.

[3216] Q. All right. Pursuant to what Board policy with black principals and black principals assigned to black — or to those schools that had black student enroll-

ments, pursuant to what Board policy was that practice pursued?

A. Well, of course, as you know, by statute, the Superintendent has the responsibility of assigning administrators to the buildings. He presents his recommendations to the Board each year. Actually, that's the basic procedure. By statute, though, the Superintendent assigns the administrators.

Q. I understand the statute quite well. My question is: Pursuant to what Board policy were black principals and black assistant superintendents assigned solely to those schools that had black student majority?

A. I don't know whether it was the Board policy on it or not.

Q. Do you remember whether or not there was an administrative directive from either of the superintendents with whom you worked —

A. No, sir.

Q. — to that effect?

A. No, sir.

Q. Well, then, whose idea was it?

A. Well, the Superintendent, to repeat what I said before, by statute, the Superintendent assigns administrators. [3217] That was not my responsibility.

Q. You mean it wasn't your statutory responsibility?

A. No, sir.

Q. Who recommended to the Superintendent where to put those administrators or what administrators to put where?

A. Again, this is a team procedure.

Q. Where did the buck stop, Mr. Dumaree? Who carried the ball?

A. With the Superintendent.

Q. Who carried the ball to the Superintendent on a principal recommendation?

A. Our division.

Q. That would be the Assistant Superintendent during the period you were in charge of administration, wouldn't it?

A. Yes, sir.

Q. And you're telling me there was no Board policy that black principals and black assistant principals be placed in black schools?

A. I don't know of any.

MR. PORTER: Objection.

THE COURT: Overruled.

Q. And you also said to your recollection there was no policy statement or administrative directive from the Superintendent that required that?

[3218] A. That is correct.

Q. And you just said that you were the one who made the recommendation to the Superintendent as to who went where?

A. I want to say this.

Q. Yes?

A. That in the matter of assignment of personnel, administrative personnel, that this again is a team project and — but the final decision is made by the Superintendent.

Q. All right. Were you ever told by the Superintendent, either of them, with whom you worked, as either a Superintendent or Deputy Superintendent that black assistant principals or black principals were not to be assigned to predominantly white schools?

A. No.

Q. You were never told that, were you?

A. No, sir.

Q. Were you ever told by the Superintendent that white principals or white assistant principals were never to be assigned to predominantly black schools?

A. No, sir.

[3219] Q. So If I were to tell you that there was a pattern that indicated black schools and black assistant

principals and black principals, how would you explain that pattern if it existed?

A. You'd have — I'm sorry?

Q. If it existed?

A. You'd have to discuss that with the Superintendent.

Q. No, I want to discuss it with you. How would you explain it?

A. That again is the prerogative of the Superintendent. He makes the final decision. He's the executive officer of the Board and employed by them to administer the School System and assign personnel to employ —

Q. That's not — go ahead.

A. — to keep teachers and to assign them and to assign administrators.

Q. All right. So if there were such a pattern, you weren't aware of any policy of the Board or Superintendent that led to it? It just happened; is that what you're saying?

A. I didn't make any such statement.

Q. Well, I'm asking you, is that what you're saying? It just happened?

MR. PORTER: Objection.

THE COURT: Overruled.

[3220] Q. Is that what you're saying?

A. Well, what is the question? I'm sorry.

Q. If such a pattern existed, your testimony is it just happened?

A. That was the decision of the Superintendent and the approval of the Board of Education.

* * * * *

[3223] Q. (By Mr. Atkins) You do recall, do you not, Mr. Dumaree, that as a matter of fact in 1956 when you became the Assistant Superintendent that there was no black person in a principal's position in a school other than one that was predominantly black? You recall that, don't you?

A. Yes, sir.

Q. The same thing would be true of a black person who was an assistant principal, wouldn't it? He would be found only in a school that was predominantly black?

A. My memory doesn't serve me on that. I don't remember where all the assistant principals were at the time. I can't say that. I don't know. I don't remember.

Q. And you also would recall, would you not, that in 1956 when you became the Assistant Superintendent — I imagine [3224] that somebody prior to your getting there had made this decision — that there were no white principals in schools that were predominantly black? You recall that, too, don't you?

A. Yes, sir.

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[3229] Q. You indicated earlier that your responsibilities included as Deputy Superintendent studying and making recommendations for changes in boundaries. Do you recall that?

A. Yes, sir.

Q. And that was also a part of your responsibility when you were Assistant Superintendent of Administration; isn't that true?

A. Yes.

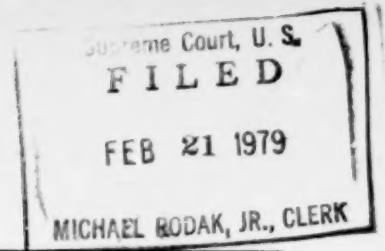
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[3230] Q. And I take it you were not instructed by the Superintendent in drawing boundaries for new schools or redrawing boundaries for existing schools to do it in such a way as to eliminate racial segregation where it existed? I take it you were given no such instructions; is that correct?

A. That is correct.

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APPENDIX



In The
Supreme Court of the United States
October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 11, 1978
CERTIORARI GRANTED JANUARY 8, 1979

VOLUME II

(Pages 407 - 802)

GORDON FOSTER,
called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[3360] Q. State your full name and your occupation, please.

A. Gordon Foster. I am Professor of Education at the University of Miami in Coral Gables, Florida.

* * * * *

[3362] Q. All right. Have you worked in Ohio before, not associated with desegregation?

A. Yes, I taught schools in the public schools and was an administrator in the public schools and taught and worked at Miami University in Oxford and taught a summer session at Ohio State in the 60's.

[3363] Q. Where else did you teach school?

A. I taught in Loveland, Ohio, which is a — it was an exempted village. I am not sure what its status is now. It may be a city at this point — for three years, and was a principal there — for four years was an elementary principal, sort of combination elementary-junior high principal. Then I taught in Middletown in about 1960 for a year, and then I started to finish my graduate work and I was at Miami University in Ohio for a year working at that time with the Bureau of Educational Field Services under Dr. Ralph Purdy.

Q. What did you do with the Bureau of Educational Field Services?

A. We did mostly field studies, field surveys for school systems, most of them in Ohio — a couple I believe were in West Virginia or Kentucky — during that period, having to do with school consolidation or school curriculum studies or school building construction, site selection, this sort of thing.

Q. Did you do studies similar to some of the OSU studies you have seen as exhibits in this case?

A. Very much so. From the year I was there at that time and then later when I was at the Miami University for three years on the faculty while I was writing my dissertation, I again worked with the Bureau. Several of the people that worked with the Ohio State Bureau also worked on [3364] our studies, and Dr. Merle Heiman, who was State Superintendent and then retired was also on our staff from time to time.

Q. When you say Miami, you mean Miami of Ohio in that instance; is that correct?

A. That's correct.

Q. Were you Director of a joint project for school districts in Ohio and other states?

A. One of the years I was at Miami following my residence at Ohio State, I was Director of an organization called Southwestern Ohio Educational Research Council. There were similar organizations in different areas of the state. This was an organization partly under federal funding and partly under school system funding of almost all the school systems of any size, such as Cincinnati, Middletown, Hamilton, in the southwestern area and of universities in that area to join together for planning purposes and all the educational study that anybody wanted accomplished in that area of the state.

I was on a half-time assignment as Director of that. As such, I was assigned into a research position. I can't remember the exact title with the Cincinnati City Schools.

Q. And how was this funded. Was this a federally funded project or was this funded by the schools?

A. It was a combination. They had some federal funding [3364A] for a period of several years, and different systems would contribute on a pupil-population ratio, according to their numbers.

[3365] Q. Would you give us your educational point of history thereafter?

A. When I received my doctorate, I went to the University of Miami in Florida in 1966, and I've been there ever since. I started out as Assistant Professor, and I'm now full Professor.

In addition to being on the faculty and school administration, in 1966, when I went there, I assumed a position of Associate Director of the Florida School Desegregation Consulting Center, which at that time covered about the southern half of the State in terms of giving technical assistance to school districts in Florida in desegregation matters. This was funded under Title IV of the Civil Rights Act of 1964.

Three years later, I became Director of that Center and still am. It's now called — well, it's still called the Florida School Desegregation Consulting Center, but currently, there's something like 28 of those centers in the country. They're called General Assistance Centers for Desegregation Concerns. It now covers the entire State of Florida.

For a period of three or four years, I was also Chairman of the Administration area at the University. I was Director of a Federal project to train school administrators, largely principals, for multi-cultural schools. This was funded under the Educational Profession Development Act by the [3366] U.S. Office of Education. We processed, over a period of about three years while I was Director, about 75 students, either through doctoral programs or masters programs to train them for working with desegregated schools.

This past year, I am also serving as Director of a new program which is similar to the desegregation center. It's called a Bilingual Center, which is again funded by the U.S. Office. There are nine such centers across the country as a result of the Nickel versus Low Decision in San Francisco. We cover about fourteen states in the District of Columbia, that's Region 3 and Region 4 of the U.S. Office of Education, to assist schools who have compliance

problems and questions under the Low Decision, and we provide them technical assistance as they deal with the Office of Civil Rights on compliance problems and provide help to them in training their faculties and this sort of thing to gear up for bilingual programs.

* * * * *

[3385] Q. I realize you've been in Columbus many times on other matters. I believe you were also here to testify in the Dayton case and spent time in the city then. Do you have any record or notes which would indicate to you how much time you spent specifically in preparation on this case?

A. I can give you the exact days I was here. It was something like 20 days so far, I believe, this spring.

Q. And I take it you spent additional time at your home and at your office working on this matter?

A. That is correct.

* * * * *

[3386] Q. Were you asked to come up with any particular result, or were you simply asked to examine the data and from that examination give your opinion as to what you were able to discover?

[3387] A. Well, I think it's impossible to come up with a result before you look at any data if you're doing an analysis. I was simply asked to do an analysis of the data that were available.

Q. What types of data do you generally try to look at to analyze the history and development of the school system?

A. Well, it depends on how many aspects of the segregation process you're examining, but its primary things are student enrollment and the racial percentages of student enrollment as far back in time as you can get them. The whole building program is very important in terms of four or five aspects, construction of new buildings and addition to buildings, closing of buildings, use of cen-

tral facilities, the use of portable facilities, and the whole business of how a system determines capacity of school buildings and what their records are regarding capacity at the various stages of the system's development. It's very helpful sometimes to know, for example, the number of rooms in a building, classrooms, special rooms, this sort of thing. Some systems now have all this on computer printouts which makes it fairly handy.

If you're getting into segregation associated with personnel, then you need to know the information for faculty and staff and administration appointments by race as far as they are available. You have to know a considerable [3388] amount about the program, if it's possible, that is to say, the curriculum, and special program such as special education, vocational education.

One thing I didn't mention in construction was the business of current construction and future construction. If there's a building program going on at the time you're making your analysis, you need, of course, to know where the pupils are, where the schools are, where the teachers are. Special things such as student transfers can be very important.

In the City of Philadelphia, for example, which is about 270,000 pupils, after receiving a computer printout of where all the pupils were, we found out that about 50,000 of them did not reside in the assignment areas where they were located, but they were all out of residence, and in some systems, a lot of this is nocontiguous assignment, not so much by sections or geographical areas, but just by individual pupils.

So where you have such things as city-wide high schools, city-wide junior high schools for one reason or another, you have children attending schools from different areas of the city for curriculum reasons, you need to know this sort of thing.

Q. All right. In determining capacity, is there an actual physical capacity of a building that can be determined [3389] that is unrelated to program?

A. Yes, in a sense. This depends to some extent on the system or the State Department of Education in a particular case, but ordinarily a certain number of pupils will fit into a certain size classroom, especially at the elementary level. When you get into the secondary schools, the program has a lot more to determine the capacity then.

[3390] A. (Continuing) But even there space is a primary factor that you deal with.

Q. Do school systems operate sometimes with two sets of capacity figures, one of them a building-rated capacity and another one a program capacity? By that I mean, for example, if a school system has a pupil-teacher ratio of 35 to 1 and decides to lower it to 10 to 1, does that affect capacity in one sense of the term?

A. Well, it does, but I never ran into that problem when we were doing consolidation studies back in the '60s. I never heard of changing around all the time for program operations. When we would go into study a system out of Miami or Ohio like Lima, Ohio, for example, we just understood that every school had a certain number of classrooms and it had a certain rating of capacity. There was never a set, as I remember, another set of figures given to you involving program capacity.

Ever since I have been involved in desegregation, though, all of a sudden we have program capacity. I am not knocking it. I think it is a valid consideration because you do have capacity — obviously capacity considerations have to deal with program.

But what you say is correct, especially more recently. Systems do have a sort of a program or an operational capacity, as it were, and quite often that can [3391] be different from the fixed stated capacity of the building as a structure.

Q. Does this sometimes vary from bond issue to bond issue?

A. It could, yes, sir, or depending on policies that the Board makes regarding, as you say, the number of pupils in a classroom, this sort of thing.

Q. If an elementary school building is depopulated for any of a variety of reasons, whether it be Urban Renewal or just declining enrollment or what have you, do school systems often convert classrooms into other purpose rooms, for example, teacher lounges, elementary libraries, nurses' station, multipurpose room, things of this sort?

MR. PORTER: Objection.

THE COURT: Overruled. You may answer.

A. Yes, quite frequently. This is very popular right now because, as you know, many systems in the country are undergoing population decline in school enrollment. One of the ways they are meeting this is to do exactly as you described, utilize the buildings for various ways. If they have got the money, they set up special classrooms and teaching stations, reading centers, all sorts of special programs. If they don't have the money, why, they do other things.

But this is — it is very politically unpopular to [3392] close a school once it is opened, so in order to avoid that, sometimes with a declining population will try to provide quality education arrangements by strengthening their curriculum program in using classrooms out of the ordinary sense.

MR. PORTER: If the Court please, I am going to object to the witness' testimony. I am going to ask that it be stricken and ask he confine his testimony to the City of Columbus.

THE COURT: Overruled.

[3393] Q. Dr. Foster, these type of changes in utilization of classrooms, is it fair to say that they sometimes

require physical structural changes and other times simply different uses?

A. Certainly this would be true. For example, some schools like in the past ten year — well, earlier — have attempted to use open space philosophy. They will simply take two classrooms, and where you have a non-load-bearing wall between them, knock out the wall and make one classroom in terms of an open space program. It gives a lot more flexibility. You can do all sorts of conversions like that, depending on your architecture.

Q. Dr. Foster, can you give us some of the common techniques used by the school systems in order to segregate?

MR PORTER: Object to the question.

THE COURT: Overruled.

A. Well, in many cases they are similar to the ones that I used to desegregate, only they go in the opposite direction. The most common ones are the use of boundary lines, usually associated with changing status of schools. For example, if a school opens, a new school opens and preempts the territory of two or three other schools that were there to start with, then you have to change boundaries, and these can be done in such a way to either desegregate or segregate, exact impact what is already there in terms of [3394] segregation.

The use of optional zones or what is also called dual overlapping zones is a frequent technique and has been for segregative effect.

The entire business of the way buildings are used, where sites are selected, how big the building is when it is constructed, what the boundaries, as I just said, are when you use the building for the first time. The way buildings are closed can sometimes have a very segregative effect because sometimes if a building is closed that is in an area where you have access to both white or black residential populations and capacity is right, you can

assign the children in such a way as to either further segregate them or desegregate them. Not always, but sometimes this happens.

The decision to make building additions, increase capacity, is sometimes used to impound or impact segregation that already exists. The use of transfers. Transfer policy has been manipulated in such a way as to segregate or maintain segregation. On occasion I have seen systems that develop a very good desegregation plan and then gut the thing by having sort of open transfers, and the children wind up going anywhere they want to.

The way teachers are assigned, the way faculty, administrative staff are promoted and assigned, the way non-certificated personnel or classified personnel are assigned [3395] can all have a segregatory effect, particularly in terms of community perception of whether a school is desegregated or segregated.

Q. What about the use of rental space by school systems; is that another way in which segregation can be made work or maintained?

A. It can be, yes. If you have a school that is overpopulated and you need to shift the pupils somewhere, sometimes you can put them in a school of an opposite — predominantly of an opposite race if space is available rather than renting.

The use of transportation from non-contiguous areas has often had a segregative effect. I am not sure whether I have covered them all or not.

[3396] Q. Let me ask you a few questions about dual overlapping zones. I believe you said an optional attendance area is a dual overlapping zone as well as fitting the other description; is that correct?

A. Well, it is at least a first cousin, yes. A dual overlapping zone is simply — one example would be where you have the same zone and the white pupils are assigned to one high school, let's say, or the black pupils are assigned

to one high school and the white pupils are assigned to two or three high schools out of the same attendance area.

Q. Is one type of dual overlapping zone where the schools have service areas which are completely congruent with each other; that would be one example?

A. Yes.

Q. And then there are others, as the example you just mentioned of a high school, for example, where you might have three white high schools and one black high school serving the attendance area of all three or portions of them; is that correct?

A. That's correct.

Q. That's another form. And does the same principle apply to portions of attendance areas?

A. It could, yes, sir.

Q. What about neutral zones; is that a form of overlapping zones, dual zones?

[3397] A. As I understand, a neutral zone compared let's say to an optional zone, an optional zone is carved out of one zone and the children are allowed to either stay in that zone or go to another attendance area, whereas, a neutral zone is sort of a no man's land which isn't caused out of either zone and children can go to either school.

Q. All right. Dr. Foster, in examining school districts, do you find each and every technique used in every school system where you have observed segregation?

MR. PORTER: Objection.

THE COURT: Overruled.

A. No, you don't. At least I can't remember ever finding one that used all of them.

Q. And can you segregate effectively with the use of one or two or three of these —

MR. PORTER: Objection.

Q. — of these techniques?

THE COURT: Overruled.

A. It depends on the situation, of course, but I have seen that to be possible, yes, sir.

Q. Just because you do not find all of the particular techniques present in a particular school system, would that indicate to you that the school system had not practiced segregation?

MR. PORTER: Objection.

[3398] THE COURT: Overruled.

A. No, sir.

Q. Dr. Foster, have you examined the new construction in the Columbus School District?

A. Yes, I have.

Q. And what period did you look at?

A. Well, I first looked back as far as racial data was available on pupils which was from 1964 through current year 1975-76, and then I extended this back for four more years from 1960 to '63, and then I took another block of ten years back to 1950.

I have actually looked at all of the construction data that are available to Plaintiffs which basically cover the whole history of the school system that there are records of, but the data I analyzed to any great extent was from 1950 — in terms of new construction was from 1950 to 1975-76.

Q. Let me go back just a little bit and ask you if you have examined a large number of Plaintiffs' exhibits and various portions thereof?

A. I think you could say so, yes, sir.

Q. And have you examined some of the exhibits of the Original Plaintiffs as well?

A. Yes, I have.

Q. Have most of these documents been School Board documents?

[3399] A. That's my understanding. In many cases, such as enrollment and racial percentages of pupils, some of the faculty data, some of the building data, I first

examined what I would call spread sheets which were made out by whoever was working on these things. Then later on I would go and examine the original documents from which these spread sheets were made.

Q. All right. You would look at the summaries — let me ask you, does the spread sheet show the trend in a particular school?

A. Yes, sir.

Q. Would it be faculty, enrollment, total population or race?

A. Yes, sir.

Q. And then you went back to the raw data yourself to check in particular instances, and did you find errors on occasion?

A. Yes, of course.

Q. Did you rework some of the summary sheets on that basis?

A. Well, to the extent that I possibly could in terms of time, I used what I would consider to be original data sources.

Q. So you actually put aside in some instances the summary sheets and relied on your own analysis of the raw [3400] data; is that correct?

MR. PORTER: Objection.

A. Yes, sir.

THE COURT: Overruled.

* * * *

[3402] Q. Now, what did you use as a measure of racial identifiability in your estimate of the racial percentage in the Columbus School District for the period 1950 through 1959?

A. Well, if I can jump ahead of that a step from 1964 until 1975 when data were available on racial enrollment, I used plus or minus 15 percent from the mean as the range of schools which were non-identifiable racially. That is to say for the current school year, the percentage

systemwide is something like 32 or 32½ percent non-white. Well, the range of that plus or minus 15 percent would be schools that were non-identifiable racially according to my — that's the way I figured it.

Now, for about — for most of those years, all except the first year or two, that was broken down by levels so that I used one set of figures for the senior high, one for the junior high and one for the elementary.

Q. Did you use the same plus or minus 15 percent?

[3403] A. Fifteen percent, yes, sir. Then between the period 1957 to 1963, I used plus or minus ten percent deviation from the estimated mean, and from 1950 to about 1957, I used plus or minus five percent to determine racial range. The reason for this is fairly obvious. If a system as it approaches let's say a fifteen percent nonwhite figure, if you had a range of plus or minus fifteen percent, it would be meaningless after you got too far down to continue them.

Q. All right. Did you make an estimate of the racial enrollment in the system for 1950?

A. Yes.

Q. What was that?

A. Well, based on the rate of annual increase from 1964 to 1975, I figured that in 1950 a conservative figure for the system would be not lower than fifteen percent non-white.

Q. All right. Are these five, ten and fifteen percent figures which you applied — I am sorry — 1957, what percentage did you estimate using the same technique?

A. Between '50 and '57 I used five percent, and between '57 and '64, ten percent.

Q. All right. And what percentage black for the system did you use for '57?

A. Twenty percent.

Q. In '64 where you had the data, it was 25 percent; is [3404] that correct?

A. The data I calculated — and I didn't have time to do the total system — was 26 and 6/10 percent for the secondary schools at that juncture, that is, 1964, and I used that to estimate the fact that the system as a whole was about 25 percent.

Q. All right. Now, the measure of racial identifiability, is it a measure of the disproportion from the system average?

A. That is correct. I might add that in any instance, as I said before, where there was any question about buildings being close on this, why, we did not count them as racially identifiable.

Q. All right. Is there any literature on the subject as to whether or not this is a reasonable technique to use in terms of the percentage deviation?

A. It is not exactly literature, but there is a lot of operational practice. There are several states, and several cases where a plus or minus 15 percent from the mean has been used to define racial nonidentifiability, the range clustering around the mean. The State of Pennsylvania has a regulation that the Human Relations Commission used which is slightly different, but similar, which says that it should be determined by a plus or minus 30 percent of the minority population in a school, so that if a school is 30 percent minority, you would have a plus or minus range of 30 times 30 [3405-6] or nine percent from the mean. The advantage of the Pennsylvania system is that it takes care of the very problem we have here, and that is as the minority population approaches zero and you have low percentages, it gives you a more logical base from which to operate.

[3407] Q. Did you use the same type of breakdown where you had an initial small plat in the Grand Rapids case?

A. I did that, yes, because very early on Grand Rapids had a very small population of the minority people,

so it became necessary to change the 50-percent deviation, and this was accepted, I think, by the Sixth Circuit in their review of the case.

Q. All right, I show you, Dr. Foster, Original Plaintiffs' Exhibit 22-B, Columbus School Profiles, prepared by Dr. Howard O. Merriman, and direct your attention to pages 6 and 7, and ask you what deviation Dr. Merriman used?

A. Page what?

Q. I think it begins on the bottom of page 6.

A. Plus or minus 10 percent from the average.

Q. All right. Would you read that paragraph beginning, "Proportion of White Pupils — Elementary Level"?

A. All right. On page 6, the paragraph is headed: Proportion of White Pupils — Elementary Level, and it reads:

The system-wide enrollment of white pupils at the elementary level is 73 percent, representing no change from the 1968-1969 school year. Table 5 indicates distribution of elementary schools by concentration of white pupils, showing a change in overall data of one more school in the middle category, parentheses (average plus and minus 10 percent), [3408] parentheses close. However, examination on a school-by-school basis indicates shifts in student population not reflected in the table.

Two schools, Chicago and First, shifted from the lower category into the middle group. Deshler and Weinland Park showed a decrease in white population with a shift into the lower category. Koebel shifted into the middle category from the high category, parenthesis (more than 83 percent), parentheses closed. The new building opened, Walden, has a high white concentration. The first four schools border the inner city.

Q. All right. And he was using plus or minus 10 percent in 1970. I believe in 1970, you used plus or minus 15 percent; is that correct?

A. That's correct.

Q. If you used plus or minus 10 percent, there would likely be more schools fall in the disproportionate range; is that true?

A. Yes.

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[3422] Q. Dr. Foster, if you will refer to your notes, from the period 1950 to 1975, how many new schools were built?

A. My figures read 103.

Q. And of that 103, how many opened racially identifiable?

A. Eighty-seven out of 103.

Q. And I believe three of the 87 schools have been closed; is that correct?

A. That is correct.

Q. And how many of those schools, of the original 87 minus the three, have remained racially identifiable in 1975?

A. Seventy-one, but I think again it is only fair to point out in my testimony that some of those were built in 1975.

Q. I understand. Do you recall approximately how many schools the data was unclear and you solved the doubt in favor of naming the school as a nonracially identifiable school?

A. Most of them, of course, were in the 1950 to '60 period. Out of that group, there were at least seven or eight that seemed reasonably clear were probably opened racially identifiable, but we just didn't want to take any risks.

Q. Dr. Foster, we have placed up all three overlays, [3423] 336, 337 and 338, reflecting the openings from 1950 to 1957 on top of PX252, the 1970 Census map. From your examination of the data with respect to new school construction, do you have an opinion as to the affect of such

construction in terms of either creating or not creating segregation in the Columbus School System?

MR. PORTER: Objection.

THE COURT: Overruled. You may answer.

A. Well, my opinion is that such construction, either because it is located on certain sites, which sometimes I understand is inevitable — I mean, you have to — finding school sites is not an easy situation, but the fact that schools are opened as black schools, so to speak, or white schools has a strong tendency to maintain a segregated system or to work towards impaction of the segregation that already exists in a system.

If all these schools that open up in the center city do open up primarily as black schools and all the schools that open up in the extremes of the suburbs open up as either all white schools or close to it, then, of course, you have the obvious inference that the system is not doing anything to correct a segregated situation when they do have an opportunity when schools open to do this. There are various techniques you can perform which will deal with opening schools. You can't always do it by site, I [3424] understand that, but if you are really interested in a desegregated system, then there are times when you can either redraw zone lines or draw them in such a way — or you can perhaps pair schools or group schools as you open them with other existing schools to promote desegregation rather than to maintain or increase segregation.

Q. Dr. Foster, can you form an opinion based on the opening of a single site, or is it necessary for you to observe a pattern or get an overview of what is happening in the system?

A. Well, you have to do it within the context, obviously, of the total system. Of course, you more directly do it within the context of a region or area of that system. For example, when you are opening up a school such as Independence or Liberty, while you open it in the con-

text of the total system, you also take into account more strongly the schools that are in that general area of the city.

Q. All right. I take it on any individual school you can end up in a considerable argument about the merits or demerits of a particular site selection; is that a fair statement?

A. Certainly.

Q. From observing the pattern of new school construction in Columbus, do you have an opinion as to whether or not that pattern could result from accident?

[3425] MR. PORTER: Objection.

THE COURT: Overruled.

A. Well, no, I think it is obvious from looking at the map and knowing the population concentrations to some extent that — and I believe I have read in testimony already or in depositions and so forth, that the intent of the school system is to construct the schools where the children are, so to speak. If you do that, why, it is going to have certain consequences, obviously.

Q. And would those consequences in this case, Columbus, Ohio, be racial?

MR. PORTER: Objection.

A. Certainly.

THE COURT: Overruled.

Q. Dr. Foster, did you examine certain data with respect to building additions in the Columbus School System?

A. Yes, I did.

Q. And what was the information available to you that you used for that examination?

A. I did that following my examination of new construction. As a result of that analysis, I followed the same general pattern in examining the new additions. I used primarily Plaintiffs' Exhibit 22, which is a record of all the new buildings and the additions and the remodeling since the beginning of time except of the last — I can't

remember [3426] exactly how far that goes. The last two or three years, I guess.

We had PX23, which ran through 1969 which had to do just with openings, but we also had a document, Plaintiffs' Exhibit 68 called a Building Program Progress Report for Columbus Public Schools dated January 5, 1976, which describes the current building program that is going on, and it lists all the schools that are involved in this program, at least that were at one point — I suppose as of January 5, 1976 — and classifies them by school level and then describes the status of the building project as of that date, and it defines whether they are new schools, whether they are additions or whether they are remodeled schools.

Q. All right. Did you obtain certain other information from the testimony of Dr. Merriman with respect to status of a number of the current projects?

A. Yes. This document was basically brought up to date, I believe, by his testimony, and I used that information. At the time that was made available to me, I already completed an additions analysis, and I revised it in light of that testimony.

Q. All right. In the period 1950 to 1959, did you utilize the same racial estimate that you had with respect to new school construction?

A. Yes, I did.

[3427] Q. And again when the information that you had as to the racial enrollment of the school was a close question, what step did you take in terms of calling that school either racially identifiable or nonracially identifiable?

A. In those cases, to the best of my knowledge, I did not classify those schools as racially identifiable.

Q. All right. Based on an estimated enrollment of approximately 15 percent black in the system in 1950, you used a plus or minus five percent; is that correct?

A. That is correct.

Q. And from 1957 forward, you used plus or minus ten percent?

A. Yes, sir.

Q. And beginning in 1964, you used plus or minus fifteen percent; is that correct?

A. That is correct.

Q. How many additions to schools were there in the period 1950 to 1959?

A. Sixty-four I counted.

Q. And how many of those additions were made to schools which were racially identifiable schools?

A. Thirty-six out of sixty-four.

Q. And of those 36 schools, how many of those schools remained racially identifiable in 1975?

A. Twenty-six of them. Two of them had closed, and they [3427A] had closed as racially identifiable schools in the same way as they opened.

[3428] Q. All right. Did you examine the data from 1960 to 1963?

A. Yes, I did.

Q. And in that period, '60-63, how many school additions were there?

A. There were 28 according to Plaintiffs' Exhibit 22.

Q. And once again I take it you are not including in these numbers remodelings or new bathrooms and things of this sort; is this correct?

A. No. Plaintiffs' Exhibit 22 just simply lists the schools and the dates of additions. It does not describe the additions. I had no data prior to the current building program in which additions were described as so many classrooms, multipurpose room, library, this sort of thing. There were simply — Plaintiffs' Exhibit 22 has all the schools in three columns. The first one is new buildings or erections. The second one is additions, and the third one is remodeling. I made the assumption that the addi-

tions column had to do with construction that was not remodeling.

Q. Dr. Foster, let me — perhaps this is a little out of order — ask you if you rebuild a school, in this case either a new school or a substantial addition to a school, on the same site and that school is already a racially-identifiable school, what effect, if any, does that have with respect — and again assuming no substantial [3429] boundary changes made, what effect, if any, does that have in terms of maintaining segregation?

A. Well, it simply locks in a segregated situation and makes it much less likely that it will ever be changed.

Q. All right. And the new constructions which you testified with respect to, were a number of those buildings built or rebuilt on an existing site or approximately the same site?

A. I couldn't testify to that directly. I assume they were because some of the schools I visited in the last couple of months, that is to say, I didn't walk in, but I have been around them and they were on the same sites.

[3430] Q. So you actually made a visual inspection of all the — most of the schools in the Columbus School System, did you not?

A. Well, not most of them. There are an awful lot of them. I can say maybe about half of them.

Q. And did you go particularly in areas where you were concerned about questions that arose from the examination today?

A. For the most part, yes.

Q. Of the 28 schools, additions to schools in 1960-63, how many of those were additions to racially-identifiable schools?

A. There are 21, by my count.

Q. And how many of those schools are racially identifiable in 1975?

A. 16 out of the 21.

Q. Turning to the period 1964-1975, I believe at that point you were using the plus or minus 15 percent; is that correct?

A. Yes, sir.

Q. And in this period, you had the HEW reports and other enrollment-by-race data and the summary form from the School System; is that correct?

A. Well, the figures I used were not directly from those reports, but from Plaintiffs' Exhibit — I don't remember. [3431] 1975-76 was PX 11, and I think they decreased in number from that in some of the earlier years, like PX 1 to 11, perhaps, as I remember it.

Q. All right. In the period '64 to '75, how many additions to schools were there?

A. 84 by my count.

Q. And how many of those additions were to racially-identifiable schools?

A. 71 out of the 84.

Q. And those schools, again allowing for the fact that things in '75 haven't had time to make a change, of those schools, how many schools are there which remain racially identifiable in 1975?

A. 62 out of the 71, and one of the schools was closed, and the year before it was closed it was racially identifiable as when it was opened or when it had the addition.

Q. There were substantial changes made in 1975, weren't there?

A. Yes, I think the exact number was 26.

Q. The totals for the period 1950-1975 in additions to schools comes to what, Dr. Foster?

A. 176 additions.

Q. And in how many of those additions were the schools racially identifiable?

[3432] A. 128 out of the 176.

Q. And again, with the understanding that 26 of those were made in 1975, how many of those remain racially identifiable in 1975?

A. 104.

Q. In using the information you obtained from Dr. Merriman's testimony, did you — let me give you a hypothetical situation.

Let's assume that the witness indicated that they converted two rooms of an existing school to other uses but also added two new classrooms. Did you consider that addition to the school for the purposes of your analysis?

A. I'm not sure what your hypothetical describes, but there was one case, I believe it was Bretnell Elementary, that had a situation — they added two rooms and lost two rooms, and I didn't count that. The only schools I counted in correcting my information on the basis of Dr. Merriman's testimony were ones that added classroom space.

Q. Dr. Foster, did you examine the data of the Columbus School System with respect to principals?

A. Yes, I did. Well, some of it, not all of it, but selected years.

Q. All right. And what years did you look at?

A. 1968-69, 1972-73, and that's just one school year in each case, and the year 1975-76.

[3433] Q. Turning first to 1968-69, what source material did you use?

A. Plaintiffs' Exhibit 448-A and Plaintiffs' Exhibit 449-A were — I also used the original on that, and I don't have the — the source. I believe that was Form 101, HEW Form 101 for racial reporting, but I don't have the PX number on it, if there is, in fact, one.

Q. All right. Did you find certain corrections that you had to make to PX 448-A and 449-A?

A. Well, of the three years I examined, one of the years I did make some corrections, and I went completely

through the HEW 101 form to do that. The other two years — that was 1972 to '73.

In '68-69, I spot-checked, cross-checked the HEW Form, and in '75-76, I cross-checked the Equal Employment Opportunity Commission Form which was used for that year as a basic data source.

Q. All right. For the period 1968 to '69, what did the data show with respect to the assignment of black principals?

A. In 1968-69 school year as to the assignment of black principals, let me simply summarize my findings and then, if you want something more, you can ask.

Of 94 racially-identifiable white schools, and this is figured again on the basis of plus or minus 15 percent [3434] from the norm at the different levels where that was available, high school and junior high or elementary, of 94 racially-identifiable white schools reporting the use of principals, 94 of them had white principals. In other words, no blacks were assigned to these 94 white schools as principals.

In the same year, there were 24 schools not racially identifiable reporting principals, and all of these 24 schools not racially identifiable had white principals. No blacks were assigned as administrators to those schools.

In the same year, there were 43 racially-identifiable black schools reporting principals in use, and 30 of those had white principals, 13 had black principals.

In sum, there were 13 black principals in the system that year, according to my figures, and they were all assigned to racially-identifiable black schools.

Q. Do you have the assistant principals for that same year?

A. Yes, I do.

Q. How many black assistant principals were there at the 95 racially-identifiable white schools — I'm sorry — 94 racially-identifiable white schools?

A. You're right. There were 95 racially-identifiable white schools. The 94 figure was simply — one of them did not have a principal assignment.

[3435] At the racially-identifiable white schools, no black assistant principals were assigned in that year.

Q. At the integrated, desegregated or non-racially-identifiable schools, according to your definition, we have 25 of those schools in 1968-69. We have 24 white principals and zero black; is that correct, and one that there was no designation?

A. That is correct, yes, sir.

Q. All right. How many assistant principals were there who were black at these non-racially-identifiable black schools?

A. There was one black assistant.

Q. And how many white?

A. 14 white assistants.

Q. Now, turning to the racially-identifiable black schools in 1968-69, how many of those 43 schools, how many of those had white assistant principals?

A. 12 of them.

Q. And how many of them had black?

A. 5 of them had black assistant principals.

Q. I take it at least from the data available to you not all of these schools had assistant principals; is that correct?

A. That is correct. Most of the — I guess all of the secondary schools had assistants, and ordinarily, maybe [3436] half a dozen of the elementary schools. I assume if they were fairly large elementary schools, they may have had assistant principals. City systems usually have a cutoff point for a population. Whenever it reaches 800 or 600 or whatever, you're allowed, assistant principals.

Q. All right. Would you look at the same data for the 1972-73 school year and tell me how many racially-

identifiable white schools there were and how many of them had black principals?

A. There were a total of 86 racially-identifiable white schools. 77 of them reported having principals. 76 had white principals, and one of them had a black principal.

Q. What was the breakdown at the racially-identifiable black schools?

A. There were 47 racially-identifiable black schools — I beg your pardon. I have the wrong set of figures. I was reading you 1975-76. Can I go back to the white schools?

Q. Yes, 1972-73.

A. All right. In 1972-73, there were 89 racially-identifiable white schools. 84 of them had white principals, and none of them had black principals. Five of them did not have a principal.

Q. Five of them did not have principals showing in the [3437] data?

A. Yes, sir.

Q. All right. Let's just stick to that point with the racially-identifiable white schools. What about assistant principals in those schools?

A. Those schools reported a total of 28 white assistant principals and no black assistant principals. That didn't mean that all of them — there were 28 schools that had assistant principals, but the total number of assistant principals in those schools was 28 whites and no blacks. That is to say, one school might have had two or three assistant principals.

Q. Okay. And at the schools which were non-racially identifiable, I believe there were 30 of those?

A. That's correct.

Q. And how many black principals were there in 1972-73?

A. There were 2 black principals in those 30 schools.

Q. And 27 whites?

A. That's correct.

Q. And there was one, I believe, that was not applicable? You didn't have any data?

A. No, there was one that did not report a principal, and there was also a school that we did not have data for in those figures.

Q. What about assistant principals at the [3438] non-racially-identifiable schools?

A. The 30 schools reported a total of 12 white assistant principals and 5 black assistant principals.

Q. The racially-identifiable black schools had what proportion of black and white principals?

A. There were 47 identifiable black schools. 21 of them had white principals, 22 had black principals and 4 of them reported no principal.

Q. And the assistant principals?

A. A total of 13 white and 11 blacks.

Q. All right. Now, do you have the data for 1975?

A. Yes.

Q. Have you summarized that 1975 data?

A. All right. In 1975-76, the current school year, there are 87 racially-identifiable white schools and 9 of them reported no principal. There were 76 white principals and 1 black principal in the schools.

The same racially-identifiable schools reported 23 white assistant principals and 3 black assistant principals.

The schools that were racially identifiable as black schools, the current year, were 47. 20 of these reported white principals, 25 reported black principals, 2 did not have principals.

In terms of assistant principals for these racially-identifiable black schools, a total of 12 white [3438A] assistant principals were reported and 8 black assistant principals.

[3439] A. (Continued) For the current year for schools that were not racially identifiable, we had a total of 32 of them. Four reported no principal. Twenty-four

reported white principals, and four reported black principals. In this group of 32 nonidentifiable schools racially, total assistant principals, 15 white were reported and four black.

Q. Can you summarize the results of your analysis and breakdown?

A. Well, my opinion is that it seems to me that the figures speak for themselves in that the appointment of principals is essentially done along racial lines. The first black principal we found serving in these three years that I analyzed in any capacity was in 1968-69. That is in any nonwhite school, either a nonidentifiable school racially or a black school — let me start over again.

The first black principal that was assigned to a white school or a nonidentifiable school was in 1968-69 when we had one black assistant principal assigned to South High School. Then in 1972-73 we had two black principals assigned to racially nonidentifiable schools as principals, and we had five blacks assigned assistant principals to racially nonidentifiable schools, but in 1972-73, still no black principals or assistant principals in identifiable white schools.

[3440] Now, in 1975-76, the current year, we find one black principal in a racially identifiable white school. If my memory serves me correctly, that's in the Oakmont School. Furthermore, there are three black assistant principals assigned to racially identifiable white schools.

I think the pattern is fairly clear that over this period of time that was analyzed, black principals are by and large assigned to black schools, and whites are assigned to white schools, but also to administrate the racially nonidentifiable schools and, to a large extent, administrate nearly half of the black schools.

Q. Dr. Foster, do you have any objections to white principals being assigned to black schools?

A. No.

Q. Does the pattern you are speaking to deal with the failure to assign black principals to racially identifiable and white schools?

A. Well, in terms of analyzing a system for segregation or for discrimination or however you want to classify it, if you have a pattern where principals are assigned along racial lines, then to that extent you have a segregated system. One of the ways you can determine whether schools are segregated or not is if they do assign personnel along racial lines.

I think clearly the evidence indicates that as far [3441] principals are concerned, Columbus has done this and continues to do it. They are beginning to make very small inroads, and I understand you just don't go out and fire white principals and put in black principals or whatever, but there is nothing that would indicate over the past several years that — if they wanted to desegregate the schools as far as administrators are concerned, they could exchange some of the white principals and black principals in their assignments. Schools do this quite frequently. I think this is a typical — if I may further analyze it — a typical procedure for schools that are beginning to desegregate in a very small way, that is, they begin to move maybe one black principal in the total system into a white school, sort of break the color line, and then when everybody feels safe about that, they make another advancement.

Q. Dr. Foster, you mentioned in the very beginning of your testimony, I believe, that the assignment of faculty, teaching faculty, and I assume you included administrators, to schools is one of the things you look at to determine whether schools are segregated?

A. Yes, sir.

[3442] Q. I believe you also used the term whether a school was racially identifiable rather than segregated?

A. I believe I did, yes, sir.

Q. Does a pattern of assignment of teaching staff to schools over the years in such a way as to assign black teachers to black schools and white teachers to white schools, does that tend to identify schools as schools intended for blacks and whites?

A. Certainly.

Q. All right. Does that sort of identification of schools, is this something that carries forward, has a short or a long-term effect?

A. Well, I think it is like every segregative pattern, it doesn't wipe away overnight.

Q. In the Columbus School System. I believe you have been made aware that there was action taken by the Ohio Civil Rights Commission which resulted in the re-assignment of teaching faculty as opposed to principals, which we have already discussed. In the context of the history of such racial assignment of teaching faculty, would the reassignment of teachers without the concomitant reassignment of principals and pupils eliminate the effect of the original racial assignments?

MR. PORTER: Objection.

THE COURT: Overruled.

[3443] A. Not in my opinion, no, sir.

Q. In your experience, Dr. Foster, you have worked with school systems that have gone through the process of desegregation in what are sometimes called first generation and second generation problems?

A. Yes, sir.

Q. That's one of the responsibilities of the Center you are associated with; is that correct?

A. To work with what we called second generation problems following desegregation of faculties and pupils, yes, sir.

Q. And have you personally observed as well as studied in the literature any continuing effect of racial assignments of faculty?

A. Very much so, and even particularly administrators and central office personnel.

Q. Dr. Foster, did you make some examination of the use of rental facilities in the Columbus School System?

A. Yes, I did.

MR. LUCAS: If the Court will indulge me just a moment.

Q. (By Mr. Lucas) What data did you use to examine these rentals?

A. I used some spread sheets which were given to me of data collected or put together from the response to [3444] Plaintiffs' third interrogatory, No. 60, I believe.

Q. Did you also refer to PX 358?

A. Well, I think that's the Plaintiffs' Exhibit number for those responses is my understanding.

Q. What school rentals did you examine and for what periods?

A. Primarily rentals from the years that racial enrollment data were available. This would have been from 1964 to 1975.

Q. And what schools did that involve?

A. This would include rentals for Cassidy pupils in 1972-73, Chicago pupils in '64-'65, Hamilton, 1970, Highland Elementary School, 1964-65 and 1970, Kent Elementary School, 1970, Mifflin Junior-Senior, 1974-1975, South Mifflin Elementary from 1972 and 1973, and the Sullivant Elementary School for 1970.

* * * * *

[3447] Q. Dr. Foster, have you made an analysis of certain rentals utilized by the Columbus School System?

A. Yes, I have.

Q. Can you begin your explanation of the analysis with the 1975-76 information provided to you?

A. All right. My data came from PX 358 which was the response to Plaintiffs' Third Interrogatory and it lists the rentals. I started with 1975-76, the current year and

worked backwards. The only rental there is of record this year is a Mifflin Junior High School — Junior-Senior High School which was also a holdover from 1974-75. That is to say there was a rental from Mifflin Junior-Senior in '74-75 and also the current year.

[3448] Q. What do you understand the rental to be to use this term?

A. My understanding in these connections was that the rentals were used for purposes for taking care of over-capacity in the sending school situation.

* * * * *

[3449] In 1974, when this rental began, our records indicate that Mifflin had a capacity of 1,000 and an enrollment of 1559, and it was 57.7 percent nonwhite.

[3450] A. (Continued) Then in 1975 Mifflin Junior-Senior had a capacity of 1,200 by our records and an enrollment of 1,515. In the year 1974 and 1975 there was some space available in junior high schools in the system. The Buckeye Junior High School, which is approximately 10 miles to the south of Mifflin in the extreme south end of the district, had available about 89 spaces according to its capacity, and it was virtually all white.

Crestview, which is much closer to Mifflin, about four or five miles directly to the west of Mifflin in the sort of north central part of the Columbus District, had a capacity in 1974 of 86 under-utilized, and Wedgewood which is down in the western portion of the district, extreme western portion of the district about I would guess 11 or 12 miles from Mifflin, it had a population under utilization of 145. These three schools were ranged from 0.3 percent non-white in the case of Buckeye to 9.4 non-white in the case of Crestview. Totaling them together would have seating capacity not utilized of approximately 328 pupils.

In 1975 again Buckeye which is to the extreme south of the district had 219 seats available and was 2.4 percent non-white. Westmoor which is again in the western por-

tion of the district had a capacity of 84 which was unused, and it is 10.3 percent non-white. Yorktown which is in the extreme east part of the Columbus District is 7.8 percent non-white [3451] in 1975-76 and had seating available of 197. These three schools which were identified as white schools had a total capacity of 500 seats, according to our figures.

Q. If we can go back, in 1974 there was a capacity available of 320 and an excess at the Mifflin Junior High of 539; is that correct?

A. That's correct, yes, sir.

Q. And in 1975 there was space available for 500 and an excess in enrollment at Mifflin of 315?

A. That is correct.

Q. Now, Dr. Foster, is it clear from the data whether or not the rental space is included in the capacity figure for Mifflin?

A. I assumed that it was not, no, sir, and that, furthermore, the enrollment listed for Mifflin included those children who were assigned to the rental space.

Q. Dr. Foster, you are aware, are you not, of the recommendation of the report of the Feasibility Study Commission of the financial needs of the Columbus Public Schools of January 1976, Plaintiffs' Exhibit 65 which indicates that there should be closing of two of the three junior-senior high schools?

A. I have read parts of that document, yes, sir.

* * * * *

[3452] Q. Dr. Foster, were you aware that such a recommendation had been made?

A. Yes, sir.

Q. All right. Go ahead. I think the question before you now is: Were there any other —

A. Yes, I understand.

Q. Okay.

A. There was a rental for the Innis-Cleveland area, which is — I assume was awaiting the opening of the new school at Innis and that this space was rented prior to the opening. According to PX358, these pupils were also housed at the Tuskegee Housing Alumni Foundation.

[3453] Q. All right. For the period 1973-74, were there other rental spaces available other than the South Mifflin rental that you referred to?

A. Well, in 1973-74, South Mifflin Elementary had a rental and also Cassady Elementary. The Cassady Elementary had started the year previously in 1972-73 and continued for two years, and '73-74, the South Mifflin — well, South Mifflin also was in '72-73, so both of them rented space for those two years.

Q. What were the enrollments and spaces available at that period of time?

MR. PORTER: If the Court please, for the purpose of the record, I would object to the question, and the basis of my objection is that they have not laid the proper foundation for the question. I think that if he's going to give this type of testimony that we should know from whence he's getting the information so that it will simplify subsequent cross-examination, if any.

THE COURT: I think that's right. Would you ask him where he got the information and supply us that?

[3454] Q. Is it the same as the answer that you gave at the beginning of the testimony as to Plaintiffs' Exhibit 358, Dr. Foster?

A. Right, plus the enrollment data, I've already testified where I got my basic enrollment data through the years, and the capacity data was from a number — a variety of sources, including the Ohio — well, that's fairly complicated, but I've made out a capacity spread sheet for the entire period of the system, and that has about 12 different sources, I believe, which I have fully documented.

Q. All right. For Mr. Porter's convenience at note-taking, could you locate that and give us those sources now?

A. Yes. Do you want me simply to read the documents?

Q. Yes.

A. All right. That I derived my capacity figures from?

Q. Right.

A. PX 58, the title is "A School Building Survey of Columbus, Ohio." It's the Ohio State Report in May, 1959, and the pages were 68 to 75.

PX 59 is a study of the public school building needs of Columbus, again by the Bureau of Research at Ohio State for 1950. The pages here were pages 41 to 47 and 107 and 108.

PX 60, another Ohio State study for May, 1953, pages 51 to 58.

[3455] PX 61, which is the Ohio State 1955-56 study. I don't seem to have the pages noted for that.

PX 62, the 1958-59 Ohio State study, July, 1959, pages 48 to 54.

PX 64, the 1963-64 Ohio State study, published in June 1964, pages 54 to 60.

PX 63, the 1967-68 study at Ohio State, published March 1, 1969, pages 66 to 74.

[3456] A. (Continued) PX 66, capacities at junior-senior and senior high schools in the permanent secondary school buildings, November 1971.

PX 65 which is reported a Feasibility Study Committee on the financial needs of the Columbus Public Schools, January 27, 1976, pages 49 to 53. This included the elementary study conducted by the Division of Administration in October 1975 and secondary estimated October '75 by the Division of Administration, page 58.

PX 43, the reference manual on the May 4, 1971 School Board issue and operating levy, ten general facts about the Columbus Public Schools, pages 10-6 to 1015.

Q. And from that you compiled a spread sheet for the various years of the enrollment figures for the various schools; is that correct?

A. That's correct.

Q. And whenever you refer to enrollment, it comes from that source?

A. That is correct.

MR. PORTER: Thank you very much.

MR. LUCAS: We would be happy to make that sheet available to counsel.

MR. PORTER: Yes, I would like to see it.

Q. (By Mr. Lucas) Where did we leave off, Dr. Foster? Cassady, I believe.

[3457] A. South Mifflin and Cassady. All right, South Mifflin Elementary which was annexed in 1971 —

Q. Excuse me. You placed the 1975-76 overlay that is PX —

A. PX 278.

Q. All right. Would you outline the boundaries of the attendance area first, please?

A. For South Mifflin?

Q. Yes.

A. It is just below where the Mifflin Junior-Senior High School is in the sort of north central portion of the district. This had a rental facility in '72 and '73. In '72 the South Mifflin Elementary was 347 over capacity and was 79.9 percent non-white. In 1975 it was 312 over capacity, and it was 83.4 percent non-white.

I made an analysis of some space that was available in schools which were predominantly of the opposite race. In 1972 Northwood, which is in the north central — I can't seem to locate it. Everything north is north anyway. It is about three miles, I believe, from South Mifflin Elementary. For some reason I still can't seem to locate it on the map.

Northwood was 2.2 percent non-white and had a capacity available of 88 seats.

Kenwood which is about five miles to the west of [3458] South Mifflin over in the western part of the — northwestern part of the district was 2.0 percent non-white and had a seating capacity available of 102 seats. This was in 1972.

Medary which is about three miles from South Mifflin — all of these schools I am speaking of are in this general area to the north and west of the Columbus District. Medary is about three miles by the way the crow flies from South Mifflin and was 1.7 percent non-white with 58 seats available.

Northridge, about three and a half miles from South Mifflin, had 61 seats available with no non-whites. That's a little more towards the center of the district but in the north.

Oakland Park in the same region, about three miles from South Mifflin, 1.2 percent non-white had 54 seats available.

So in 1972 these five virtually all white elementary schools had 363 seats or spaces which would have been available.

[3459] Q. How many overcapacity was the South Mifflin Elementary at that time?

A. In 1972, 347 overcapacity. In 1973 when South Mifflin was 312 overcapacity, the same five schools had 553 seats available. Northwood had 119. Kenwood had 145. Medary had 112. Northridge had 90, and Oakland Park had 87.

In 1973 these five schools ranged from 0.5 percent non-white at Northridge to 1.7 percent non-white in Medary.

Q. All right. Did you perform the same analysis with respect to the Cassady Elementary?

A. Cassady which is not far from South Mifflin, a little in the north of the district and on the extreme east, again, Cassady was part of the Mifflin annexation in 1971 in this general area. Space was rented for Cassady over-

capacity in 1972 and 1973. In 1972 Cassady was over 352 spaces. Within a radius of five to six or seven miles there were eight elementary schools, almost all of them virtually all white — well, all of them virtually all white, none of them over 3.6 percent non-white, which had a combined capacity available of 563 spaces. This included — all these schools are in the north or north central, northwestern part of the Columbus zone. This included Beaumont which was 3 percent non-white and had 35 seats. Maize Elementary which was 1 percent non-white had 72 seats. Marburn, 2.5 percent non-white had 36 seats. Homedale, 3.6 [3460] percent non-white had 122 seats available. Michigan, 3.6 percent non-white, had 45 seats available. Valley Forge, 0.9 percent non-white, had 63 seats available. Kenwood had 102 seats available, 2 percent non-white, and Northwood had 2.2 percent non-white and 88 seats available.

[3461] Q. Now, what was the excess enrollment at capacity in 1971?

A. In Nineteen what?

Q. 71.

A. A hundred and thirty-four overcapacity.

Q. And it jumped to 362 in '72?

A. That is correct.

Q. All right. What happened in 1973? Did it continue to increase?

A. It continued to increase to 416 overcapacity.

Q. And capacity for both years or all three years has shown as what?

A. Four hundred and thirty-five seats.

Q. All right. And in '73, the percentage of black at capacity was what?

A. 48.6 percent non-white.

All right. In 1973, in a group of six schools, including Medary, Beaumont, Maize, Valley Forge, Homedale and Kenwood, ranging from three miles to approximately seven and a half miles the way the crow flies from Cassady, there

were 639 seats available. All of these schools — well, these schools range from 1.3 percent non-white at Valley Forge to 3.1 percent non-white at Homedale in 1973.

At Medary, there were 112 seats available; at Beaumont, 100; at Maize, 103; at Valley Forge, 87; at [3462] Homedale, 92; and at Kenwood, 145.

Q. That gives you a total of 639, and what was the total overcapacity at —

A. 416 in 1973 at Cassady.

Q. All right. And did this continue to increase in 1974?

A. In 1974, there were 526 overcapacity at Cassady.

Q. And what had happened to the racial enrollment?

A. It had climbed to 55.9 percent non-white. They show no rentals, however, in 1974, and I assume by that time the addition that increased their capacity from 435 to 630 was probably in use to take care of that increased enrollment.

Q. All right. Does the 1975 data show that increase in capacity at Cassady?

A. To 630, yes, sir.

Q. All right. And what happens to the racial enrollment between '74 and '75?

A. It increases at Cassady from 55.9 percent non-white to 89.3 percent non-white.

Q. In 1972-73, was there another school in the rental, McGuffey School?

A. Yes. It's listed in the PX 358 as the McGuffey Junior Elementary.

[3463] Q. And this school was at the — what racial composition in 1972-73?

A. 34.7 percent non-white.

Q. And I take it you made no analysis of alternatives available of a desegregative nature at that point; is that correct?

A. Because of the racial composition, I did not.

Q. All right. In '71-72, in addition to the McGuffey School, was there another junior high school involved?

A. Clinton Junior High School rented facilities in 1971-72.

Well, this will give it close enough, I believe, if we go back.

PX 299, the junior high school for '75-76 will show the Clinton Junior High School, which is to the — nearly to the extreme north of the district and in the central part.

Q. What happened to the Clinton Junior High at that period of time in terms of rental?

A. In 1971, at Clinton, which was 1.7 percent non-white, it had an enrollment of 1,249 and a capacity, according to my figures, of 1,000, which leaves it 249 seats over capacity.

In that year, the system was admittedly a bit tight for space, but in Mohawk Junior-Senior High School, [3464] which is to the south of the system, just across from what's now the Interstate and about, by my estimate about seven and a half miles from Clinton to the north at Mohawk.

At Mohawk, there were 194 seats available in the junior-senior high school.

Q. What was the percentage of black at Mohawk?

A. The percentage black at Mohawk in 1971 was 67.6 percent.

Q. All right. Were there a number of elementary schools in the period 1970-71 where there were rental spaces?

A. In 1970-71, there were four elementary schools that rented in addition to the McGuffey Junior-Elementary, which was still renting but which I did not make an analysis of because it was 20.6 percent non-white.

Q. All right.

A. There was Hamilton Elementary, Highland Elementary, Sullivant Elementary and Kent.

I again placed the elementary overlay for '75-76, which is Plaintiffs' Exhibit 278, over the 1970 Census, PX 252. I think these schools will be found on it.

First of all, Hamilton, which is in the center of the district, a little to the north, in 1970, there was only 8 over capacity, according to my figures. There was 93.5 percent black — or non-white, rather.

[3465] The same year, Highland, which is to the west of the district out Broad Street a way, was 68.9 percent non-white and an overcapacity of 63 pupils.

In 1970, Kent Elementary, which is in the center part of the city and a little to the south, it's a mile or two south of Broad Street, Kent was 90.1 percent non-white and 126 pupils overcapacity.

And in the same year, Sullivant, which is a little southwest of the central part of the city, of downtown, Sullivant Elementary was 62.2 percent non-white and had 65 seats overcapacity.

If you add these four schools together, that gives you a total in 1970 of 262 of spaces that were needed.

At the same time, in 1970, I found at least six white elementary, racially identifiable white elementary schools which did have a considerable amount of capacity available. One of these was Kenwood, which is in the northwest part of the district, which was zero percent non-white, and it had 151 seats available.

Q. What was its enrollment, according to your figures?

A. Its enrollment was 255, with a capacity of 406 according to my figures.

Q. And where did you get the enrollment data for all of this?

A. From 1970 — pardon me a second. In 1970, this [3466] would have been from Plaintiffs' Exhibit No. 6.

Northwood, which is in the central northern part of the system, in 1970, it was 3.3 percent non-white and had 44 seats available.

At Beaumont, which is in the northern-eastern part of the system had 32 seats available and .2 percent non-white.

Bellows, which is down in the southwestern part of the Columbus District had 134 seats available, 5.5 percent non-white.

At Parsons, which is in the south part of the Columbus School District, it had 107 seats available and no non-whites in attendance or in enrollment.

Stewart, which is to the central and southwestern part of the system, had no non-whites, and had 38 seats available.

Q. Let's go back to Parsons. What was the enrollment at Parsons?

A. Parsons had an enrollment of 357, according to my figures, with 347 capacity.

[3467] A. (Continued) These schools ranged, if you could match them up in the same general geographic area with the schools that were over capacity and the schools that were under capacity, I think you could have put them together with a reasonable amount of travel distance because there were some of both in the south and some in the western part of the district and some in the north and north central part.

Q. All right. Were there rentals in '67 and '68?

A. There were two rentals listed in '67 and '68. There was Ohio Elementary and Windsor Elementary.

I made an analysis of these and found that in 1967 when Ohio rented space, it was 121 over capacity, and in 1967 when Windsor rented space, it was 110 over capacity. Windsor also rented space in 1966, and it was 221 over capacity.

Q. All right. Looking at under-utilized schools, did you find very much in the way of excess capacity at that point?

A. In 1967 I did not find enough spaces available in opposite race schools to warrant a decision that space was available of that nature. There could have been perhaps 70-75 pupils moved, but not enough for the number needed.

* * * * *

[3473] Q. Dr. Foster, did you examine all of the optional attendance areas in Columbus that were available in the data?

A. Some of them much more closely than others, but my main intent was to examine the ones that had — that in my opinion had racial implications, so my examination of some of them which obviously weren't racial was very cursory.

Q. All right. Dr. Foster, in your examination of the optional attendance areas, did you of necessity also have to examine boundary changes that took place over a period of time?

A. In connection with those optional zones, yes, sir.

Q. And was it also necessary to interrelate the opening and I suppose on occasion the closing of schools during that same examination?

[3474] A. In some instances, yes, sir.

Q. All right. Did you also have to examine the changes at other grade levels other than the area where the option existed?

A. I think if I interpret your question correctly, there were some options which I judged to be racially oriented which were true at the elementary level, and the same territory was true at the junior high school level and also at the senior high school level.

Q. All right. Did you examine the Fair Elementary-Fairmoor Elementary optional attendance area?

* * * * *

A. I should first apologize to Mr. Lamson. In his absence, we curled the census maps the wrong direction making it a little more difficult.

The Fair Elementary-Fairmoor Elementary, using the 1960 Census, PX 251, as the base map and the '59-60 elementary overlay, PX 263 on top of that, just to the east of the district at — and Fair is just to the east of [3475] the center of the city and Fairmoor is across Bexley just to the east of Bexley. Directly east of Fair Elementary, I used these two documents, PX 263, PX 251. I used the enrollment data, particularly PX 12, which gives the percentage non-white for the years, I believe, '64, 1965 and 1966, and various other data on enrollment and percentage, racial percentages through the years of the option.

Q. All right. Were you able to determine from the data available to you the year the option began?

A. Yes. The option began in 1959-60, and continued through last year, 1974-75.

Q. All right. At its inception, were you able to determine the enrollment of the school itself, or were you able to determine the underlying racial composition of the attendance area?

A. Well, we did a combination of that. One is we knew the racial enrollment in 1964, and we extrapolated that a bit from that to get some idea of what the racial percentage was in '59-60, and then we had the '59 overlay on top of the '60 Census, and that also contributed to our knowledge of the ethnic situation.

In 1960, according to the census map, the optional zone area, which is bounded on the north by Broad Street and on the east by Preston, down about two-thirds of the way and then Parkview for the balance, on the south by Fair, [3476] is for the most part — for all the part, as a matter of fact, and on the west by Alum Creek.

This optional area on the 1960 Census is entirely white, which is 0 to 9.9 percent non-white.

Q. Would you look at the black data and see if you can get a more refined reading as to both the number of people living in that area and their races?

A. The race indication was that this was indeed an all white area. The block data for the 1960 Census gave us the number of people, not the number of pupils, but the number of total people in the zone. There were six blocks which had people in the optional zone.

Block 1 had 11 people in four houses. Block 2 had 27 people in seven houses. Block 3 had 42 people in sixteen houses. Block 14 had 53 people in nine houses. Block 15 had 22 people in six houses, and Block 16 had 4 people in one house. This made a total of 159 persons in 43 houses, and they were all white, according to the census data.

Q. All right. What was the underlying attendance area of the schools to which the option was made available?

A. On the west, the pupils could go to Fair. On the 1960 Census, Fair to the extreme west has three or four white blocks, 0 to 9.9 percent non-white — or black, rather. It's mostly made up, otherwise, of Franklin Park, the white area [3477] to the northwest, and all the blocks are either orange, blue or green, ranging from ten percent non — ten percent black to 89.9 percent black. The option to the east, Fairmoor, as of the 1960 Census, has no blocks other than white blocks.

Q. By white, you mean 09.9?

A. That's correct. This would be borne out by the 19 — by the PX 12, which gives the racial data for 1964 as Fairmoor at 0.1 percent non-white, so I would assume that it would be safe to say that in '59, when the option was started, Fairmoor was virtually all white.

Q. What was Fair in 1964, the school from which the option was carved?

A. 92 percent non-white in 1964.

[3478] Q. And in the 1960 Census, the total population, as you've already described, it's orange, blue and green, the major portion?

A. Yes. That would indicate that it was — other factors equal, that it was getting blacker by the year.

Q. Is there an unusual factor about this option relating to its non-contiguous nature?

A. Well, it is a bit unusual in that it jumps the City of Bexley and the option is to schools on either side east and west of the City of Bexley.

Q. In your opinion, Dr. Foster, does this option established by the Columbus School System, at least from the records made available to us in the 1959-60 school term and continuing until 1975-76, did it have a racial effect?

A. In my opinion, it did. The option on the face of it would have been set up to permit the white pupils who lived in the optional zone to attend Fairmoor rather than Fair.

Q. Dr. Foster, is this an option which was unusual in nature except other than the discontinuous characteristics or is it a type of option which in your research you have found before?

A. Well, it's very similar to options that are set up to maintain an escape alley for whites as a school area gets blacker and where you have a white area or white zone that is [3479] available to which they can be optioned.

Q. All right. Did you examine the Franklin Junior High School, Eastmoor Junior High School optional attendance area?

A. Yes, I did.

Q. Would you put up the overlays for them?

A. All right.

Q. Have you placed up the junior high overlay for 1959-60?

A. Yes. I'm looking at the base map, again, Plaintiffs' Exhibit 251, which is the 1960 Census, the junior high '59-60, which is Plaintiffs' Exhibit 283.

This optional zone was — started at Fair-Fairmoor in '59-60, and as depicted on the map towards the — just

the east of the center of the downtown area, Franklin Junior High would be the westernmost school, and again across Bexley to Eastmoor Junior High School, directly east of Franklin except for the intervening City of Bexley. This was carved, again, out of the easternmost part of Franklin Junior High School.

Q. All right. Franklin Junior High School, in 1964, had what racial composition?

A. According to Plaintiffs' Exhibit 12, Franklin was 86 percent non-white in 1964.

Q. And Eastmoor?

[3480] A. Eastmoor was 31 percent non-white.

Q. All right. Examining the 1960 Census map, what does the underlying area for the Franklin Junior High area show?

A. Franklin Junior High School, overlooking the '60 Census map, the northwest portion, which would be about, I would judge, a third of the total area, is colored mostly red with a little orange, meaning from the orange 50 to 89.9 percent, the red, 90 to 100 percent black.

[3481] A. (Continuing) Everything south of Broad Street which would be roughly two-thirds of the zone as the elementary is colored some white, some blue, some green, some orange, ranging from the white at 0 percent to 9.90 up to 89.9 percent black.

The option which is Eastmoor Junior High has a rather peculiar configuration going all the way to the extreme east of the district approximately where Yorktown would be at this point, Yorktown Junior High School, and to the north of Whitehall and then back into the northwestern part of the Eastmoor zone just to the northeast of Center City. This is an all white area except for that portion which comes out from the Center City and is blue, orange, red and a couple blocks which are green.

Q. How long did this option continue?

A. This option continued as the elementary through 1974-75. It had some modification.

Q. What were the nature of the modifications?

A. In 1961-62 the option was changed to include an additional junior high school to the east which is Johnson Park. Johnson Park is directly south of Eastmoor Junior and comprises the area at that time to the extreme south-west of the — I mean the southeast of the Columbus District. There are on the census 1960 map in the total area of Johnson Park, there is one pink block or one orange block, [3482] one red block, I believe, and one blue block.

Q. Does that comprise the other half of the areas surrounding the Whitehall —

A. It is to the south and southwest of Whitehall, yes, sir. If you looked at the '61-62 junior high school map which is PX 285, it would simply show an arrow coming out from Franklin or from the optional zone also down to Johnson Park which would indicate a three-way option rather than two.

Q. All right. How long did that particular double three-way option continue?

A. Well, in 1964 the option was for Johnson Park — I beg your pardon. In 1961-62 it changed from Franklin and Eastmoor to Franklin, Eastmoor and Johnson Park. Then in 1962-63 the option changed from Franklin Junior High School to Johnson Park, and it left out Eastmoor. Then the following year in 1963-64 it changed back to the option just between Franklin and Eastmoor, and it continued that way until the end of the option in '74-75.

Q. I believe you described the Franklin attendance zone. What about the optional area itself; is its basic character the same as the one for the elementary?

A. Yes, it is coterminous with the elementary zone.

Q. Did those boundaries, elementary and junior high, remain the same in terms of the optional area through that [3483] period, through 1975?

A. Through the life of the option, yes, sir.

Q. Dr. Foster, are optional attendance areas that have racial effect always between schools, one of which is 100 percent or almost 100 percent white?

A. No, not necessarily. They can be between — well, for an example, it could be between a school that's 90 percent black and 50 percent white.

Q. In your experience, have you found that there is movement by whites to schools with lower percentages of black enrollment in the various communities you have studied?

A. Very definitely, yes.

Q. Is it true even with the so-called magnet programs?

A. Yes. That was particularly true in the Detroit case, magnet schools.

Q. What was the effect in your opinion, Dr. Foster, of the junior high option and its variations with respect to the Franklin Junior High School?

[3484] A. Well, I attempted to develop or to determine some rationale for the year's change with Johnson Park, but I couldn't understand why that was. The total effect of the junior high option would indicate to me the same as the elementary option, and that is that it allowed the white pupils in the optional zone to avoid going to Franklin Junior High School and instead go either to Eastmoor or to Johnson Park.

Q. What was Johnson Park's racial composition in 1964 as compared to Eastmoor?

A. Johnson Park in '64 was 0.37 percent non-white.

O. And it was added to the option in which year?

A. For 1961-62 and stayed in '62-63 and was out again in '63-64.

Q. All right. Did you examine the optional attendance area between East Senior High School and Eastmoor Senior High?

A. Yes, I did.

Q. Would you put up the senior high overlay for the '59-60 school year?

A. This overlay is Plaintiffs' Exhibit 304 and describes — well, on this is a picture of the option at the senior high level which is between East and Eastmoor, East being the school which is just off Broad Street towards the end of town, and Eastmoor again across Bexley and the same [3485] plant as the Eastmoor Junior High School.

Q. Now, East Senior High was what racial composition in 1964?

A. In 1964 according to Plaintiffs' Exhibit 12, East was 95 percent non-white.

Q. And Eastmoor, the school to which the option was given?

A. In that same year it was 11 percent non-white.

Q. The underlying census data at East shows what in terms of color?

A. The East Senior High, about half of it, a little more than half is above, to the north of Broad Street, and that is almost entirely red or some orange, a little white to the extreme north and one or two blue blocks and I believe one green block just north of Broad, which would indicate that it was heavily black in that area. To the south of Broad you have some white blocks, I would judge perhaps a third of the number, and then you have a little bit of everything, green, blue, orange and red, to complete the picture.

Q. And in 1960 in Eastmoor, the underlying color was what?

A. The 1960 Census, Eastmoor was — the portion to the east of the zone, the Eastmoor High School encircled completely the City of Whitehall, and all of that portion [3486] which is in the extreme southeast of the Columbus District, the extreme east and the northeast, as you go out eastward on Broad Street and Main Street, all of that was white except for two single blocks, one of which is

red and one orange. Then to the extreme northwest of the Eastmoor High School zone, as in the junior high school, coming out of the central part of the city, you find some red blocks, some blue blocks, about four green blocks.

Q. Roughly speaking, it formed a doughnut around the Whitehall City; is that correct?

A. That is correct, the attendance zone for Eastmoor Senior High School.

Q. All right, the senior high optional attendance area on the base map, Plaintiffs' Exhibit 251, does that show as white?

A. It shows as all white, yes, sir.

Q. And that is the same area that you previously described in giving the blocks and the number of people in each block from the 1960 Census; is that correct?

A. That is correct, yes, sir.

Q. In your opinion, Dr. Foster, what was the effect of the East Senior High-Eastmoor Senior High optional attendance area?

A. In my opinion, it was a racial oriented optional zone in that it allowed the white pupils who lived in the [3486A] optional zone to attend the predominantly white high school, Eastmoor, and to avoid being assigned to the East High School which was predominantly black or non-white.

[3487] Q. How long did this option continue, Dr. Foster?

A. This option went on until last year. It ended this year and continued through 1974-1975.

Q. Now, Dr. Foster, you have described this same optional attendance geographic area appearing at elementary, junior and senior high school levels. Did you have any data showing how many students there were taking advantage of the option in each particular attendance period?

A. No, I did not. All you can do is make inference from the total population of the optional attendance zone.

Q. The School Board kept the option in the boundary directories for each of those years; is that correct?

A. Yes, sir, I believe so.

Q. In examining that option, Dr. Foster, did you find any capacity reason for such an option, particularly one located in that part of the zone?

MR. PORTER: I would object until he lays the groundwork for it.

THE COURT: Overruled.

A. At the junior high level and the senior high level, there would be, according to my figures, no capacity problem. For example, from 1962 until 1966, Franklin had space probably to house these pupils. They ranged from five under capacity in 1963 to 101 under capacity in 1965. At the same time Eastmoor starting in 1963 had a considerable overcapacity [3488] at the senior high school level through the first four years of the option, at least, both high schools, East and Eastmoor, had considerable amount of capacity, and then it varied at both junior-senior high school levels for the next ten years of the option going back and forth one way and another on capacity. At the elementary level in 1961 through about the first ten years of the option, Fair was in an overcapacity situation. At the same time, Fairmoor was also in an overcapacity situation, but not to the extreme that Fair was. My analysis of this would be that there weren't probably enough pupils at any given level of the three levels in that optional zone to tax the capacity unduly of any of the schools involved.

[3489] Q. Was there another option involving the Franklin Junior High School and Roosevelt Junior High School?

A. Yes, sir.

Q. And when does the data indicate that that particular option began?

A. This option, according to my data, started in 1955-56.

Q. And where was the option carved from?

A. It was carved out of the southern end of Franklin, which we can show, perhaps, with the junior high overlay in PX 281.

[3490] Q. (By Mr. Lucas) Dr. Foster, have you overlay up for the 1957-58 school term?

A. Junior high school, yes. It is PX 281 over Census Map 1960, PX 251.

Q. All right. Is there an option between Franklin Junior High and Roosevelt Junior High?

A. Yes.

[3491] Q. And I believe you testified already that it began in 1955-56, the school term; is that correct?

A. That's correct.

Q. What's your source of that information?

A. At the center of the map, the blue hash marks, Roosevelt to the South and Franklin is to the north, and the optional zone is a one-block area wide, about 18 or 20 blocks long in between the two.

Q. Where did you get the information, Dr. Foster, that the option began in 1955?

A. Out of the '54 and '55 directories. The '55 directory is the first place you find the option. It's not in the 1954.

Q. All right. Does it show up in any of the OSU Studies?

A. It probably did. I don't have a note to that effect, but those options are in one-page maps, usually, in the OSU Studies, and I would assume that it would show up in there, also.

Q. And how long did this particular option continue after the 1955-56 school year?

A. This continued through 1960-61, with some modifications, very small modifications.

Q. All right. Would you explain the option, please?

A. All right. It's carved out of the southern part [3492] of Franklin, which is to the north. The option is bounded on the north by Main Street and on the east by Alum Creek, on the south by Mound Street and on the west by Monroe.

The base census map for 1960 shows the option to be predominantly white in the blocks with one or two green and blue blocks with the white ones, the green being ten to 27.9 percent black and the blue 28 to 49.9 percent black.

[3493] Q. What did the respective districts look like?

A. The Franklin district to the north on the 1960 Census north of Broad Street was almost all orange or red, one or two blue blocks, one green block, a couple white ones. To the south of Broad, which is about half of the geographical portion of the zone, you have a combination of white blocks, blue blocks, green blocks and orange blocks.

The school to the south, Roosevelt Junior High School, in the extreme northern portion of the zone, had a scattering of white blocks, orange blocks, blue blocks and green blocks. Then starting south of Livingston, very few except white blocks. There are two or three green ones and two or three blue ones south of Livingston, indicating a predominantly white area total population-wise as of 1960.

Q. What were the enrollments as of 1964 between Franklin and Roosevelt?

A. PX 12 in 1964, Franklin Junior was listed as 86 percent non-white, and Roosevelt was listed as 40 percent non-white.

Q. Would it be fair to describe the areas described by the option as in a changing area from your examination of the map?

A. That is correct. It is along the portion of the Franklin area that is changing.

Q. All right, and did it begin in 1955, whereas the [3494] Census Map that you have is for 1960; is that correct?

A. That is correct.

Q. Can we place underneath the 1950 Census, please?

All right, we still have the 1957-58 overlay, Plaintiffs' Exhibit 261 now overlaid on Plaintiffs' Exhibit 250, the 1950 Census. The Roosevelt zone as of the 1950 period is mostly white in its underlying color; is that correct?

A. It is all white except for about 8 or 10 blocks to the north and to the west — well, yes, that would be right — which are blue, green, and three orange ones in the extreme northwest.

Q. And these boundaries again as of '57-58, the Franklin School location is above that area in an area that is apparently changing as of the 1950 Census; is that correct?

A. That's correct, because the color line is at Broad Street primarily, and south of Broad you have a mixture of primarily green and blue blocks with a predominant number of white ones in the 1950 Census.

[3495] Q. All right. I show you Plaintiff's Exhibit 61, the 1955-56 Study, Public School Building Needs, Columbus, Ohio, referring you to page 18, figure 3, grades 7 through 9, and ask you if the option appears on that map?

A. The option does appear, yes, sir.

MR. PORTER: Could we have the reference again, please, the exhibit number?

MR. LUCAS: Sure. 61, page 18, figure 3.

MR. PORTER: Thank you.

Q. All right. The students attending Franklin were given an option to attend the Roosevelt School under this option, as you understand it?

A. Or Franklin, yes, sir.

Q. How many blocks long was this option?

A. I believe I testified about 18 to 20 blocks long and one block wide.

Q. Was this option modified in 1960?

A. Yes.

Q. Do you have the 1960 overlay?

A. Yes. We place Plaintiffs' Exhibit 284, the junior high '60-61 overlay over the junior high '57-58, which is Plaintiffs' Exhibit 281 —

Q. Excuse me. I believe you'd better move the other base map. I'm sorry.

A. All right. Placing Plaintiffs' Exhibit 284 over 281, [3496] and both of them being over the 1960 Census, you can see that there are two or three blocks at the extreme western end of the option which do not continue in 1960-61. Otherwise, the option continues as before.

The western boundary of the option was shortened, I believe, by two blocks, which would move it over from Monroe to 18th Street, as I read the map.

Q. All right. Was there further modification in 1961?

A. Yes, the modification in 1961 was that the option was closed. The PX 285 overlay, PX 284, will illustrate that the option in '61-62 was closed, and the optional zone was a re — well, it was rezoned, the optional area was rezoned back into Franklin.

Q. All right. And Franklin was the predominantly black school?

A. That's correct. Franklin stood at 86 non-white, Roosevelt at 40 percent.

Q. All right. Dr. Foster, in general, from your experience with optional attendance zones, do they tend to be changed or closed after they have served a particular purpose?

A. Well, not always, but they tend to be, yes. Some of them just drag on through unnecessarily, I think.

Q. Does this particular change in the Franklin zone [3497] fit any pattern which you're familiar with?

MR. PORTER: Objection.

THE COURT: Overruled. You may answer.

A. Yes. As the area that's under option gets blacker in the two schools, if they are two that are involved, both approach each other in racial composition, then there's less reason or little reason to maintain an option if, indeed, it is a racial option, and I would so judge this option, because it's obviously nothing to do with capacity based on the figures.

[3498] A. (Continued) And as there is less need — if there are no whites left in here to go south to the Roosevelt High School, then there is no longer need for the option.

Q. You said there was no capacity reason. Did you study the capacity between Franklin and Roosevelt to see whether that might account for this kind of option?

A. Yes, I did.

Q. What did you find?

A. I found that for the six years of the option, there was undercapacity each year in Franklin ranging from 28 seats to 152 seats available in 1958.

Q. That's the school the option was carved from; is that correct?

A. Yes. In Roosevelt there was overcapacity the first four years ranging from 23 seats to 76 seats in 1958; and in 1959 and 1960 there was less or there was more capacity available still at Franklin than there was at Roosevelt. Both of them were under utilized.

Q. And if there had been a question of Franklin being overcrowded and a desire to assign or permit some students an option out of Franklin into another school in an effort to relieve the overcrowding, would you have expected to find that Franklin was — its enrollment figures and capacity figures, that it showed seriously overcrowded?

A. If it was an option for capacity reasons, yes, you [3499] would expect Franklin to be overcrowded.

Q. Dr. Foster, did you examine the optional area between Central Senior High and North Senior High?

A. Yes, I did.

Q. I believe this started in 1960-61; is that correct?

A. Yes, sir. We have on the board the senior high '60-61, Plaintiffs' Exhibit 305, overlaying the 1960 Census, PX 251.

Q. All right. Would you describe the — first of all, do you know what school the option was carved from?

A. According to my records, it was carved out of the northwestern portion of the Central zone, the Central zone being a high school zone to the southwest of the city directly west of center city and extending on out in a northerly portion which surrounds Grandview Heights and I believe includes most of what would be the elementary attendance zone at Kingswood. That's the Kingswood area. So the option was carved out of we could say the northwestern part of Central, and the option was between Central and North which is immediately to the north of the Central District.

Q. All right, and the optional attendance areas described in PX 305, the senior high overlay for '60-61, what does the racial composition show as the underlying census data?

[3500] A. If you look at the hash marks illustrating the option, it is all white except for one block almost at the extreme western end of the option, and that one block is blue.

Q. All right. Would you describe the Central and North Senior High attendance zones in light of their underlying demographic data?

A. All right. The 1960 Census underlay shows that North is completely white except for a small portion in the southeastern part and about three blocks otherwise which

are green in the southern part around Ohio State University. In the southeastern part there are about I would say 10 to 15 blocks, a couple of which are green, three of which are blue, and the rest are either orange or red.

The Central attendance zone at that time, according to the 1960 Census, would be predominantly white also, but a considerable number more of blocks scattered around the periphery and also some in the center of red, orange, green and blue. I would say about perhaps a third of the blocks or a little more maybe would be non-white blocks, would be colored blocks.

Q. What was the racial composition of Central, the zone, the attendance area from which the option was carved in 1964 according to the exhibits?

A. Central would have been 27 percent non-white, while North was 7 percent non-white in 1964.

[3501] Q. All right, and do you have the latter enrollments at those schools?

A. Yes, I do.

Q. What happened to the enrollment of those two schools?

A. Well, this option continued through 1974-75, last year, with some modification.

[3502] A. (Continuing) And in 1974-75, the year the option ended, Central was 33.6 percent non-white, and North Senior High was 15.6 percent non-white.

Q. All right. You've said there was some modifications in the option. Can you tell us what they were and when they took place?

A. The modification was that in 1960-61, it started, the option started with grade ten, and in 1961-62, it included grades ten through twelve, and I believe that's the only modification that was involved.

Q. All right. Where was the optional area put back after — when it was changed this school year?

A. If we overlayed the senior high '75-76 map, we would see that it was back into Central.

Q. During the period the option existed, do you have an opinion as to what the effect of the option was?

MR. PORTER: Objection.

THE COURT: Overruled.

A. In my opinion, the option was primarily racial, allowing whites to go from the Kingswood area and Central High School into North High School, which continuously was a whiter school. I have an idea there also may have been some overtones of the fact that Central, I believe, is considered sort of an inner city school while North would be more of a suburban school. I would expect there would be some [3503] of that in it, also.

Q. Was there a capacity problem with this option?

A. No capacity problem that I could determine. Both Central and North, from 1960, especially for the first ten years of the option, were underutilized by a large number of students, anywhere from 180 to over 400, as high as 580 at one point at North, underutilized, and only in the last three years, North has become overpopulated while Central is about even. So for the largest part of the life of the option, there was no capacity problem either way.

Q. North, even when it became overpopulated, substantially so, compared to its earlier underutilization?

A. No, only somewhere between 15 seats in 1974 and 90 in 1972, which is very insignificant for a high school.

Q. All right. Did you examine an option, Dr. Foster, which included East Senior High and Linden Senior High — which appeared in 1962-63?

A. Yes, I did. '62-63. On the board, we have senior high '62-63, Plaintiffs' Exhibit 307 overlay, PX 251, a 1960 Census.

[3504] Q. All right. Did you determine from the map and from the directories that the option began in 1962-63? In this case, did you primarily rely on the map?

A. My notes don't include the origin. It is included on the map that this was the first year.

Q. All right. How long did this one continue?

A. This started in '62-63 and continued through '75-76.

Q. Would you describe, first of all, the boundaries of the option?

A. All right. The option is almost in dead center of the map. It's a rectangular area, nearly square. It's bordered on the north by Windsor Street, on the east by Woodland, on the south by a railroad, I believe the N and — I'm not sure, maybe a couple of railroads — anyway, railroad tracks, and on the west by Joyce.

The option — I'm sorry.

Q. The optional attendance area, the part that's cross-hatched in green, what does the underlying census data show for that?

A. The 1960 Census shows a combination of white blocks, and to the north red blocks and orange blocks, I would judge about a third each.

Q. All right. And what does the 1960 — I'm sorry.

First of all, before you do that, tell us what [3505] the underlying attendance boundaries, what the demographic data is for East and for Linden?

A. All right. For East to the south of the option — and the option comes out of the northern part almost like a chimney of the east zone. The east, north of Broad Street, is almost completely red with a few orange blocks and very few white ones.

Q. Would you describe the boundary, just with the pointer, so the Court can see it?

A. All right (indicating). It's about half above Broad and half below Broad to the east of the center part of town.

Q. And the chimney extends up to, what street is that on the north?

A. The chimney extends up to Woodland, and I believe it encompasses what has been described in the case

as the American Addition, which is to the north of that chimney.

To the south of Broad High Street and East High School zone, you will find a combination of white, orange, red, blue and green, pretty much an equal mix, I would say, to the north of the option, Linden-McKinley, which is in the center part of the Columbus District and a little to the north of downtown.

[3506] A. (Continuing) North of 17th you will find all white blocks except for one or two green ones and one blue one. Then south of 17th which at this point in the 1960 Census appears to be the racial line, you will find a few white blocks, a few blue and green ones, and the balance red and a couple of pink ones.

Q. Is the Linden-McKinley zone one that has changed frequently as you go through the maps, attendance boundaries?

A. Yes, especially in the southern part as the black population goes north and then northeast through the years.

Q. In 1964, what was the enrollment at East?

A. In 1964, PX 12 would indicate that East was 95 percent non-white and Linden was 12 percent non-white.

Q. All right. Were there any changes in this particular option in 1975-76?

A. I don't have any, no, sir.

Q. All right. When it was ended, when the option was ended, what had happened to the two zones in terms of the racial enrollment?

A. Well, I would like to check, but my notes indicate it is not ended. If I could have the '75 overlay.

All right. PX 320, the senior high '75-76, would indicate that the option in '75-76 is the same as in '62-63 except for one block further extension west which I would assume would probably be the western portion of Joyce Avenue, [3507] since sometimes the directories will indi-

cate that one side of the street goes one way and one the other on the boundary line.

Q. All right. During the period that the option has existed, I believe in '64 East was 95 percent non-white, Linden-McKinley 12 percent non-white. Did this option in your opinion have any racial effect?

MR. PORTER: Objection.

THE COURT: Overruled.

You may answer.

A. In my opinion, it was definitely a racial option at its beginning, since you have a disparity of 95 percent in East non-white in 1964 and Linden-McKinley with 12 percent in 1964 non-white. Continuing through the years you have a similar disparity except that about 1970 — well, a little before 1970. About 1966, a couple years later, Linden began to change in racial composition. In 1968-69 it was 35.5 percent non-white, while East was 98.9 percent. This year, 1975-76, East is 99 percent non-white and Linden is 89.5 percent non-white. It would seem to me that as of now there is obviously no racial connection with the option and it is not — in examining the capacity data certainly for the first nine or ten years of the option, there was no capacity problem involved.

Q. What were the capacity figures between East and [3508] Linden?

A. Well, for the first — pardon?

Q. Between East and Linden?

A. Reading a few of them quickly in the first nine years starting with 1962, East was under 264, under 37, under 65. In 1965 it was over 97, over 109, over 6. Then in 1968 it was under 7 and in 1969 under 60. Linden High School maintained a constant undercapacity in those years ranging from 584 undercapacity to about 10 under capacity in 1967.

[3509] Q. All right. Did you examine the options between West Mound and Highland?

A. Yes, I did.

Q. Did you examine this both in terms of the optional attendance area and in terms of boundary changes?

A. Well, yes. Boundary changes are always part of optional attendance zones because the boundaries do change as the options change.

Q. Put up the 1950 base map if you would, please, first.

A. We have on the board PX 263 which is the elementary '59-60 overlay and PX 250 which is the 1950 Census.

Q. All right. Point out the area of the option, if you will.

A. It is to the western portion of the district lying between Highland and West Mound, Highland being to the north and West Mound to the south. The option comes out of the southeastern part of the Highland Elementary attendance zone.

Q. In 1950 that area shows white; is that correct?

A. The optional area shows all white in the 1950 Census.

Q. All right. Looking at the Highland and West Mound area in 1950, the West Mound shows entirely white, whereas part of the Highland zone has red, green and orange in it; [3510] is that correct?

A. Just about, but there is one block in West Mound which I believe is green just south of Stafford. Otherwise they are all white. Highland is partly red, partly orange, partly green and blue and white.

Q. All right. This particular concentration of black population, does it have some common name in terms of its geographic area?

A. I believe that's called the hilltop area, if I am not mistaken.

Q. Now, let's put the 1960 Census up.

All right, is the optional area still white?

A. Looking now at the '60 Census underneath, the optional area is still all white. The West Mound Elementary attendance area has added three or four blocks either

green or blue in the northwest corner, and the Highland attendance area has added a considerable number of green, blue and red and orange blocks which leaves it only with its north — well, about a third of the eastern, a third of the Highland zone to the east is still white, according to the 1960 Census.

Q. When did this option start?

A. According to my notes, it started in 1955-1956.

Q. And what is the source of your information with respect to the starting date?

[3510A] A. The '55 directory, plus the OSU 1955 study which is PX 61, Figure 2, page 17.

[3511] Q. All right. How long did it continue?

A. It continued through 1960-61.

Q. And this was carved originally out of Highland in the southeastern end; is that correct?

A. That is correct (indicating).

Q. What happened in terms of enrollment? What does the data show for 1964 at West Mound?

A. PX 12 indicates that in 1964 West Mound was 15 percent non-white, Highland was 75 percent non-white.

Q. The option is approximately what, three blocks long?

A. I would judge so, and it's square, virtually square, but I think those are probably long — they appear to be long blocks running north and south.

Q. What was the effect of this option, in your opinion, Dr. Foster?

MR. PORTER: Objection.

THE COURT: Overruled.

A. In my opinion, this was a racial option which allowed the whites to leave Highland, which was largely and shortly a non-white zone, and go to West Mound, which was a white area.

Q. Okay. Was this area rezoned the following year to the option, in other words, ended?

A. In '61-62, most of the option was zoned into [3512] West Mound.

Q. All right. Can we put that overlay up?

A. Looking at elementary '61-62, which is Plaintiffs' Exhibit 264 over Plaintiffs' Exhibit 263, there is a jagged line at the southern end of Highland and at the northern end of West Mound indicating a new boundary line which ended the option and took in, I would say, the northern third of the area into — optional area into Highland and the southern two-thirds into West Mound.

Q. All right. So the wider area which previously had optioned into West Mound by this boundary change is assigned to West Mound?

A. About two-thirds of it, yes, sir.

Q. Is this in any way, from your analysis, a capacity change?

A. It could be in the sense that Highland's was over-capacity for those years, '55 to '60, ranging from 10 over-capacity in '59 to 105 over in 1957, whereas West Mound was under capacity in five of those years, ranging from under 4 seats in 1957 to 105 in 1960, but overcapacity in 1968 by 137, the point being, however, in terms of racial connotation of this option is that if they really had a capacity problem, and I think it probably did, it would have been very simple to make the option to the west of the option that did exist and have a desegregative effect rather than [3513] allowing the whites to — if they really needed seats, then they could have zoned an area further west of the option providing numbers of pupils could be moved, and they would undoubtedly have been black pupils rather than white pupils as this case would be.

[3514] Q. Are you saying they could have created an option or they simply could have redrawn the attendance zones?

A. The attendance problem being east, the intelligent thing would have been to actually rezone, it seems

to me, so you know that children were going to move rather than give the choice.

Q. When they do rezone, where do they change the boundary?

A. They changed the southern part of the optional zone which was white and left the northern part in Highland.

Q. And I don't recall if I asked you what the racial enrollment at West Mound and Highland was in '64?

A. I believe I testified to that. In 1964, West Mound was 15 percent non-white and Highland was 75 percent non-white.

Q. Was there another change in this particular area?

A. There was another change in Highland, another option in the Highland attendance zone which started in 1955, and it was carved out of the northwest sort of pan-handle section of Highland. I'll have to go back to the '55 map here.

Q. Does this option show up in 1955, Dr. Foster?

A. We're about to determine that.

Okay. The first overlay we have is '57-58, which is PX 261, and it's not on that overlay because by then the [3515] option has already been removed, but the data indicate in PX 58, the 1939 OSU survey, which I believe is on Figure 14, page 111 —

Q. Would you turn to that, please?

A. — shows the Highland zone going to the north.

Q. The original Highland zone, is that shown on the 1939 OSU survey?

A. Yes.

Q. And that's PX 58, page 111, Figure 14?

A. Yes, captioned "Distribution of Pupils, Grades 1 through 6, Inclusive."

Q. All right. Now, that's not an option at that period of time; is that correct?

A. It simply shows the Highland zone running east and west much as it does now underneath the Columbus

State Hospital to the north, and then going on up on the western side of the Columbus State Hospital to the north, all that being one zone with no options.

Q. All right. I'll show you Plaintiffs' Exhibit 61, Figure 2, the grades 1 through 6 for 1955. Does that show what I would call the chimney to the north has been converted into an optional attendance area?

A. That is correct, Figure 2.

Q. Would you give us the boundaries of that option, please, the streets?

[3516] A. The boundaries are the Pennsylvania Railroad, and the District boundaries to the north; to the east would be the Columbus State Hospital; to the south was Broad Street, and on the west was Eldon, which I believe is about three or four blocks to the west.

Q. That option, according to the data available, you started in 1955?

A. That's correct, and continued through '56-57. In other words, a two-year option.

Q. It does not appear on the '57-58 overlay up on the map; is that correct?

A. That's correct.

Q. From the 1939 survey you determined that it was part of the Highland Zone and from the '55 OSU Report you determined that the northern portion of the Highland Zone was created an option for a two-year period; is that correct?

A. That's correct.

Q. What does the underlying census data for 1950 show for the area that was made into an option?

A. The area which I just described as the optional area is all black for the 1950 census.

Q. I am sorry.

A. I beg your pardon. All white, and that's not to say white people, but white blocks on the census map.

[3517] Q. Highland and West Broad at the same time, can you describe them in terms of the census?

A. On the 1950 census map, West Broad is —

Q. Perhaps you might want to refer back to the 1939 boundaries.

A. — completely white and Highland is about two-thirds white, one third red, orange, blue and green, and I don't think the boundary would affect that.

Q. Except for the optional attendance area portion of Highland; is that correct?

A. That's correct.

Q. What did they do when they eliminated the option in 1957, Dr. Foster?

A. They moved the option to West Broad which is shown on the elementary '57-58 overlay.

Q. When you say they moved the option, you mean they cut off the northern portion of the Highland Attendance Zone?

A. That's correct, at Broad Street.

Q. Redrew the boundary line at Broad; is that correct?

A. For a portion of it, then it dips farther south and again farther south before it goes back up to Broad and goes west.

Q. What was the effect, first of all, of the optional attendance area during the period 1955 through 1958?

A. In my opinion, this was a racial option which allowed [3518] the whites in the optional zone to leave Highland's and go to West Broad.

Q. What was the effect of the change in the boundary between Highland and West Broad in 1957, Dr. Foster?

A. This would have further compacted the blacks population into Highland and placed the white portion of the Highland Zone, at least this part of the Highland Zone, into West Broad Street which would have had a segregative effect on both counts rather than a desegregative effect.

Q. At one period of time actually with respect to Highland, we had an option in the eastern part of the zone

which was eliminated in part by taking part of the option and assigning it down to West Mound; is that correct?

A. That's correct.

Q. Originally Highland went up to the north in a chimney here, then that was made an option and then it was cut off and assigned to West Broad; is that correct?

A. That's correct.

MR. PORTER: Objection.

THE COURT: Overruled. You may answer.

BY MR. LUCAS:

Q. The net effect of all of those actions on Highland, Dr. Foster, do you have an opinion as to that?

A. I believe I just said that it — both options and the way the boundary lines were handled at the close of the options [3519] tended to impact the blacks in the Highland and make for whiter schools in both West Mound and West Broad, having a segregative effect on both counts.

Q. According to Plaintiffs' Exhibit 12, what was the racial enrollment in 1964 in Highland?

A. Seventy-five percent non-white in '64.

Q. West Broad?

A. Zero percent non-white.

Q. That's the area that had the white portion of Highland assigned to it; is that correct?

A. Yes, sir.

Q. Is this an area where a simple redrawing of attendance boundaries, this Hilltop area, in a different manner from that which they were drawn, have effected substantially desegregation? Have you looked at that?

A. Yes, because I think this is an obvious example of when, if a school district really went into — a desegregator had any inclination to do so at any point in time from the options and what went on then until this current year.

MR. PORTER: If the Court please, I will object to it. It is not responsive to the question.

THE COURT: It was had any inclination to do so, specific with what could have been done, so we will allow that.

BY MR. LUCAS:

Q. Go ahead, Dr. Foster.

[3520] A. Any time until the present, and including next fall, for example, the — if I might have the '75-76 option.

Q. Dr. Foster, just a moment. Go ahead.

A. We found elementary '75-76, which is Plaintiffs' Exhibit 278. The underlying census data is incorrect because it is 1950, but I don't think we need that to illustrate what it is I am describing.

If you take the schools West Broad, Highland, West Mound, which are the three we have been talking about in terms of boundary changes and options, and you add Burroughs, which is contiguous, these three schools are all contiguous to Highland; West Broad being on the northwest, Burroughs to the west and southwest and West Mound to the south and southeast of Highland's.

Q. What are their racial enrollments today?

A. This year the racial enrollment are Highland 67.1 percent non-white; West Broad 2.0 percent non-white; West Mound 13.9 percent, and Burroughs 11.2 percent.

Either by redrawing boundary lines or by some combination of pairing or grouping, it would be relatively simple to desegregate all four of those schools and make them racially non-identifiable. If you add up the total population of those four elementary schools, which are right together, you have 20.6 percent non-white as of the current year.

MR. PORTER: If the Court please, I move to strike [3521] the answer. It has no relevancy to this proceeding.

THE COURT: Overruled.

BY MR. LUCAS:

Q. Go ahead, Dr. Foster.

A. Current year shows 3,060 capacity for the four schools with 2,773 enrollment, which would allow capacity for either boundary changes or pairing or grouping.

Q. Going back to the option, Highland and West Broad, did you take a look to see if that was a capacity problem in 1954 through 1957?

A. Yes.

Q. Your data substantiating these capacities again was the various studies and exhibit numbers you related earlier?

A. That's correct. The option was that of Highland to West Broad, and in 1955 Highland was 63 over capacity, but West Broad was 115 over capacity.

In 1956 Highland was 67 over, but West Broad was 113 over, so my conclusion was that it would not have been for capacity reasons.

[3522] Q. Dr. Foster, did you examine what is called in the records of the Board the downtown option?

A. Yes, sir.

Q. What documents did you use to examine this particular optional area?

A. The Ohio State 55 Study, which is PX 61, page 17, Figure 2, also the Original Plaintiffs' History Exhibit covered part of this option, which I believe was started in 1925.

Q. I believe that was the Board minutes you've indicated?

A. As I remember it.

Q. Was that called a neutral zone at that time?

A. I believe so, yes.

[3523] Q. All right. Would you describe the option, please?

A. The option is in the center of the downtown district. It is bordered on the north and northwest by railroad tracks. It is bordered on the east by Ft. Hayes which is to the east of the white area square on the map. It is bordered on the south by King and Broad, King to the south of Ft. Hayes and then Broad further south.

THE COURT: Did you say King?

THE WITNESS: That's what my notes indicate, and I believe the map will indicate that. It is sort of jumbled. I beg your pardon. It is Spring. Then on farther south by Broad. Then to the west part of it on High Street and part of it on Front Street, Front being the farthest to the south of the western portion.

The option started with seven alternatives starting on the northwest with Hubbard. Next to it towards the west would be Milo. The next one reading clockwise would be Garfield and then Eastwood, and farther south would be Douglas and then Fulton, and finally Mohawk would be directly south of the option. So it would be a total of seven options.

[3524] Q. All right. Did you examine the census data underneath the — on the 1950 map, base map?

A. Yes. The overlay is elementary '57-58, which is PX 61 over the 50 Census data. A good portion of the option to the west is white with two or three green or blue blocks, to the south there are some blue or green blocks, and I have one orange, then there's an eastern portion just to the west of the option, just to the west of the Garfield zone which is also red. Part of the option on the overlay covers the Fort Hayes area, which is all white, and explains the white block from the northwest corner of the option — northeast corner. I'm sorry.

Q. All right. Did you take a look at the 1940, '50, '60 and '70 Census data and determine what kind of residents there were in this area?

A. Yes, I did.

Q. All right. Can you tell us what the 1940 Census shows by age groups?

A. The 1940 Census for this area comprised Tract 30 and a portion of Tract 35, ages 5 to 14. Estimated Tract 30 had a total of 644, 315 of whom were blacks. I took a third of Tract 35, which is an approximation. This would give a total of 254 and 182 of whom were blacks.

Q. All right. What about the 1950 Census?

A. The 1950 Census would include — the data was for [3525] all ages, that is, a total population. Tract 30 indicated 3,137 blacks, 1,395 whites, and one-third, again, an estimation of one-third of Tract 35 would be 1,528 blacks, 1,038 whites.

In 1960, again all ages, Tract 30 indicated 3,778 blacks, 716 whites, and a third of Tract 35 indicated 1578 blacks and 433 whites.

In 1970, again all ages, indicated from Tract 30 728 blacks and 282 whites, and a third of Tract 35 was 415 blacks and 244 whites.

These figures indicate a declining population and also an increasing percentage black of that population that was remaining.

[3526] Q. All right. What happened to this particular optional attendance area? Before you do that, give us the 1964 racial enrollments at the seven receiving schools.

A. Okay, the seven receiving schools in 1964, according to the PX 12, the racial percentages were Hubbard, 7 percent non-white; Mohawk, 11 percent non-white; Douglas, 54 percent non-white; Fulton, 85 percent non-white; Milo, 90 percent non-white; Garfield, 99 percent non-white; and Eastwood, 100 percent non-white.

Q. All right, what happened to this option in 1958-59? Was there any change?

A. No, sir.

Q. And in '59-60?

A. No change in either '58 or '59.

Q. All right, in 1960-61, was there a change?

A. Yes. Part of the option went into western Garfield.

Q. Let's put the 1960 Census up.

A. All right. I have on the board elementary '60-61 which is PX 284A overlaying elementary '57-58 which is PX 261, both of them overlaying the 1960 Census.

Q. All right, what happened to the optional attendance area in 1960-61?

A. It is pretty difficult to see on the map, but the western portion of Garfield picked up I believe two or three blocks from the eastern part of the option, approximately [3527] four square blocks I have on my notes, which would be the part directly under Fort Hayes which was added to the Garfield zone and taken out of the option.

The other thing that happened was that Fulton was dropped as a receiving school which left six of the original seven schools.

Q. What happened demographically underneath on the Garfield change? Does that change of boundary conform in any way to the underlying racial census data for 1960?

A. The 1960 Census data would indicate that the portion that was moved into Garfield during '60-61 was all red, I believe. I believe that's correct.

Q. Does the new boundary of the option show that it is white to the west of the Garfield boundary?

A. I think except for one block perhaps at the corner of the part that was removed which is red. The rest of it would be largely white, yes, sir.

Q. The underlying red part has been put into Garfield. What was the enrollment of Garfield in '64?

A. Racial percentage?

Q. Yes.

A. 99 percent non-white.

Q. All right, was there another change in 1961-62?

A. Yes, in '61-62 Mohawk was dropped as a receiving school. That's the school directly south of the option.

[3527A] Then in '63 and '64 Mohawk was put back in which is illustrated on the maps if we put them on the board.

[3528] Q. All right. And that would be Plaintiffs' Exhibit 264 and 266, representing '61 and '62, '63, '64 maps?

A. That's correct.

Q. In 1964-65, was there another change?

A. Two blocks on the west end of Clearbrook — we'll put up PX 267, which is the '64-65 map.

'64-65 elementary overlay is PX 267. This illustrates approximately a two-block portion of the southern-eastern most part of the option was moved into the western end of the Clearbrook elementary zone.

It also illustrates that Mohawk was taken back out of the option in that area, '64-65, out of the receiving schools.

Q. And there's a dotted line in the Clearbrook zone. Can you tell me what that means?

A. I believe that has to do with grade structure, indicating that certain grades can go — I'm not exactly sure. I believe that's what it is.

Q. All right. Which area of the Clearbrook zone was it that the boundaries expanded into?

A. Into the western portion.

Q. All right. Was that an expansion or contraction of the option?

A. That was a contraction. I believe that dotted line across Clearbrook indicates it's part of another zone with a [3529] 1 through 6 structure, and Clearbrook would be, I believe, a primary structure, if I remember correctly.

Q. All right. In '66-67 —

A. There's one other change here, and that is the option extended eastward a block or two into Felton, and that can be seen just to the east of the Ft. Hayes area. The option previously was along the same line as the Ft. Hayes boundary line, and it moves east a block or two into the Felton attendance zone.

Q. All right. In '66-67, was the option extended again?

A. I don't — the option was extended west a block or two in Felton, the same as before '64-65, having dropped

out the year before. It changes back and forth a little every year. It makes it sort of complicated.

Q. Okay. In 1967-68, were some schools dropped out?

A. '67-68, Milo dropped out and Eastwood was dropped and Fulton was reinstated. And then in '70-71, Milo came back into the option. Those are all various Plaintiffs' Exhibits, being elementary map overlays.

Q. What happened in 1975-76?

A. The total option was ended in 1975-76 and moved into — what was left of it into Garfield, which is depicted on Plaintiffs' Exhibit 278.

[3530] Q. All right. During this period of years when the downtown option existed, is it your understanding that the option was carved out of some particular attendance area or was it a neutral zone?

A. I think you referred to it earlier as a so-called neutral zone which we defined in our testimony previously as not being carved out of any zone, but simply being between or among different zones.

Q. All right. What is the effect of such an option between racially dispairing schools in an area with a mixed population in general?

A. Well, the surrounding receiving schools change considerably from time to time, but in 1964, they ranged from 7 percent at Hubbard non-white and 11 non-white at Mohawk to 100 percent non-white at Eastwood, and the effect racially is simply to allowing everybody in this option to choose where they wanted to go and, ordinarily, what happens then, the whites would move to Hubbard or to Mohawk, and as opposed to a non-racial policy of simply assigning these pupils if you want to promote desegregation to certain schools, you would assign black areas to Hubbard, for example, or white areas in the zone to some of the racially-identifiable black schools.

[3531] Q. What was the effect of the change in the boundary with respect to the Garfield zone?

A. Well, it simply compacted the black population in Garfield and moved the black zone west two or three blocks.

Q. The last year of the option, can you give me the racial composition of the four schools remaining? Perhaps we ought to put up the 1970 base map and the '74-75 overlay.

A. Did you say the '74-75 or '75-76?

Q. Let's try '74-75 first.

A. We have on the board PX 277 which is the elementary '74-75 with the 1970 Census underneath that which is Plaintiffs' Exhibit 252, and it shows the last year of the so-called downtown option which is in the center.

Q. Now, the western boundary of the Garfield School is almost coterminous with the racial boundary, is that correct, or a few blocks on the other side?

A. One or two blocks to the west are colored orange or blue, I believe, in a white area. Otherwise, it is along the racial line.

Q. Has the southern boundary of the Garfield School changed without putting the other overlay on?

A. I believe it has gone further south to Broad Street, and all of Clearbrook is incorporated.

Q. All right. Looking at the Felton and Garfield attendance zones, does that make an almost even dividing line [3532] between the underlying base data color of red and orange and white to the west?

A. Are you asking if there is about equal territory?

Q. No, no. I am asking does the boundary generally proceed along that dividing line?

A. Yes, sir, except the boundary line to the west of Felton is on the '74-75 overlays Fort Hayes which is white, and there are no pupils presumably out of that area.

Q. And this option is eliminated in '75-76. Let's put that overlay up.

Now, on this map the Fort Hayes is now shown as having an attendance area; is that correct?

A. That's correct. It is bordered completely with an attendance zone line, but it is not assigned any school.

Q. And the Garfield zone is expanded to the west for the first time and picks up these additional blocks, white blocks to the west, western area of the option; is that correct?

A. That is correct.

Q. What were the last schools to which the option pertained in 1974-75?

A. The option was still to Hubbard to the northwest, to Garfield to the east, to Douglas to the southeast and to Beck to the south which by that time had included part of [3533] the — well, it included I guess all of the Fulton zone.

Q. In '64 Hubbard was what percentage non-white?

A. In '64 Hubbard was 7 percent non-white.

Q. And in 1974-75?

A. Hubbard was 0.9 percent non-white in '74-75.

Q. And Garfield in '64 was what?

A. Garfield in '64 was 99 percent black.

Q. And in '74?

A. It was 99.2 percent black or non-white.

Q. And what was Douglas in '74?

A. Douglas had gone from 54 percent non-white in '64 to 85 percent non-white in 1974.

Q. And Beck?

A. Beck was 17.2 percent non-white in '74.

Q. All right. Did you examine the Main and Livingston option?

A. Yes, I did.

Q. When did this option begin?

A. 1954-55.

Q. Can you identify the option area on the overlay for 1957-58, PX 261?

A. All right. This is currently overlaying the '60 Census. The option is toward the southwest area of the district from downtown. The Main attendance zone is to the north and east of the option, and Livingston is to the west [3533A] and south of the option, the option having been carved out of the southwestern — well, the southern part of Main.

[3534] Q. All right. What is the underlying demographic data with respect to the optional attendance area?

A. On the 1960 Census, it would be just white blocks.

Q. All right. Let's go back to the 1950 Census base map and see what the process is.

What does the entire main zone look like for 1950?

A. The main zone for 1950 appears to be all white except for a green block.

Q. All right. And the option begins '54-55. What's your source of identification for that information?

A. This was in PX 58, the 1939 OSU Study, Figure 14, page 110.

Q. All right. Did you also look at any of the other — the Original Plaintiffs Exhibits with respect to this particular option?

A. Yes. This was in their original exhibits. I believe it was PX 6, I believe.

Q. Can we put the 1960 map back up?

I'm sorry. Before you do that, would you tell me what the Livingston zone looked like in 1950?

A. In 1950, the Livingston attendance zone was largely white. It had in the northwest corner one or two blocks with either orange or red, I can't really tell, and so — about four green or blue blocks scattered to the west.

Q. Okay. And that's assuming that the the boundaries were [3535] the same at that time as they were shown in the '57-58 overlay; is that correct?

A. Pardon?

Q. That's assuming that the boundaries were the same for those attendance zones at that time?

A. Yes.

Q. Let's put the 1960 Census base map up.

Now, in the 1960 Census for the first time the Handord Village shows up as the black residential area; is that correct?

[3536] A. I believe that's the area to the east of the Fairwood Zone.

Q. Yes.

A. Bordering Alum Creek on the east, which is in red on the '60 census.

Q. The option started in '54-55. How long did it continue?

A. Through 1961-62 with some slight modification.

Q. What was the dimension of the original option attendance?

A. I believe about three blocks, east and west.

Q. What was the racial composition of Main in 1967?

A. Main in 1964, according to Plaintiffs' Exhibit 12 was 77 percent non-white.

Q. Livingston?

A. Livingston was 27 percent non-white.

Q. The Hanford Village area would have been which one of those elementary areas, or adjacent to it?

A. Would have been part of the Fairwood.

Q. That's to the south or west?

A. That's directly to the east of Main and also Livingston.

Q. Was the area black population movement toward that direction?

MR. PORTER: Objection.

[3537] THE COURT: Overruled.

Q. From your examination of the 1950, '60 and '70 census maps, Dr. Foster, can you tell us whether the area population movement in terms of minorities was in that direction?

A. Yes, it was east towards Alum Creek.

Q. What modification was made in this option?

A. In 1960-61 the option was reduced to one block, which at this time was in the Kent School which had opened in '60-61 and the block was I believe north and south block known as Bedford.

Q. Can we put up Plaintiffs' Exhibit 284A, the 1960-61 elementary.

Can you identify the Kent Elementary School on that map?

A. The Kent Elementary School is directly south of Main and to the northeast of Livingston. The optional zone is designated between Main and Livingston coming out of Kent, and it is simply the point at which the arrow goes west to Livingston and north to Main.

Q. The Kent attendance boundaries were established out of the schools of what previous attendance zones?

A. Mostly from Fairwood to the east and a little to the north, and some from Livingston to the west, and then from Ohio to the northwest. It is a rather small compacted attendance zone.

[3538] Q. Before we get further into the Kent attendance area and the Kent School, what was the effect in your opinion of the establishment of the option between Main and Livingston?

A. I believe that this was a racial option which allowed the whites in the optional zone to exit from Main and go to Livingston which was a much whiter school.

Q. The Kent Elementary opened in 1960-61 taking part of the Fairwood, Main and a couple of blocks from Livingston and Ohio attendance zones. Do you have a 1964 enrollment for Livingston?

A. '64 Livingston was 29 percent non-white.

Q. Ohio?

A. Ohio was 80 percent non-white.

Q. Kent?

A. Seventy-five percent. It opened non-white.

Q. Fairwood?

A. No, I am sorry. It was 75 in 1964. Fairwood was 69 percent non-white in '64.

Q. What did Kent look like in the 1960 census in terms of the underlying colors?

A. It was a combination of white, one or two green and blue blocks, and the rest orange, I believe.

Q. You have already described Kent as a very small, relatively small attendance area. What was the effect on the location and opening of Kent with those attendance boundaries [3539] in terms of the racial composition of the schools in the area?

A. The effect was to further compact, in my opinion, the black student population in this area to allow Livingston to stay white longer and also Deshler to stay white, and the racial line was moving south from Main and also from Ohio, and this was a small area which set up a school that went black fairly rapidly.

Q. Going back to the Main-Livingston option itself, in the first five years of the existence of that option was there any capacity problem?

A. It started in 1954 and the record would indicate there was really not that much difference in capacity needs between the Main and Livingston School in the first — for the 1950, Main was 48 percent over capacity and Livingston was —

Q. Excuse me. Forty-eight percent?

A. I beg your pardon. In 1954 Main was 48 people over capacity and Livingston was 57 over capacity. In 1955 Main was under seven places and Livingston was under three.

In 1956 Main was 35 over capacity; Livingston was under by 13. In 1957 Main was 39 over capacity; Livingston was over by 11.

It wasn't until 1959 that Main took a big jump and became something like 310 over capacity.

Q. Would you examine the Linmoor Junior High School area, [3540] including the option?

A. Yes, sir, I did. The Linmoor-Everett option opened in 1957-58, and on Plaintiffs' Exhibit 281, the Junior High for '57-58 currently on the 1960 census as shown in the center of the map with a red border and a broken red and blue border.

Q. Linmoor opened in '57-58. Was there phase-in in the grades one year at a time in that situation?

A. Out of Linden-McKinley, which was 7 through 12, they phased in, as I understand it, Grades 7, the first year, and then Grades 8 and 9 were the following two years.

That was also taken partly out of Indianola, Linden-McKinley being shown on the map actually in the Linmoor Zone, although the senior high zone would extend completely around that.

It is in the Junior High Linmoor Zone. The part from Indianola that was in the option was to the northwest part of Linmoor and to the northeast part of Indianola, and the part from Everett became a part of the option — I beg your pardon. Can I start over?

Q. Yes.

A. In using the '57-58 overlay it is an attempt to show what the Linmoor Junior High Zone was like prior to the option. It came out of Linden and out of Indianola and out of the eastern portion of Everett.

[3541] Q. All right. What's the general description of the underlying census data?

A. The underlying census data from Linmoor in '57-58, based on the '60 Census, would indicate the northern part of the area from Linden was all white and the southern part was green, blue and orange.

The part coming out of Everett was mostly red and orange with a few blocks of green, blue and white.

The part coming out of Indianola, which was actually — I testified earlier that it was to the northeast of Indianola.

There was also a southeastern section out of Indianola. This had white, red and blue in it in the southeastern section, and the north appears to be mostly a non-residential area just above the Ohio State Fairgrounds, mostly non-residential as designated white on the '60 Census.

[3542] Q. Dr. Foster, you put up the 1958-59 junior high overlay. What exhibit number is that

A. Plaintiffs' Exhibit 282.

Q. Can you summarize what happened with the establishment of the Linmoor School?

A. Yes. This is a very complicated business. I will just do that in a sentence.

In '57-58, which I was trying to describe before recess, the Linmoor Junior High opened carved out of three schools, Indianola, Everett and Linden-McKinley, and it took portions of each of those three existing zones and established just a seventh grade center the first year. That's what happened in '57-58. Then the optional zone was established in '58-59, the following year, which is depicted on the current map overlaying the '57-58 we have up now, the '58-59.

[3543] Q. The choice of boundaries for Linmoor, what effect did that have in terms of race, if any?

A. Well, the portions that were picked out of Everett was the black part of Everett out of the southeastern corner of Indianola, was the large — most of the black part of Indianola, and the part that came out of Linden included all of the black part that was in Linden, which was the southern half, so it seemed to be, as the school was established, sort of in the cards that it would contain the black pupils out of that area for the most part.

Q. What alternatives were available, Dr. Foster?

A. Well, when it opened in '58-59, if you had desired to have a desegregative effect rather than a compacting effect, you could do any number of things, but the boundaries could have been changed in such a way as in one place, I believe, the Ohio State Surveys recom-

mend when you have three or four schools together and you have to change one school, for example, the western part of Everett, which I believe is the Kingswood area could have been moved up into Indianola. Some of the northern part of Indianola could have been moved over into the new school, Linmoor. The black portions to the east of Everett and Indianola could have stayed in those areas so that they were sure to have a black population, and it would have — some move such as this would have indicated that Linmoor was not to be [3544] a black school but was to be a desegregated school.

Q. All right. When you say the black areas stay in those schools so that it would stay black, you mean with the black representation?

A. That is correct, and there did some. I mean, part of Indianola stayed in but a big chunk of it also went into Linmoor, and part of Everett stayed in Everett but a good chunk to the east went into the new school.

Q. All right. Can you now discuss what happened with the optional attendance zone?

A. All right. In '58-59, the optional attendance zone was set up, and this again is a little complicated, but it was formed out of the portion of Everett that — eastern portion of Everett that had come into Linmoor, and it was really the southern part of that portion, almost the southern half exactly of the part of Everett that had gone into Linmoor, but there was also a grade split.

[3545] A. (Continued) The optional zone was for all three grades, 7 through 9, but the northern part that was left in Linmoor, the seventh and eighth grades were to go to Linmoor out of the portion of the zone that was not made optional and grade 9 to Everett. The optional zone was bordered on the north by Starr and Third and Gibbard — it had three jumps of one block at a time — on the east by the railroad, on the south by the railroad, and on the west by the railroad.

Q. The underlying area, according to the 1960 Census was mostly what color?

A. Of the optional zone, it would be either all red or orange except I believe — all red or orange except for railroads.

Q. Red and orange do indicate the presence of some white?

A. That is correct. Orange is 50 to 89 percent black, and red would be 90 to 100 percent black.

Q. What is the effect of this option with respect to students in the Everett School?

A. This option as it was established would allow the whites in the optional zone who were left to attend Everett rather than be assigned to Linmoor.

Q. Of course, blacks could choose to stay in Everett as well?

A. Either way, yes, sir.

[3546] Q. Was the option changed to take all of Everett in?

A. In 1959-60, which is PX 283 now on the board, the option was expanded north to add that part of Everett which had been taken into Linmoor, and it also added a little portion of the territory that had been taken into Linmoor from Indianola which would be to the extreme south of that portion. It looks to be maybe a block wide and two or three blocks long out of the part of Indianola that had gone into Linmoor. In other words, the option now included all of the Everett portion that went into Linmoor and a little bit of the extreme southeastern part of Indianola.

Q. What is the underlying demographic nature of the added area?

A. On the '60 Census Map, the underlying map would indicate largely red and orange with a couple of blue and maybe one green blocks to the extreme west, and a part

coming out of Indianola would be white, red and blue, from the looks of the Census Map.

Q. Are those the only blue and white blocks, the ones you noted, in that particular part of the attendance area?

A. Of the optional zone?

Q. Yes.

A. There are a couple of white blocks in the extreme part of the Everett portion, in the northern part of the option.

[3547] Q. All right. What happened to the Arlington Park area and east?

A. If you look at the junior high '58-59 map, the Arlington Park area is still part of the Linden-McKinley zone to the east of the Linden-McKinley School.

[3548] A. (Continuing) Then in '59-60, this area is sent non-contiguously to the Linmoor zone as depicted by the green arrow going southeast from the Arlington Park area.

Q. All right. Is the bottom leg of the Arlington Park zone cut off, or is there still a corridor?

A. There is a corridor which includes that non-contiguous assignment all the way south in the Arlington Park area, to the south of the Arlington Park area.

Q. All right.

A. And this would be just north of the western portion of Eastmoor Junior.

Q. They had been previously attending Linden-McKinley; is that right?

A. That's correct.

Q. And where is Linden-McKinley on that?

A. Linden-McKinley is in the Linmoor zone, in the northeast section of the Linmoor zone.

Q. This is the building that's not in its own attendance area; is that correct?

A. As far as a junior high school is concerned at this point, yes, sir.

Q. In 1960-61, was there an opening of a new junior high school?

A. Yes.

Q. Would you put up that overlay?

[3549] A. This is PX 284, which is the junior high 1960-61. To the north of Linmoor and Linden-McKinley a new junior high opened known as Medina in 1960-61. Medina was carved out about half from Clinton, which is to the north of Linden-McKinley, extreme north central part of the district, and about half of the southern section of Linden-McKinley.

Q. Is the underlying attendance zone shown at least by the demographic area of 1960, is that what color?

A. For the Medina School, it represents an all white area.

Q. The area taken out of the school to the south, is that a white area as well?

A. Out of the northern part of Linden?

Q. Yes.

A. Yes, that's all white in the 1960 Census.

Q. What was the effect of opening Medina, setting those attendance boundaries?

A. The effect was to further compact the area south of the Medina attendance zone, being Linmoor and Linden, in terms of their blackness and to maintain — or insure the fact that the Medina School, at least for the time being, would be either all white or nearly all white.

Q. What happens to Linden-McKinley?

A. Well, it changes about every year, but in '70 — in '60-61, the same year that Medina opened, in addition, [3549A] they're giving up the northern part of its zone to Medina. The Arlington Park portion that was zoned into Linmoor in '59-60 was now zoned back in a contiguous manner to Linden-McKinley. This was in '60-61.

[3550] Q. And the Arlington Park area shows as white, and it was connected by this little, narrow strip

down into this white area to the south; is that correct?

A. Well, that's correct, only the boundary changed in '60-61 to include everything in Linden-McKinley all the way down to Champion.

Q. All right. Now, the map appears to come down into a white corridor, although there do not appear to be any streets on the base map in that area; is that correct?

A. Most of that is apparently non-residential, yes, sir.

Q. Okay.

A. That includes the railroad yards and some other things.

Q. And the school is actually — the school building is actually still located in the Linmoor zone, but is attendance area is essentially a white attendance area with the exception of the orange area located south of Seventeenth?

A. Seventeenth.

MR. PORTER: Objection.

THE COURT: Overruled.

A. Yes, sir.

Q. I notice that there seems to be a change in pattern in the way zone lines are drawn in terms of north, south, east or west. What is the effect of the Medina zone [3551] in terms of drawing lines east and west of the corridor?

A. Well, as you open up new schools to the north of the expanding black residential area and expanding black school population, if you start drawing lines east and west, as was done with Medina and was done later with McGuffey, that prohibits you from going down into the zones and picking up black pupils and, at the same time, as you go north, establishes east-west racial boundary lines along certain streets from time to time.

[3552] Q. Up to that time both the junior and senior highs had generally run north and south; is that correct?

A. Especially the senior highs where they took in large chunks of territory, North and Linden, for example.

Q. Was there any change of significance in 1961-62?

A. No, sir.

Q. McGuffey opened in '62, I believe; did it not?

A. Yes, sir, '62-63.

Q. Can we put that overlay up?

Where is McGuffey School?

A. McGuffey is immediately south of Medina, junior high, following the east-west boundary line with Medina and immediately north of Linmoor and Linden-McKinley.

Q. What happens with our movable Arlington Park this time?

A. In '62-63 non-contiguously assigned, not as much of it as was part of the movement, but a good portion of it assigned to Medina.

Q. Medina in '64 was what in terms of racial composition?

A. I would have to look that up.

Q. Would you, please?

A. Medina in 1964, according to Plaintiffs' Exhibit 12, was 100 percent white.

Q. Arlington Park area has gone from Linmoor, zoned into Linden-McKinley, now it is going up to Medina; is that [3553] correct?

A. That is correct.

Q. McGuffey was taken out of what attendance zones?

A. McGuffey was taken out of the southern portion of Medina and was taken out of Linden-McKinley.

Q. It is a little confusing because Linden-McKinley is not in the attendance area?

A. That's correct, but the southern border of McGuffey Junior coincides with the northern border of Linmoor, but when it opened in '62-63 it picked up the northern part of — well, it picked up what was left there of Linden-McKinley Junior High School.

Q. What was McGuffey in 1964?

A. McGuffey was 100 percent white in 1964.

Q. What happened to Linden-McKinley?

A. Linden-McKinley, in 1963-64, was its last year, so when McGuffey was built, it, as a junior high school, was no longer. As a matter of fact, in '63-64 the enrollment indication was that it had only 114 pupils left at the junior high level.

Q. What about Linmoor? What was it in '64?

A. Linden-McKinley?

Q. No, Linmoor.

A. Linmoor in 1964 was 60 percent non-white.

Q. What was the effect of the opening and drawing of [3554] boundaries, boundary lines of McGuffey?

A. It enabled McGuffey to maintain a largely white population, at least in the beginning, and compacted further the blacks into the Linden-McKinley Junior High zone.

[3555] Q. Did the McGuffey zone lines generally run east and west?

A. Pretty much the same as Medina.

Q. Now, what happened to the optional attendance area during this period? Did it come to a close?

A. The option ended in 1964-65 which would have meant it had one more year after this.

Q. All right. Can we put that overlay up?

A. All right. PX 288, junior high for '64-65, indicates that the option was closed in that year.

Q. Was the option split by the opening of a new school?

A. Monroe Junior High School opened to the south of Linden in, I believe, '64-65. It opened 99.7 percent non-white.

Q. What was the effect of the boundary changes and the opening of Monroe in that particular location, Dr. Foster?

MR. PORTER: Objection.

THE COURT: Overruled.

A. Oh, it picked up about half of the optional zone between Everett and Linmoor. The other half was left in Everett. I would say that this had a couple of effects. One is there was a black area maintained in Everett which allowed it to be a desegregated or non-racially identifiable school, I believe, at that time; and opening up Monroe in [3556] in this area further compacted, of course, the center city black population, and it was inevitable that would be an all black school.

Q. In fact, it opened 99.7 percent?

A. Yes, sir.

Q. It picked up parts of what zone, Dr. Foster?

A. Well, it picked up half of the optional zone. Everett picked up the other half, and then Monroe picked up a good portion of the Champion zone which was moved further south to Broad Street to pick up the old Franklin zone.

Q. What was Champion in '64 when Monroe opened?

A. At what time?

Q. '64?

A. Well, I think it was, yes, 100 percent non-white.

[3557] Q. Reviewing all of these changes in connection with Linmoor, Linden-McKinley, McGuffey, Milo, I believe it is — let me check my memory on the names. I'm sorry — Medina, Monroe and the changing of the boundary between Monroe and Champion, what is the net effect in that total area of the city of the variety of options, boundary changes and school openings and setting of boundaries you've described?

MR. PORTER: Objection.

THE COURT: Overruled.

A. Well, the net effect is very racial in that it blocks the blacks into an impacted zone coming out of the downtown area of Champion, Monroe.

I think it had a desegregative effect in regard to Everett by maintaining part of the black area to the east of Everett.

Linmoor, in my opinion, was opened as a school that was desegregated black from the beginning, because it opened with black portions for the most part of the schools it made up — from which it was made up, and as you went north, first Medina and then McGuffey were established as sort of a holding zone as the black population moved to the north and to the east, and I think you'll find, if you look at present enrollment data, that those lines pretty much have been maintained at this point.

[3558] Q. Dr. Foster, did you examine an optional combination between Fair, Eastgate and Eastwood?

A. Yes, I believe I did.

On the board, we have elementary '57-58, which is PX 261 overlaid on the 1960 Census, the 1939 Ohio State Survey, PX 58, page 111, Figure 14, shows a 1938 map, grades 1 through 6,—

Q. Turn to that, please.

A. — which indicates the Fair Elementary School, which on the '57-58 map which is on the board is to the east of the center of the city, west of Alum Creek, for the most part, and south of Broad Street.

But in '50 — or in 1938, according to the Ohio State Map, PX 58 shows the Fair School going north of Broad to Greenway, which would be on the '57-58 map as a three-way optional zone with arrows pointing east, south and northwest.

[3559] A. (Continuing) Greenway is at the top of that zone and falling between Taylor and Woodland.

Q. Taylor on the west, Woodland on the east?

A. That's correct. That is to say in 1938 the Fair zone went north of Broad and ended in a little funnel at the extreme north, the top of which was Greenway.

Q. All right. Was there an option between Pilgrim and Fair?

A. The directory in 1951 indicates that there was such an option between Pilgrim and Fair. At least it started then, no later than 1951, and the directories indicate that this option continued until 1954 when Eastwood, which is a school north of Broad and northwest of Fair, was reopened taking that portion of Fair Elementary School which was north of Broad Street as far north as Long and Livingston, which is about three blocks or so north of Broad. So the optional zone was bordered on the north by Greenway and bordered on the east by Woodland, bordered on the south by Long and bordered on the west by Taylor.

Q. All right. Is there another option in addition to the Pilgrim-Fair option between Pilgrim and Eastwood?

A. Well, I am sorry, that's the option I have been talking about as the Pilgrim-Eastwood option. The Pilgrim-Fair option, let me explain the differences, if I may go back?

[3560] Q. Yes, please.

A. Again, it is rather complicated. The Pilgrim-Fair option, Pilgrim is to the north of Fair which at that point extended on up above Broad. From 19 — in 1951, '52 and '53 the directories show that this option did exist between Fair and Pilgrim and did have Greenway on the north part, again, Taylor on the west and Woodland on the east and, as I described, Long was on the south. Then in 1954, according to the directory, we had the Pilgrim-Eastwood option. At that point Eastwood had reopened taking the northern portion of the Fair zone above Broad Street.

[3561] The boundary was the same as the previous option with Woodland on the east and Taylor on the west and Greenway on the north, except that it contracted, I believe, about two blocks from Long up to Clifton which was the southern most boundary in 1954 in the Pilgrim,

Eastwood option, a territory of about six blocks altogether, I believe.

Q. Let me show you a document entitled, "Which September? which bears several different exhibit numbers in this record. This particular copy is Original Plaintiffs' Exhibit 51-H-10B, and ask you if this is — referring you to Page 7 and Paragraph 5 — the general area described in the options you are testifying about?

I realize that doesn't give the boundaries.

A. Yes, that would be in the general area because three of the four streets, I believe, are named as part of this area.

Q. Would you read Paragraph 5?

A. "School districts are established in such a manner that white families living near colored schools will not be in the colored school district. The area in the vicinity of Pilgrim School, embracing Richmond, Parkwood and parts of Greenway, Clifton, Woodland and Granville Streets is an excellent example of such gerrymandering."

"A part of Greenway is only one block from Pilgrim School, however the children that live there are in the [3562] Fair Avenue School District 12 and one-half blocks away."

Q. 1955 was there an additional option established?

A. Just the Pilgrim, Eastwood option became a three-way option in 1955, which was established with the Eastgate according to the directory. This was also depicted in Ohio State 1955-56 Report, Plaintiffs' Exhibit 61 on Page 17, Figure 2.

It is also depicted on this map, 57-58 overlay as a three-way option between Pilgrim to the northwest, Eastgate to the east and Eastwood to the south.

Q. Was this option reduced in 1960-61?

A. It became a one-street option on Parkwood, which is a north-south block, and about three blocks on the

west side, and that would have been between Pilgrim and Eastgate.

Q. The information furnished to you, does it indicate whether or not Eastgate was a portable unit school for some period of time?

A. I believe it was a four-room portable prior to its '54 opening.

Q. Can we put up the 1960-61 overlay?

Can you identify the one-street option?

A. This is Plaintiffs' Exhibit 284-A and the one-street option is depicted on the map between Pilgrim and Eastgate with an arrow going east into Eastgate and west into Pilgrim and the center of the arrow being the optional zone.

[3563] Q. In your study of the data, Dr. Foster, what was the effect of the series of options with respect to Pilgrim, Eastwood and then Eastgate?

A. During this period that it would have allowed the whites to get out of Pilgrim, and into Eastwood, and then into Eastgate during the time of the black movement.

Q. Was there a capacity problem that you could find from your study of the data, Dr. Foster?

A. Looking at capacities over and under for Pilgrim, Eastwood and Eastgate, in '51 Pilgrim was 107 under capacity. In '52 it was 64 under capacity. In '53 it zoomed to 143 over capacity, and then in '54 it was back to 74 under capacity.

Q. Eastwood was opened in '54. What was it?

A. Eastwood was 56 under capacity in '54 when it opened and Eastgate was four under.

[3564] Q. And in 1959, were they all three over capacity — I'm sorry — 1955?

A. In 1955-56, all three schools were over capacity, not very much, between 11 and 79, and in 1957 on into 1960, Pilgrim again was under capacity all four of those years.

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[3566] Q. Dr. Foster, did you conduct an examination of what I would call the south area of the school system in regard to new school construction, the assignment patterns in that area, boundary changes in connection with the openings?

A. Yes, I did.

Q. All right. I believe we placed up the 1957-58 overlay which is Plaintiffs' Exhibit 261 over the base map for the 1960 Census, PX 251. Would you discuss, please, the bringing in of the Heimandale to Fornof contiguous area as it operated during that period?

[3567] A. All right. Heimandale Elementary zone is in almost the extreme south of the Columbus District and directly west of that, across the Chesapeake Railroad, is the Fornof Elementary zone.

Beginning in 1957, there was an area in Heimandale comprising three streets shown on the elementary 57-58 overlay in sort of an inverted seven figure within the Heimandale zone. That was Wilson, Bellview and Eagle Streets, and according to the directory, children on those streets were assigned to Fornof.

Q. This is the Columbus School Directory; is that correct?

A. Yes, sir.

Q. Is it your understanding, I believe, from me and perhaps Mr. Lamson that the Heimandale zone was brought into the Columbus School District with that particular discontinuous area in effect?

A. I believe it was when it was annexed in 1957.

Q. All right. The streets, Wilson, Bellview and Eagle, in terms of the underlying census data, what is indicated in terms of race?

A. Those are all white streets which would signify zero to 9.9 percent black population.

Q. And the balance of the Heimandale zone?

A. Is almost entirely blue except for a small portion [3568] in orange, about three or four blocks in red and another — perhaps one more white block.

Q. All right. And the Fornof zone to which the non-contiguous white areas are assigned?

A. The Fornof zone in '57-58 was entirely white to the west and to the northeast. As it moved over, there was some blue and some red and I believe one orange block.

Q. All right. In 1964, what was the racial composition of the Heimandale School?

A. Forty percent non-white.

[3569] Q. And Fornof?

A. 0.2 percent non-white.

Q. The option in question from examination of the school directories continued for how many years?

A. The option was kept through 1962-63.

Q. All right. Is this reflected on the overlays as they progress, PX 262, 263, and so forth?

A. Each year, yes.

Q. Dr. Foster, understanding that the optional area existed prior to annexation, do you have an opinion as to the keeping of this white area option to the white Fornof School from the Heimandale area by the Columbus School System for each of the years in question?

MR. PORTER: Objection.

THE COURT: Overruled.

A. My opinion is that this was a racial option which allowed the white people to go to Fornof rather than the Heimandale School and that there was no reason, unless there may have been a hidden political one, and that's still not a valid one, for Columbus to keep that an optional area. But as administratively, there would be no reason.

Q. All right. Could you determine anything from the capacities that would indicate why those three streets should be isolated out of the Heimandale attendance zone and discontinuously assigned to Fornof?

[3570] A. I don't seem to have that in my notes, but, as I remember it, there was no marked capacity problem.

Q. Would there have been any particular reason to keep the same three white streets going to the white school for capacity reasons?

A. Not to my recollection. I don't have the exact capacity figures at that time on my notes.

Q. All right, can we look at the 1963 overlay?

A. All right.

Q. The 1963 overlay is what PX number, Dr. Foster?

A. That's PX 266 on the 1960 Census.

Q. Does this show a discontinuous area to the Moler School?

A. There is an area to the east of Watkins which previously was in the Watkins zone. This area has an arrow pointing to northwest into the Moler zone, yes, sir. That's at the extreme southwest of the Columbus District.

Q. All right. Is that the first time that particular discontinuous area appears?

A. I believe that's correct.

Q. Was there a school opened that same time in that area?

A. In '63-64?

Q. Yes.

A. Koebel was built the following year. There was [3571] an addition built to Heimandale in '63-64.

Q. In '64 the Koebel Elementary opened; is that correct?

A. That's correct.

Q. I think the first year you have racial data for that is 1965?

A. It was zero percent non-white in 1965. Koebel was part of Watkins. It was carved out of the northern part of Watkins.

Q. All right. Can you put up the '64 overlay with the '63 overlay? Does that show the opening of the Koebel School?

A. I believe it will, yes, sir.

Q. And that's carved out of what portion of the Watkins zone?

A. This is the northern part of the Watkins zone directly beneath Refugee Road. Watkins extended down to here the previous year, and then the boundary was shifted farther down into the Clarfield zone, the southern boundary of Watkins at the same time as Koebel opened.

Q. What is the western boundary of the Koebel School?

A. The Koebel School?

Q. Yes.

A. Lockbourne.

Q. All right, that's almost a rectangular area for [3571A] the Koebel School; is that correct?

A. That's correct.

[3572] Q. And that underlying census data shows as what?

A. In 1960 the underlying census data shows it nothing but white area.

Q. And it opened, the racial data shows, in '65 zero percent non-white; is that correct?

A. That's correct.

Q. Did the discontinuous attendance areas and the opening of the Koebel School relate to each other in any way in your opinion?

A. Yes, in my opinion they do. Well, in the first place, Koebel was obviously situated in such a way in the zone lines and the boundary lines drawn at its initial opening to contain the Watkins area to the south and at least opened up Koebel, and again it was a white area. Then the area to the east which is the non-contiguous area which was assigned to Moler, Moler at that time in 1964 was 0.2

percent white. Watkins at the same time was 24 percent — pardon me — was 0.2 percent non-white. Watkins in 1964 24 percent non-white. This whole combination of events compacted the whites, the blacks into the southern most area of the place we are talking about and the western most, that is to say, the New Watkins, and then allowed Koebel to open up white and allowed this area to the east, the non-contiguous zone, to move into Moler and maintain its identity with the white school.

[3573] Q. All right. What options were available which would not have resulted in the same sort of racial separation?

A. Well, admittedly there was a capacity problem in this whole area through the '60s, but Heimandale was partially black at this time. Watkins was going black very quickly. Zone lines could have been drawn in different directions. For example, if you take Koebel and Watkins, if you simply drew the lines north and south instead of east and west, you would have had two at least temporarily desegregated schools. There is no way to tell how many of these children attended Moler, but if you look at capacities in terms of alternatives, it is my opinion that these children could just as easily have been sent to Alum Crest which is immediately north and contiguous to the zone, could have either been assigned there on a temporary basis or simply incorporated into the Alum Crest School. Alum Crest since its beginning has been kept apart from any of the other things that are going on in the area. Capacity-wise, however, from the figures it would seem to be just as available to accept pupils at that time as Moler.

Q. And Alum Crest at that time was what?

A. Alum Crest in 1964 that would be, right?

Q. Yes.

[3574] A. Alum Crest was 50 percent non-white in 1964.

Q. And Moler?

A. Moler, I believe, was less than 1 percent non-white, 0.2.

Q. And Heimandale?

A. Heimandale was 40 percent non-white.

Q. All right. Of the two schools, one to the north and one to the west with substantial minority enrollments were Heimandale and Alum Crest; is that correct?

A. That's correct.

Q. The discontinuous area skips over Alum Crest to go to the white Moler School; is that correct?

MR. PORTER: Objection. Objection.

THE COURT: Overruled.

A. That is correct.

Q. All right. Was there another elementary opened in this — let me go back.

There's a railroad involved in there somewhere; isn't there, Dr. Foster?

A. Chesapeake, yes, sir.

Q. All right. Can you show me where it is on the map?

A. In the southern area. The railroad is right along the racial line as it goes along the area. It starts in the northwestern portion below Refugee Road and cuts almost straight across the area exiting in the southeastern section.

[3575] Q. All right. Were there any school attendance boundaries which crossed that?

A. Well, in our first overlay that we had on this afternoon, '57-58, which is PX 261, on Census Map 50, the overlay will show that the Clarfield Elementary School in the portion north of Williams Road did indeed cross the Chessie lines. It's in the shape of a sort of a dogleg to the west, and it was in quite a good-sized residential area in the western portion.

Heimandale crossed the line, also, but the part of it that did cross the line was either all railroad yards or railroad property. That's right along Corr Avenue, to the northeast part of Corr.

Fornof at that point also crossed the line in its extreme northeast portion.

Q. All right. I'm sorry to interrupt you. Put the other overlays on.

All right. Was there another elementary school opened in this area? I refer to the Cedarwood Elementary.

A. Cedarwood was opened in 1965-66, yes.

[3576] Q. Perhaps before we get to Cedarwood we ought to go back and pick up, so we don't have so many overlays on the map, the Stockbridge opening.

A. All right. And in the '59-60 elementary overlay, the PX number is 263, it shows the opening to the extreme south of the area and the district of Stockbridge Elementary School. Stockbridge took that portion of Clarfield Elementary that was west of the railroad except for a little part in the complete southwest which is non-residential, and that essentially made up its early population, although there was quite a triangular area to the north of that residential zone which I would imagine was still all farmland at that time.

Q. All right, and how did Stockbridge open?

A. In 1964, Stockbridge was zero percent non-white.

Q. All right. Let's refer, if you will, to the Parsons School. I believe it opened in the 1960-61 school year.

A. All right. PX 84A, which is elementary '60-61, would show the opening of the Parsons Elementary School to the extreme southeast corner of the Columbus District, just below the Scioto Trail School and just to the west of the Stockbridge School to which we just referred.

Q. Is the underlying area there an indication for the 1960 Census as to its racial composition?

[3577] A. Both Stockbridge and Parsons are completely white on the 1960 Census Map.

Q. Parsons in '64 was what percentage?

A. Parsons in '64, as was Stockbridge, is zero percent non-white in '64.

Q. All right. Was the school, the Watkins School, opened at that same year or the following year?

A. A year later, '61-62. This is PX 264 now overlaying. In '61-62, Watkins was opened south of Refugee Road, taking the extreme southern part of the Smith Road attendance area all south of — that was south of Refugee Road and picking up the northern half, more or less, of Clarfield Elementary, so its southern part was made up pretty much of Clarfield in the northern part up to Refugee on Smith Road.

Q. Okay. Garfield in '64 was what percentage?

A. You mean Watkins?

Q. Garfield, first.

A. Garfield. Clarfield, you mean?

Q. Yeah.

A. I'm sorry. Clarfield in 1964 was 50 percent non-white.

MR. PORTER: May I have — what school is that?

THE WITNESS: Clar — C-l-a-r-f-i-e-l-d, Clarfield.

Q. No, I'm sorry. Garfield.

[3578] A. Garfield?

Q. Yes.

A. Garfield was 99 percent non-white in 1964.

Q. And Watkins was opened in '61-62. What was the number of rooms built there?

A. Watkins had 19 rooms, according to my figures.

Q. All right. And what percentage did it open in the '64 data?

A. In 1964, Watkins was 24 percent non-white.

Q. Okay. Was there an addition built at Stockbridge in 1961-62?

A. In 1961-62, the year that we're discussing, Stockbridge had a four-room addition.

[3579] Q. And Stockbridge at that time was what?

A. In '64 Stockbridge was still all white.

Q. The addition to Heimandale was made in what year?

A. There was a six-room addition to Heimandale in 1963-64, two years later.

Q. Can we put that overlay up?

A. All right. This is PX 266, elementary '63-64.

Q. And Heimandale, would you show us the zone?

A. Heimandale is in the center of the southern area just to the northeast of the Chessie Railroad.

Q. Was there any change made in its attendance boundary at that time?

A. Well, I don't have '62-63 underlaying, but from '61-62 there was a change which would move it to the northwest picking up the area of Fornof that extended east beyond the railroad. The new line in '63-64 had Heimandale going to the railroad in the northwest, and then in the northeast it also picks up — no, I beg your pardon. That's the only thing, I believe, in Heimandale.

Q. All right, in '64 the percentage black at Heimandale was what?

A. 40 percent non-white in '64.

Q. Now, you have already covered the Koebel Elementary built in '64-65?

A. That is correct.

[3580] Q. Perhaps if we took these overlays down and put up the overlay for '64-65 alone, it would be helpful.

A. All right, this is PX 267, elementary '64-65, overlaying the 1960 Census.

Q. All right, would you identify Koebel?

A. Koebel is just to the north of Watkins and just south of Refugee Road.

Q. Was there an addition made to Parsons that same year?

A. Parsons had a six-room addition in '64-65. Parsons is in the extreme southwest area at this time.

Q. All right, Parsons' enrollment in '64-65 was what?

A. In 1964 Parsons was zero percent non-white.

Q. Let's put up the '65-66 overlay.

A. This is PX 268, elementary '65-66.

Q. And the Cedarwood Elementary was opened at this point in time; is that correct?

A. That's correct. Cedarwood is to the extreme south central part of the area we are describing, the southernmost area of the district, and it was carved out of Parsons.

Q. All right. Were there other — let me go back. What was the percentage black at Cedarwood when it opened?

A. In 1966, the first year we have data, racial data for Cedarwood, it was 100 percent white.

[3581] Q. Was an addition made in that same general vicinity to another school?

A. A four-room addition in 1965-66 to Scioto Trail which is just north of Parsons and Cedarwood.

Q. And what was its racial composition?

A. Its racial composition in 1965 was 0.6 percent non-white.

Q. Were there alternatives available to the boundaries established for these schools in that southwestern portion, particularly with reference to the Heimandale School?

A. Well, at any time the boundaries could have been changed during this period to incorporate white schools which all lay to the southwest of the railroad with mostly black schools to the northeast of the railroad. There are various combinations of pairings —

Q. Is there access across the railroad?

A. There is access. There is an underpass going north and south at Parsons which would then be just above the main railroad yards, and there is access across the railroad at Williams which is at the extreme end of the Stockbridge-Clarfield zones.

Q. That is the area where Clarfield used to cross the boundary; is that correct?

A. That is correct. Then if you run north — I can't remember the name of the street. Let's see. Groveport runs [3582] northwest off of Williams and again crosses part of the railroad and picks up Lockbourne again which does not cross the railroad. So there is a north passage and a south passage, so to speak.

Q. I believe you have examined that area physically yourself, Dr. Foster; is that correct?

A. Yes, I have, that's correct.

Q. And although there are sidewalks, for example, at the underpass, the area is such that it might require some transportation for safety reasons?

A. Well, of course, I am not certain what it was like at this time, but as it is now, I would estimate that the district would have to use transportation for safety purposes because there are very few sidewalks in that general area.

Q. There are a lot of railroad yards and industrial area in between; is that correct?

A. That's correct, and a lot of farm land still on parts of it.

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Q. Did you make an estimate of the distances between the Heimandale School or some of these other schools that [3583] opened or had additions, Dr. Foster?

A. My estimate would be that in no pairing or grouping or combination of schools black and white you would make would be more than three or four miles.

Q. Did you make your estimate based on examination of the map and the map legend as well as the physical examination you made?

A. Not this particular map, but another map that I carried when I traveled around.

Q. Was there another addition at the Clarfield School in 1966-67?

A. There was a four-room addition at Clarfield at that year, yes, sir.

Q. Could we put up that overlay?

A. This is PX 269, Elementary '66-67.

Q. Once again would you locate Clarfield with the pointer?

A. All right. Clarfield is at the extreme southeastern portion of the area which we are discussing.

Q. In 1966-67 what was the racial enrollment of Clarfield?

A. 80 percent non-white in 1966.

Q. What is it today?

A. Clarfield today is 84.4 percent non-white, I believe.

Q. Was there another addition, series of additions, in this area in the year 1975?

[3584] A. As I understand it, based on PX 68 and Dr. Merriman's testimony, in '75 or as part of the current building program, Cedarwood had an addition of eleven rooms and —

Q. Where is that on the map?

A. Cedarwood is to the west and south of the area (indicating).

Q. And what percentage black was that in '75?

A. Cedarwood was 2.2 percent non-white in '75.

Q. Was there another school in that area with an addition?

A. Stockbridge, which is also in that area just above Cedarwood, had a two-room addition in '75?

Q. I'm sorry, did I ask you how many rooms there were at Cedarwood?

A. There are 11 rooms.

Q. Was there a corresponding development at the junior high level in this period in this part of the city?

A. There was a building in 1963-64 of one junior high school in the southwestern part of the zone, the other side of the railroad, and that was Buckeye Junior High School.

Q. Can we have the 1963-64 junior high overlay?

A. All right. This is junior high '63-64, PX 287.

Q. Is this the year the Buckeye Junior High was opened?

[3585] A. That's correct.

Q. Would you locate it on the map, please?

A. It's to the extreme west and south of the area we're talking about. There's a diagonal line which is pretty much the railroad. It is the railroad, in fact, or a part of it, which separates the Buckeye zone from the Marion-Franklin zone, or, in fact, Beery Junior High School, which is part of the Marion-Franklin complex.

Q. All right. What was the racial composition of Buckeye the first year that you have data?

A. In 1964, Buckeye was 0.1 percent non-white.

Q. And what was Beery at that same time?

A. Beery at that time — well, a year later, I don't have the '64 figure for it, in 1965, Beery Junior High was 20. non-white — 20. percent.

Q. All right. Were there additions made to both of these schools?

A. Yes. In '67-68, Buckeye had an addition, of what size, I don't know. I think we have the square footage on it, but not the number of rooms.

Q. And what was Buckeye in that year?

A. 0.1 percent in '67, the same as '64.

Q. Was there any change in the boundary in that period, do you know?

A. I don't believe so, no, sir.

[3586] Q. All right. And was there an addition made to Beery after 1964?

A. As part of the current building program, there's an addition to Beery which has been completed, I believe, which includes two rooms.

[3587] Q. All right. And what is the current racial enrollment at Beery?

A. 70.4 percent non-white in 1975.

Q. What is the 75 percentage for Buckeye?

A. The 75 percentage for Buckeye Junior High School is 2.4 percent non-white.

Q. Are these contiguous schools?

A. Yes.

Q. In examining the process from 1957 through 1975 that took place at both the elementary and junior high level in this south area, centering around the developing black residential area, can you summarize what you, in your opinion, saw taking place in terms of construction and the boundary changes?

MR. PORTER: Objection.

THE COURT: Overruled.

You may answer.

A. Well, my summary would be that during this period the area was rapidly expanding in population and needed additions and new construction which were provided, and they were provided in such a way, that is, openings of new schools and additions to schools, to compact the black area north and east of the railroad and into the black schools in that area. Part of this total picture, of course, at each opening, was boundary changes to make way for the new [3588] school. There were some additional boundary changes, also, which I think we testified to, at least some of them.

We also had two non-contiguous assignments which were racially oriented during that time to Moler and to Fornof out of Heimandale, to Moler out of Watkins.

So during that period, I think that the major effort in the way schools were built and additions made, pupils assigned non-contiguously and boundaries drawn was simply to compact the black area and maintain everything southwest of the railroad as white as possible.

Q. How did the Alum Crest area fit into that, if it did?

A. Well, simply as I testified that it would have been an alternative, in my opinion, for the area, the non-con-

tiguous area west of Watkins, which was assigned to Moler, and it was contiguous to that area.

Q. In terms of the opening of the Buckeye Junior High School, what alternatives did the Board have, in your opinion?

A. Well, you need certain racial data to describe explicitly that sort of an alternative, but essentially, the alternative would have been to simply draw these zone lines in such a way that an equal number of minority pupils would have been assigned to Beery Junior High School and also to Buckeye as it opened, and I don't think from looking [3588A] at the maps that that would have been too difficult to do. You would have had to have crossed the railroad, obviously, probably at both the north and south passageways.

[3589] Q. That's something that the School System has done in the past; is that correct?

MR. PORTER: Objection.

THE COURT: Overruled.

A. Well, Marion-Franklin High School is still doing it. This whole zone is an attendance zone for that high school.

Q. Can we put up the 1970 base map with the 1975 elementary and junior high overlay?

A. We now have the 1970 Census, PX 252, elementary '75-76, which is PX 27 and junior high '75-76, which is PX 299.

[3590] Q. Dr. Foster, from your examination of the changing demographic pattern between the '60 and '70 Census, would you say that the pattern of growth in the Heimandale area in terms of minority concentration has now joined with the Alum Crest area?

* * *

A. My observation would be that the whole area in Heimandale and to the east of Heimandale south of Refugee Road has grown similar to the underlying census data

for Alum Crest which is to the north and — the north of the eastern part of the area we are discussing.

Q. And everything to the south, has it remained white?

A. Of the railroad, you mean?

Q. Yes.

A. I believe it does, yes, sir, and south of Refugee Road.

Q. Directing your —

THE COURT: Did you say south of Refugee Road?

THE WITNESS: Well, south of Refugee Road in the [3591] area which he was discussing which would be to the west and south of the Chesapeake Railroad and south of Refugee.

Q. (By Mr. Lucas) Did you examine the opening of the Sixth Avenue Elementary School in 1961?

A. Yes, I believe I did. This is elementary '61-62, PX 264, on the 1960 Census.

Q. Sixth Avenue Elementary opened carved out of what district?

A. It was carved out of Weinland Park, to the extreme east of the Weinland Park zone. It would be in almost the center of the school district, a little to the north.

Q. Can we put the '60 elementary overlay on top of the '61-62 overlay?

A. Yes.

Q. It might show up a little better. Can you show us how the Sixth Avenue Elementary was carved out of the Weinland Park area?

A. I now have 284A, Plaintiffs' Exhibit, elementary '60-61 over the '61-62 overlay. Weinland Park is nearly a square district pretty much in the center a little to the north and west of the city, and then in '61-62 just to the east the entire eastern edge of the district was carved out and made into Sixth Avenue.

Q. The boundary of Weinland Park is a dotted boundary; is that correct?

[3592] A. That's correct. I believe it goes along Fourth Street north and south which is the racial line for the area on the '60 Census Map.

Q. It almost splits the Weinland Park zone; is that correct?

A. Well, just about. I would say it was about the eastern third, may be a little more than that.

Q. It is almost adjacent to the site of Weinland Park?

A. Immediately east of the site, yes, sir, would be the zone line, Fourth Street.

Q. So it would back up to the school almost; is that correct?

MR. PORTER: Objection.

THE COURT: Overruled.

Q. (By Mr. Lucas) Let's lift the overlay now. What was the underlying racial composition of the new Sixth Avenue Elementary?

A. It appears to be all red or orange, the blocks. There is a white portion to the extreme east, but I believe that's railroad territory.

Q. What does the 1964 enrollment by race show for that school?

A. The 1964 for Sixth Avenue is 91 percent non-white.

Q. And the '64 Weinland Park?

[3593] A. Weinland Park is 30 percent non-white in 1964.

Q. When did Weinland Park close?

A. I don't think it is closed. Sixth Avenue closed in 1974.

Q. So do you know how many rooms it was when it opened?

A. My records indicate eight classrooms and one kindergarten.

Q. Is that a fairly small elementary school?

A. Well, it was really opened as a primary school which explains the dotted line between Weinland Park and Sixth.

Q. What was the effect of opening the Sixth Avenue School at the time it was opened and the location of the school?

A. Well, it opened up as a racially-identifiable black school and compacted the blacks in the eastern part of Weinland Park into that area. In my opinion, this could have been avoided by simply running the line east and west, depending on the number of children in different parts of the area, or simply making it dog-leg to the northern part of Weinland and picking up white children. There are any number of ways this could have been done. I believe at that time there was also a grade combination with Second School which is immediately below Weinland, and some of those [3594] children also went to Weinland, perhaps.

° ° ° ° °

A. I believe those assignments are described in Original Plaintiffs' Exhibit 8B which I don't have with me.

Q. All right, the Gladstone Elementary School was opened in 1965. Did you examine the opening of that school, Dr. Foster?

A. We have Plaintiffs' Exhibit 268, elementary '65-66, over the 1960 Census.

Q. Would you locate the school, please?

A. Gladstone is in the sort of center of the district a little to the north of the downtown area, and it was carved out of the southwestern portion of Duxberry Park, Duxberry being to the north and east.

[3595] Q. All right. What was the underlying census data with respect to that?

A. That in the 1960 Map, Duxberry Park area is all white, the Gladstone area to the south, just above the line, the zone line, has a couple of blue blocks and I believe two green ones and one blue one, I believe.

Q. All right. Would you put up the 1970 Census base map?

Is Gladstone still located?

A. All right. On the 1970 Census map, Gladstone at this point is either all red or all — it's either red or orange, I would say about half and half, and Duxberry is, on, about a fourth orange and red blocks and one green — one or two green blocks, and the balance, I believe, is blue, maybe one white block in the corner, part of a white.

Q. This open at the mid-point between the two census period, and you've looked at both census maps. Can you give us the racial enrollment for Gladstone the first year that you have data?

A. The year after it opened in '65, in 1966, I believe it had 78 percent non-white.

Q. And in 1965, what was Duxberry?

A. Forty percent non-white.

Q. And after the opening of Gladstone, what happened to the Duxberry enrollment?

[3596] A. The following year it dropped to 33 percent non-white in 1966.

Q. Do you have an opinion as to the opening of the Gladstone Elementary with respect to the effect on Duxberry?

A. Yes. My opinion is that this was built as a containment school as the blacks moved north and northwest and allowed Duxberry to remain whiter for awhile and assured Gladstone's opening as virtually a black school. This could have been changed by some combination of boundary lines or pairing with schools that were white to the north, perhaps Linden and/or McGuffey.

Q. What was Linden in 1965?

A. It had no blacks in 1965, nor did McGuffey.

Q. All right. Did you look at the boundary changes in connection with the Hudson Elementary opening?

A. '66.

Q. '66 overlay.

A. We now have the PX 269 elementary, '66-7 overlaying PX 268, elementary '65-66, and both of those overlaying the 1970 Census.

Q. Can we put the 1960 Census map up? I'm sorry. We should have done that earlier.

All right. Would you describe the boundaries of the Hudson Elementary and the area it was taken from?

A. All right. Hudson is in the center part of the [3597] district to the north a ways from downtown. It was carved out of the northern part of Hamilton. Its boundary to the north would be Hudson Street, to the east is Dresden, to the south is Duxberry and to the west would be the Penn Central Railway.

Q. All right. The school just above it is McGuffey.

A. McGuffey and Como.

Q. And below it is Hamilton directly to the south; is that correct?

A. That's correct.

Q. And let's put the 1970 Census back up.

All right. In the 1970 Census, would you describe the Hudson attendance area in terms of the basic census data?

A. All right. The Hudson attendance area to the east and the block just above the southern boundary is all red or orange except for one block in the extreme northwest which is blue. The northwestern part of Hudson Elementary is green and blue blocks intermixed with two or three blocks that would appear west of that and east of the railroad which are white.

Q. All right. Is the Hudson zone a narrow zone?

A. It appears to be about three blocks wide, yes, sir.

Q. And it runs east and west?

A. I would judge about somewhere at ten to sixteen or [3598] eighteen blocks.

Q. All right. In the '60 Census, I believe it showed all white; is that correct?

A. The Hudson zone?

Q. Underneath the base map?

A. Yes, sir.

Q. And the 1970, it shows mostly orange and red; is that correct?

MR. PORTER: Objection.

THE COURT: Overruled.

A. Mostly -- about two-thirds orange and red with one-third blue and green.

Q. All right. Does that indicate to you anything with respect to the rate of racial change at that period of time in that area?

MR. PORTER: Objection.

THE COURT: Overruled.

A. That it was changing black very rapidly, yes, sir.

Q. Hudson opened what percentage black according to the earliest data you have?

A. My 1967 data indicate that Hudson was 41.9 percent.

Q. And what was Hamilton, the school just below it?

A. In 1966, Hamilton was 61 percent non-white, the year Hudson opened. In 1967, it was 95 percent non-white.

Q. What was it in 1968?

[3599] A. 90.3 percent non-white.

Q. What happened to Hudson in terms of its racial enrollment?

A. What year did you wish?

Q. Take us from the 1967 data to today, if you will, if you have it.

A. I have it on the spread sheet.

In 1967, it was 41.9 percent non-white; in '68 it was 54.3; in '69, it was 62.4 percent non-white; in 1970, it was 69.2; in '71, it was 74.8; in '72, it was 77.9; in '73, it was 80.1; in '74, it was 82.7 and currently it's 82.9 percent non-white.

[3600] Q. In your opinion, Dr. Foster, what was the purpose of the location and opening of the Hudson School with the boundary lines drawn as they were?

MR. PORTER: Objection.

THE COURT: Overruled.

A. In my opinion this was a racial containment opening which compacted the black pupil population south into Hamilton. Drawing the line east and west along Hudson Street also in my opinion had the effect of setting a racial line at that northern position which is still to some extent effective on the 1970 Census Map, as you can tell, because most of the area north of Hudson Street is still a whiter area, and the black area is very heavy immediately south of Hudson.

Q. Were these alternatives available in 1966 with respect to both Hudson and Hamilton?

A. Well, again it is my opinion that if you would have run the lines north and south rather than east and west, you could have put black pupils with white pupils in a much better desegregative fashion than was done.

Q. What were some of the available schools, and have you looked at their racial enrollments?

A. Immediately to the northwest of Hudson is Como Elementary, and immediately to the north is McGuffey Elementary. Then to the northeast is Linden. In 1966, the [3601] year Hudson was opened, Como had no blacks. McGuffey had I think one black student, and Linden had 0.1 percent non-white, perhaps one or two black students. So all three of these schools were virtually all white schools.

By drawing the line north and south, Hudson could have undoubtedly been opened a desegregated school and would have served to desegregate the three white schools, and probably Hamilton could have been included in that combination.

Q. Can you say without having a spot map exactly

where the lines should have been drawn?

A. No way, no, sir.

Q. But with a spot map, the lines could have been drawn in that direction?

MR. PORTER: Objection.

A. I believe they could have, yes, sir.

* * * * *

[3622] Q. Dr. Foster, from your examination of the data that's been made available to you, examination of the demographic changes in '50, '60 and '70 census, school construction, school boundaries and particularly the growing areas of black concentration in particular parts of the city, do you have an opinion as to whether or not the actions of the Columbus School Board contributed in substantial part to any containment of black children in particular sets of schools?

* * * * *

A. Yes, I do.

* * * * *

[3625] Q. I will try to do it again: We got that far afield.

Dr. Foster, from your examination of the records, in particular the exhibits in the cause, the examination of depositions, the maps and overlays, the demographic data which you have studied, the racial enrollments furnished by the school district, school construction, assignment of principals to schools, the changing of boundaries, setting of boundaries, optional attendance areas, all of the matters in that respect that you have examined, many of which you have testified to here today, and I believe the second part of the question was considering the concentrations of minority population in the Columbus School District, of the actions and policies of the Columbus Board of Education contributed in any substantial way to the maintenance of racial separation in black and white in the Columbus School System over the years?

MR. PORTER: May I have my objection?

THE COURT: Yes.

A. My answer is: In my opinion they have, and I would add to the actions, the inactions or the lack of action.

[3626] Q. Can you describe in some general way how this worked with respect to the various concentrations of black population in the city as they expanded?

A. I think I have done this off and on in my testimony in treating various aspects that I made analysis of, but in the western part of the Columbus District, within the Highland's area, in my opinion the blacks in that area have been compacted and the white areas maintained because of actions or lack of action by the Board.

In the south portion of the Columbus District about which I testified earlier this afternoon, my opinion is that the actions and inactions or lack of action by the Board definitely has kept the blacks, the black community, helped to keep the black community, particularly the schools is what I am referring to, northeast of the Chesapeake Railway and the whites in isolation to the southwest of that dividing line.

As the black residential areas moved south from the center of Columbus, and north and northeast, in my opinion actions and inactions of the Board have contributed in various ways to allowing whites, while that transition was taking place, to remove themselves to whiter schools and has generally had the effect of compacting the black pupils and schools as the movement went along toward the center of the city in both instances.

* * * * *

CROSS-EXAMINATION BY MR. PORTER

* * * * *

[3657] Q. [By Mr. Porter] All right. You stated that in the process of building a school that the problem of site

selection was not an easy one to solve. Am I stating your testimony generally accurately, or would you correct me, please?

[3658] A. I seem to remember I said something to that effect, yes, sir.

Q. And you went on and said: But the fact that the school opens racially identifiable, there is a strong tendency to maintain that racial identifiability and that there is an obvious inference that the school system is not doing anything if it were really interested in desegregating the system. I think that was generally your statement. Does that sound accurate?

A. Well, I guess recently so.

Q. What is the problem that a school system faces or faced in the '50s and the '60s with respect to site selection? What do you mean? What did you mean?

A. Well, site selection for a city school district like Columbus is an ongoing process where they're heavily into the real estate business, and most systems of this nature, and I assume Columbus does, also, has at least one person, sometimes a staff of people, depending on the times of their existence, whether they have a population press or not, simply out buying schools and looking for sites and so forth and paying attention to real estate developments that may already be underway or are projected. School administrators are in constant touch with the people who are building school developments and inner city developments and all of this. They work very closely, as a matter [3659] of fact, and they generally plan this — if they open up a new subdivision to have a school tucked away in it somewhere.

Q. Do you find this to be an unsatisfactory or a reprehensible practice on the part of a metropolitan school system to conduct its business affairs in that way, or do you feel that it is an appropriate practice for them?

A. Well, I think there are some things about the practice that many systems have in terms of site selection

that I would not agree with currently, but generally, the process itself, absent the racial considerations, is — I would classify as a good or normal business procedure for buying school sites.

Q. Now, if one selects a site in a growing area or selected a site in the '50s in the City of Columbus in a growing area out from the center of town, that school would open up, would it not, under your system, as being racially identifiable?

[3660] A. Unless the school administration or the board decided to open it otherwise by changing the boundaries or the assignment of pupils within certain boundaries that they may have set up.

Q. Well, let's, if we might, please — maybe we could get Mr. Lamson to put up the 1960 Census Map, and let's put on top of it, if we might, the 1960-61 elementary system.

Dr. Foster, directing your attention to Plaintiffs' Exhibit 251, the 1960 Census, and the 284A overlay, directing your attention to Maize Elementary School which is up at the top which opened, I believe, according to my records, in 1960; is that right?

A. I believe so, yes.

Q. Now, what is the underlying color where Maize is located?

A. I assume it would be white. It is white, yes.

Q. What are the colors around it?

A. Of the elementary schools around it?

Q. Yes, please.

A. I believe all of them are all white.

Q. Now, would you please explain to me or, more appropriately, for the record, how that school can open and be other, under your system, anything other than racially isolated?

A. Simply by pairing it with another school that is [3661] of a different racial makeup, ranging it, pairing it

or grouping it with another school that is of a different racial makeup and assigning children in such a way that it is thereby desegregated.

Q. Now, Dr. Foster, looking at that 1960 Census Map and that elementary system for 1960-61, where would you have to go to do that?

A. You would have to go south to the area around Eleventh, Windsor, Weinland Park, Milo, Leonard Elementaries.

Q. Can that be accomplished or could that be accomplished without transportation?

A. No, sir.

* * * * *

[3673] Q. Thank you. Doctor, would you point out, please the Mifflin Junior High School?

A. It's to the northeastern part of the school district (indicating). The school's here (indicating)

Q. And it was your suggestion or testimony that 89 — there were 89 seats available at Buckeye. Would you identify Buckeye, please?

A. Buckeye's to the southwest of the Columbus district.

Q. It is the furthest — it's the most southerly of the junior high schools?

A. Yes, sir.

Q. Can you give us an approximation in straight distance as to what that is, please?

A. I estimated in my data it was about ten miles from Mifflin, south of Mifflin.

Q. And assuming the availability of the 89 seats, it would be necessary to take some part of the 530 students, take 89 of them out and send them from Mifflin to Buckeye; is that right? That's what you do?

A. Well, I think if you were making that kind of a decision, you'd probably want to take two busloads, which depending on your capacity would be 100 or 125 children,

which would leave Buckeye slightly over capacity, but not nearly so much as Mifflin.

Q. All right. And another of the schools was [3674] Crestview with 86 seats. Would you identify it, please?

A. Crestview is to the north of the district about half-way, and a little to the west (indicating).

Q. And approximately how far, please?

A. I estimated four to five miles from Mifflin.

Q. That's a straight distance; is that right?

A. Yes, sir.

Q. Do you happen to know how you would get there by a road?

A. I didn't make that analysis, no, sir.

Q. All right. Wedgewood had 145 seats, according to our figures. Would you identify it, please?

A. Wedgewood would be in the extreme western portion to the south of the school district (indicating).

Q. And it is approximately how far, please?

[3675] A. I estimated about 12 miles.

Q. All right, thank you. Would you take your seat, please.

Now, if this system were to be followed, it would mean that you would break up the junior high school into units or numbers that would fit into Buckeye, Crestview and Wedgewood, and some other arrangement would have to be made; is that right?

A. Well, if you used, for example, all three of those facilities and made them slightly over capacity, you would wind up with a fairly over-capacity distribution in those three and in Mifflin Junior High. They would all be a little over capacity, which a junior high school can stand much easier than an elementary school.

Q. Well, I think, if my figures are approximately correct, there were 539 over capacity at Mifflin; is that right?

A. That's right.

Q. And there were 300-some spaces available?

A. That's correct.

Q. And it would be true, would it not, that you would be breaking up part of the seventh grade or part of the eighth grade or part of the ninth grade? You would not be able to handle the entire class, would you?

A. That is correct.

[3676] Q. Now, directing your attention, if I might, Dr. Foster, to optional zones, I have first some general questions that I would like to ask you, and then I have some specific ones. The first is that I take it from your testimony, and I guess it would be my understanding that you do not know, nor so far as you know or I know are figures available that show to what extent individuals in an optional zone have in fact used it; is that right?

A. Yes.

Q. And I think that you have also testified possibly here, but certainly it is your opinion that optional zones are used for all sorts of purposes; is that not true?

A. That is correct.

Q. One of which obviously you have testified is to permit whites to leave some type of a situation; am I right about that?

A. Yes, sir.

Q. You testified concerning certain options, but you did not testify concerning all of the options that have existed within the Columbus School System during the period that you examined; isn't that true?

A. That is correct.

Q. And in fact, options showed in the — additional options showed in that Ohio State report that you used I think for 1955 or '56, in addition to those to which you [3677] testified; is that right?

A. I am not exactly sure of the latter, but I would think that's possible, yes, sir.

Q. Do you remember, by the way, when you examined that Ohio State report that shows one or two of the options about which you testified, that it also shows the area annexed to the City of Columbus? Do you recall that?

A. I am aware of the areas that have been annexed as far as the schools go. I don't recall specifically seeing that in the Ohio State report.

Q. Is your testimony here in this proceeding based upon certain specific instances — strike that.

The instances about which you have testified, the specifics, were they selected in this case by you, or were they selected by someone other than you?

[3678] A. By me.

Q. They were selected by you?

A. Yes, sir.

Q. And so they are the distillation or the residue or whatever of your examination of these various boundary changes and optional zones and discontinuous zones that existed in the Columbus Public School System from time to time during the period of your examination; is that right?

A. Almost right. The optional zones I would agree with.

The boundary changes — I testified in my remarks about non-contiguous assignments and about school openings and about optional zones for many boundary changes, dozens of them, but I did not specifically testify — or I did not make a complete analysis of all the boundary changes in the system from year to year is what I'm trying to tell you.

Insofar as boundary changes related to school openings, to areas like the south area which I testified to in some detail, to the west area, that portion of it around Highland which I testified to, to the various optional zones or school openings what I testified to, those boundary changes I did make an analysis of. I did not set out specifically, because I wasn't asked to, to make a complete analysis of every boundary change that took place during the time data were available.

* * * * *

[3684] Q. And so if you open up — strike that.

Directing your attention to the Fair-Fairmoor optional zone which is contiguous or coterminous with East, Eastmoor and Franklin?

A. Franklin, Eastmoor and one year Johnson or two years Johnson Park.

Q. Okay. Directing your attention to that optional zone, do you know the number of students or school children within that optional zone that were affected by it?

A. You mean who opted to move one direction or another?

Q. Yes.

A. Well, I think you just stated that we both agreed that neither of us knew this for any school option.

Q. You testified concerning the number of houses within those census — I suppose that was census information?

A. Yes, sir, census block information.

Q. And the number of people within those houses; am I right?

[3685] A. That's correct.

Q. Were you furnished or advised by the Plaintiffs of the information contained in Plaintiffs' Exhibit 140 which enumerated the number of elementary and high school students within the area and how many were in public schools?

A. No, I don't believe I have this information.

Q. First I would ask you what the year is? I believe it is 1972; is that right?

A. Minutes of the State Board of Education, July 10, 1972.

Q. Directing your attention to the second page under "Pupils in the Area" would you read it, please?

A. Twenty-five in elementary, 13 in high school with only one or two in public schools.

* * * * *

[3689] Q. Well, I want to know about your testimony with respect to the Franklin-Roosevelt High.

A. Well, this is not the only thing that went into making up my testimony regarding the optional zones. There were also factors as to how the schools were situated racially in 1964 which I also testified to. The Census Map is simply one indication of the way that the General population data are running, and I combined this estimation with the figures that the School Board gave the Plaintiffs for 1964.

Q. But that assumption, and correct me, that assumes that there are people within the defined area, does it not?

A. Well, I think the School Board would be a little ridiculous to set up an optional zone between two schools if there were no people in the area. I think that's a safe assumption on my part.

Q. Well, Doctor, isn't it also true that if it's colored orange, red, green or blue that that means there are people there? Isn't that true?

[3690] A. According to the map that Mr. Lamson has made, I would say that was true, yes, sir.

Q. And it was my understanding that those colors represented non-whites, is that right, in some varying percentage?

A. That's correct.

Q. And it was my understanding that it was your testimony that this was permitting whites to leave; isn't that right?

A. That's correct.

* * * * *

[3691] Q. All right. Directing your attention to the downtown option.

A. All right.

[3692] Q. This option permitted those students within this downtown area, defined area, to go to any one of a

number of five schools. It varied from five or six to seven; is that right?

A. Yes.

Q. Those schools throughout the existence of the option contained schools which were racially identifiable black and racially identifiable as white, did they not?

A. Yes, I believe so, although for the years before '64 this would again have to be an estimate on my part.

Q. I understand. Now, I am not clear about the direction of your testimony on this, Dr. Foster. I am correct, am I not, that a black student could elect to go to Garfield or Hubbard or any of the other schools that were within the group that particular year; isn't that right? Isn't that your understanding?

A. I believe so, yes, sir.

Q. And the same would be true of a white student, would it not?

A. Yes, sir.

Q. And as a matter of fact, isn't it — it is not unusual to find a zone of this type in a downtown area; isn't that correct?

A. I have seen many cities, and I don't remember a single one where there was an optional zone like this in a [3693] downtown area.

Q. All right. Now, you testified that the function or the purpose of this was to permit what? What is the segregative effect of this?

A. Well, simply that if you are white and you do not wish to go to a racially identifiable black school, you could have opted to go to either Mohawk or Hubbard, and I think that was the primary affect of it. In other words, it left the option up to the pupils or their parents, and there were both racially identifiable schools black and white involved in the option.

Q. Well — excuse me, are you through?

A. Yes.

Q. Isn't it also true that to the extent that a black went to a racially identifiable white school, that you have improved, that it has an integrative effect, does it not?

[3694] A. That is correct.

* * * * *

[3700] Q. Directing your attention to Weinland Park and I guess it was what, Sixth that had the primary K through 3?

A. Yes.

Q. And when did that, did Sixth open? Do your notes show that?

A. Pardon me, sir. Sixth Avenue Elementary opened in 1961.

Q. And it, if I recall correctly, was a primary center consisting of K through 3; is that right?

A. I believe that's correct, yes, sir.

Q. And I think your testimony went to the question of it having or to the point that it had — Sixth had split off the east part of Weinland; is that correct?

A. Yes, sir.

[3701] Q. Which I believe you testified had the effect of making Sixth what, white or black? I don't recall?

A. Black.

Q. And removed those blacks, then, K through 3, from that area from Weinland Park; is that right?

A. Yes, sir.

Q. And would I be correct that the western part of the Weinland Park that was left was more white than the eastern part; is that right?

A. That's correct, yes, sir.

Q. Now, what happened to 4 through 6? Did they stay at Weinland Park?

A. In the total area, yes, sir, I believe so.

Q. So that if the Columbus Public School System had as its object the intent to segregate, it was only going to

segregate K through 3 and not 4 through 6; is that right?

A. Yes, sir.

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[3705] Q. How do you explain the fact that the racial characteristics in 1975 of the southern part of Columbus, that the area to the east of the railroad tracks is predominantly black or has a high non-minority percentage [3706] and the area to the west does not?

A. Well, I didn't make any such analysis in my study of the school system.

Q. Well, you testified yesterday that the school system caused the area to the east to go black —

A. The schools —

Q. — and kept the area to the west white. That's what you said.

A. I was speaking of the school population, I believe, in my testimony, not the general housing situation.

Q. The school system does not control the housing pattern, does it?

A. It has a considerable effect on it, in my opinion.

Q. But it does not control it, does it?

A. No, not completely, of course not.

Q. How do you explain the fact that the black population of the City of Columbus went northeast rather than northwest?

A. Well, like I say, I have not made an analysis of that, but I could guess that there are certain reasons which are typical of any city expansion or development which have to do with that in terms of the real estate market and the schools and the whole — all the forces that operate to determine those things acting in unison and with reciprocal effect.

[3707] Q. But, Doctor, you are purporting to testify that the Columbus Public School System intentionally has segregated the races, and you purported to do this based on what they did in 1957 and '58. Now, did you make an

analysis in order to permit yourself to make that type of a statement or not?

A. In terms of their decisions insofar as schools were concerned, yes, I did.

Q. And where is that information?

A. Well, I've already testified to it. If you're talking about the southern part in terms of school openings, boundary changes connected with school openings, assignment of pupils in a non-contiguous fashion, to some extent school additions, the whole business of — I did testify also to such things as the appointment of black principals so that the community perceives certain schools as black and certain schools as white. All of this is accumulative effect and process in terms of community perception of schools, and their perception of the intent of the School Board.

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[3713] Q. (By Mr. Porter) You would agree, would you not, that the shifting housing patterns or the changing housing patterns play a part in the or cause the racial composition of the particular schools, absent some type of a pairing or transporting situation?

A. That they are a contributing factor, yes, sir.

Q. If there is a need for a school building in an area which is 90 percent white or 90 percent black, is it your opinion that the School System should not build that building?

A. Well, I think a school system needs to take that need in context with the total system so that any decision in that regard would have to be made for each individual school as it arose. There are times when I think by making choices of sites which may be made available, a school does not have to open up in an area that is 90 percent white or 90 percent black. That is to say there may be alternative sites which can handle that population just as easily generally which would be placed more nearly toward the buffer area or buffer zone where white or

black residential areas would come together. If it is that kind of situation, then I think sometimes you can make choices that way.

If it is in a completely isolated racial housing [3714] pattern, that is to say if it is in the extreme suburbs where everything is white, then I think a school has to make the decision that if you open it there in this day and age, you need to have some boundary assignments which will suggest that you are paying attention to the necessity to open that school up as a racially non-identifiable school, and there are ways to do that.

Q. We will get to that latter part in just a moment.

If the building is built on the edge in a period of years, at least historically, there is an expanding population. Historically at the present time you would expect that school to become black, would you not?

A. You mean if it were built on any edge in the City of Columbus?

Q. On the edge of a black-white housing situation?

A. Not necessarily. Some of the black residential areas over the Census Maps '50-60-70 have remained relatively stable. Some of them haven't. So I think it would depend on the situation.

If you are talking about downtown expanding black residential areas, that would be one thing. If you are talking about west Columbus, that might be another thing and so forth.

Q. So that to the extent that it may have been all right for the Columbus Public School System in the '50s to [3714A] have built on the edge of a racially changing area in one situation but not in another; is that right?

[3715] A. Well, I think you have to make a judgment as to the nature of the black residential movement and the white residential movement when you're considering race, yes, sir.

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[3727] Q. I have got it in my notes. I will be glad to show it to you.

Now, Doctor, to the extent that the Columbus Public School System relied on advice which it received in [3728] the '50s and the '60s from the Ohio State University in pursuing its building program, are you — do you mean to suggest or imply that the Ohio State University intended to segregate the Columbus Public School System?

A. Well, I don't think — I haven't read all of the Ohio State University's surveys, but the parts that I did read, I saw very little, if any, reference to race. I don't think Ohio State was concerned with racial implications.

Most university bureaus, research bureaus that do this type of survey work do so at the request of the school system, and their main thrust in these surveys was not to deal with the racial component at all, but simply to deal with the usual population and construction needs absent race. I don't think in most of those surveys, if not all of them that I read, race had any consideration.

Q. And that would also be true, would it not, of the studies with which you worked when you were at Miami of Ohio that were done by this group at Ohio State and your group at Miami? The same thing would it not?

A. Well, in several of them there were no minority students involved at all. I can't really answer that question because I don't remember.

Q. Did you do a study — did you participate in a study when you were at Miami, any studies at Cincinnati, the Cincinnati School System?

[3729] A. I don't believe so. We did some studies of schools in Hamilton County. I can't remember just which ones, but I was involved in two or three studies of suburban schools, but not Cincinnati Public Schools that I remember.

Q. And it would be true, would it not, that the studies with which you are familiar, both the ones that were done

by Ohio State for the Columbus Public School System and the others that were done while you were at Miami or to which you had some exposure, that those systems, the total systems, were built in substantially the same way that the Columbus Public School System was built or developed over the period from 1950 to 1965; is that right?

A. Well, I can't say for certainty, but I would imagine so, yes.

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REDIRECT EXAMINATION BY MR. LUCAS

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[3753] Q. [By Mr. Lucas] Thank you. Dr. Foster, you were asked about the Fair-Fairmoor option. Do you recall that?

A. Yes, sir.

Q. And you were shown Plaintiffs' Exhibit 140 which you indicated you had not seen previously. I ask you to direct your attention to the State Board minutes of [3754] July 10, 1972, page 44, which is PX 140, an excerpt therefrom, and ask you if it indicates in there that this particular transfer raises the question of percentage of racial mix under the heading "Miscellaneous," I believe, Dr. Foster?

A. There is a listing of considerations. Number 7, Roman numeral VII is Miscellaneous Considerations, and Item No. 3 under that states: Raises the question of percentage of racial mix.

Q. It also indicates in No. 1 that no school buildings are in that area?

A. That is correct.

O. Now, Item Roman numeral III indicates that there are pupils living in the area; is that correct?

A. I believe I read that into the testimony, yes.

Q. 25 to the elementary, 13 to the high school?

A. Yes, sir.

Q. Only one or two in public schools?

A. Yes, sir.

Q. This was near the end of the option in terms of its extinguishment by the School System?

A. 1972? Yes, sir.

Q. In your experience, Dr. Foster — let me go back and establish a few facts. This option existed from the directories of the School Systems at the elementary level, [3755] did it not?

A. Yes, sir.

Q. And it was set up by the School System at the junior high level; is that correct?

A. Yes, sir.

Q. Was it at the junior high or senior high that they had two options for some period of time?

A. Junior high level.

Q. What options were those?

A. This was in 1961-62 when the option included both Eastmoor and Johnson Park as well as Franklin. Then in 1964 it included only Johnson Park and Franklin and then — no, I beg your pardon. In 1962-63, the following year, it included just Franklin and Johnson Park, and then in the third year, '63-64, it changed back to Franklin and Eastmoor.

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[3756] Q. [By Mr. Lucas] Dr. Foster, it was suggested that this option had little effect with only two children in public schools. Aside from the fact that we were not furnished data by the School System as to how many used this option in earlier years or thereafter, for that matter, does the establishment and maintenance of this kind of option indicate anything to you from your experience with respect to the intentions of the school authorities?

MR. PORTER: Objection.

THE COURT: Overruled. You may answer.

A. Well, I have been through that area, and I think that the general affluence of the area would indicate that

this is a typical sort of situation where you are more than likely to get some rather potent pressure that we spoke about earlier in my testimony on options on the school board, and the fact of this option would indicate to me that the school board might well have had considerable pressure to maintain this sort of option even though it may have involved in a certain period very few students.

* * * * *

NOVICE FAWCETT

called as a witness on behalf of the

Defendants, being first

duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PORTER

[4278] Q. [By Mr. Porter] Would you state your name please?

A. My name is Novice Fawcett.

Q. And where do you reside, Dr. Fawcett?

A. I reside at 3518 Rue De Fleurs, zone 21, in this community.

Q. And what is your business address, please?

A. I'm the President Emeritus of Ohio State University and serve as an Educational Consultant.

* * * * *

[4280] Then I returned to the City of Columbus as Superintendent of Schools in 1949 where I served seven years until 1956.

* * * * *

[4284] Q. What was the status, if I might use that word, of the City of Columbus when you came here as Superintendent of the Columbus Public School System in August of 1949?

A. Upon reflection, I presume I would describe it something like this: It was and is a capital city that had experienced rather substantial growth between around

1940 and 1949, a dimension of growth which, as I look back upon it, probably was not understood too well by anyone. The [4285] City had, during the war, experienced an influx of some new industry, beginning — I believe probably the largest one being Curtis Wright, the Lockbourne Air Force Base and others, and following — either toward the end of the war or following the war — I have forgotten which, was the decision on the part of General Motors Corporation to bring the Ternsteda Division of General Motors here. So there had been a substantial increase in the population and obviously a very substantial increase in the birth rate from 1940 to 1949.

There was considerable amount of residential construction, particularly in some of the outer sections of the City, and in general the City was poised to do something, but, as I viewed it at the time, I am not quite sure that it knew exactly what it was poised to do.

Q. Do you happen to recall — and if you don't, it is perfectly all right — what the population increase had been between 1940 and 1949?

A. Well, in 1940 the population, as I recall, was a little over 300,000, around 305 or 6 thousand. By the time I came here, 1949, it was 370-some thousand.

As I recall, I was told that there was an increase of about 2 percent in population in the city during that period.

Q. I am going to direct your attention, Doctor, to some [4286] figures and maps that have been put in evidence here.

MR. PORTER: For the Court's benefit, I will be using these exhibits, and these are originals. They are a little easier to read, possibly, than the ones the Court has. The 1950, for the purposes of the record, Your Honor, the 1950 Ohio State University Study I believe is identified as Plaintiffs Exhibit 59. The 1960 Ohio State University Study — I am sorry, the 1953 Ohio State University Study

is marked as Exhibit 60, and the '55 or '56, one, is marked as 61.

Q. (by Mr. Porter) Now, Dr. Fawcett, I believe you have copies of these reports, do you not, with you?

A. Yes, I do.

Q. Would you refer to Plaintiffs' Exhibit 59 which is the 1950 study, and directing your attention, Dr. Fawcett, to figure 4 which appears immediately following page 8, I would ask you to identify, if you would, please, the areas of growth of residential building construction as shown upon that map for the period 1938 to 1941.

A. Yes. The greatest areas of growth, according to this map, are identified as the area immediately east, a little southeast in Bexley and a little southwest of that community. Another area could be identified as being north of 17th Avenue in between Cleveland Avenue and the railroad track. One of the sharpest increases had been in the north- [4287] northwest which is the area principally east and west of North High Street and north of 17th Avenue extended. There was some growth in a small area of the school district that projected between Upper Arlington and Grandview, and the beginning of a very substantial growth in the far western part of the city principally, but not exclusively, south of Broad Street and beyond Hague Avenue.

Q. Now, Dr. Fawcett, I would now direct your attention, please, to figure five of that same exhibit which appears on the next page and is the distribution of residential construction for the period 1942 through 1945, the Second World War, and would you describe generally where those heavy concentrations of new residential units are, sir?

A. According to this map, there was somewhat less construction in that period because of a shortage of materials, but there was still some additional in the area east of Bexley and in the area north-northeast in the general direction of Gahanna. There was continuing increase in

the construction in the area north of 17th Avenue between the railroad track on the west and Cleveland Avenue on the east and the northern boundary limits of the City, some continuing construction in the north-northwest section, further development of the small area that projected between Upper Arlington and Bexley and continuing development of new residential areas in the far western part of the City [4288] south of Broad Street.

Q. Now, Dr. Fawcett, if I may, please, I will direct your attention to Figure 6 which is the next map and is the distribution of building construction for the period 1946 starting right after the Second World War to 1949, the time when you became Superintendent, and would you please describe the heavy areas of new residential buildings? [4289]

A. The most concentrated areas of residential instruction here are in roughly the same areas as described before, but since the war was over and material was available, this is a period in which the growth really began to take place rapidly.

The areas east of Bexley literally filled. That's the area between Bexley and Whitehall. The area north of 17th Avenue and between the railroad track on the west and Cleveland Avenue on the east literally filled. The north-northwest area extending from, well, east and west of High Street all the way over to the Olentangy River had a sharp increase in residential construction.

Again, this area between Bexley and Upper Arlington on that map experienced considerable residential construction.

Q. Excuse me, doctor. You mean between Grandview and Upper Arlington?

A. I am sorry, between Grandview Heights and Upper Arlington, and the area on the west and far west, principally again south of Broad Street, began to expand rapidly.

Q. Thank you, doctor.

Now, doctor, if you would put that aside for just a moment, I would like for you, please, to describe the status now of the Columbus Public School System when you arrived in 1949, and I would like to deal with it two ways. I would like to deal with its structure, its organizational [4290] structure, and I would also like to deal with it from its physical standpoint as you saw it at that time, and if we might, let's take the physical part of it first.

A. As I recall, there were 42 or 43 elementary schools in the city at that time, I believe of that 11 junior high schools and six senior high schools, the six senior high schools being rather good buildings. All, I believe, were constructed in the decade of the 20s following the 1st World War.

The junior high school facilities were not of quite the same quality as the senior high school ones, but quite good compared to most of the elementary school buildings. The vast majority of the elementary school buildings were in a very bad state of repair, and some so far, I thought, deteriorated that it would be an unwise use of resources even to restore them.

In terms of the operation of those buildings, I remember, for example, heating plants all over the system were obsolete. They were fired by men shoveling coal furnaces. Some of the elementary buildings I felt were — the safety features were at least questionable, and I felt that an attack had to be made on that problem immediately.

As far as the organization is concerned, the other part of your question, I think I would say for the most part the system had been organized on what was called a vertical [4291] K-6 3-3 system of organization, kindergarten, first six years of elementary, the junior high school system and the senior high school system. As a matter of fact, the first junior high school in the United States was

the Indianola Junior High School, started, I believe, about 1909.

The staff was a very limited staff. There were many good people, but teacher-pupil ratios were very high. The central administrative staff was what I suppose most chief executives of educational institutions today would describe as being a very thin staff. It was organized under three assistant superintendents reporting to the superintendent, one for business, one for elementary education and one for secondary education.

There were some special services, but the personnel was very limited.

Q. What had been done with respect to the physical facilities during the period prior to 19 — the 30s and 40s prior to your being appointed superintendent? [4292]

A. It would be a little easier for me to place that matter in perspective if I might observe that during the high periods of unemployment in the '30s, not very many school systems had the resources to do anything about building construction. As a matter of fact, I think there was an issue tried in this city, if I remember correctly, around 1938 that failed. In the '40s, with the war, it was impossible to get materials for the construction of buildings.

There had been some planning carried on to the credit of this city, a modest amount of planning, at least, prior to the end of the war, a kind of post-war planning effort, limited but quite good in other respects.

A bond issue, as I recall, kind of an umbrella-type issue had been submitted around 1945, and in that issue which had passed, the schools were to get I think it was \$6.5 million. Apparently action following the passage of the issue was postponed for two reasons. One, it took some time to develop working drawings and specifications for buildings, but, secondly, prices were going up very rapidly, and there was competition for a limited amount

of materials. Evidently no action toward the construction of buildings was undertaken until probably in the very latter part of 1948.

Q. What was the situation with respect to enrollment [4293] and projected enrollment as seen by you and your people when you came in 1949 and early 1950?

A. Well, as I recall, one of the factors, of course, that has a direct impact upon future school enrollments is the birth rate. I do remember that the number of births reported in Columbus in 1940 was somewhere between 4,500 and 5,000, perhaps 47 or 48-hundred children, and when I came in 1949, I believe that the number of births in the district was about 9,000.

In addition to the increase in the birth rate, there was a certain migration of people seeking employment in this area. The combination of all of these factors led to the conclusion that planning for the future had not been adequate, that we would need to pursue vigorously more up-to-date data and should plan for the best scientific and objective study we could get in order to have such data available for making sound decisions.

It also meant to me that we would in due course have to go to the voters of this community and persuade them that what we were trying to do was a legitimate form of procedure to which we would have to have stronger support if we were to discharge the responsibilities we felt that we had.

Q. Let me interrupt you right there, if I might, and while it is a little out of order, I would like to ask you [4294] what did in fact happen to student enrollment within the Columbus Public School System from the time of your arrival in August of 1949 and the time you left in the summer of 1956?

A. I think, if I recall correctly, we at that time interpreted that problem to the people of the community in terms of having absorbed at least two cities the size of

Newark and Lancaster into the Columbus School District. School population, I believe or school enrollment in that period increased 24 or 25 thousand students, 20-some thousand students, as I recall.

Q. I believe that the figure, and it shows in the Superintendent's Reports which we will get to later, but see if this coincides with your recollection, that the enrollment in 1950 was approximately 46,000 and by 1957 the enrollment had climbed to 71,000?

A. That sounds correct. Of course, figures related to that kind of problem I believe are all recorded either in the Annual Reports or in the studies done by the Bureau of Educational Research.

Q. Now, you have stated that you recognized a need when you arrived for a building program or the necessity to build buildings. What did you do about this?

A. After reviewing that problem in considerable depth with members of the staff of the schools and generally with [4295] members of the Board of Education, I was ready to propose that we seek the assistance of the Bureau of Educational Research of the Ohio State University to do an up-to-date study. They had conducted a study here in 1939, I believe. I had been over that study and felt that recommendations were inadequate because the growth of the city had then exceeded the expectations of the people who carried the study forward.

At that time the Bureau of Educational Research which originated, I believe, on the campus of the University in the '20s under the very distinguished Dr. Charters and later taken over by Dr. Holy, was probably one of the best recognized research bureaus for this kind of study in the country. Since they had already done one study ten years or more before, it seemed appropriate to me to try to determine whether or not they would be available for doing another study, and it had a good deal of other work to do at the time. The one condition would

be that I would provide some staff assistants to help them gather the data on which the Bureau itself would make the recommendations.

The Board of Education approved proceeding in this respect and at this time I brought Mr. Francis Rudy as a teacher on special assignment to be my representative in the collection of the data to be used by the Bureau in making its report and recommendations. [4296]

Q. Now, Dr. Fawcett, would you please get before you again Plaintiffs' Exhibit 59 which is, I believe, the study done by the Bureau of Educational Research, College of Education, Ohio State University, in 1950 entitled "A Restudy of the Public School Building Needs of Columbus, Ohio." Do you have that again?

A. Yes, I do.

Q. And I would ask you to turn to page 3 little i and direct your attention, please, to the first paragraph — wait a minute — the first paragraph on that page after the word "preface," which it describes I believe about the 1939 study, and I would ask you to read that.

A. Once before during 1938 and 1939 the Ohio State University Bureau of Educational Research made an extended study of the school building needs in Columbus, Ohio. At that time detailed recommendations were made for additions to or replacement of certain elementary and junior high school buildings, for a program of modernization of older buildings and such things as heating plants, toilets, fireproofing, artificial lighting and new floors, and for the replacement of over-aged or outmoded educational equipment. The cost of the proposed program was estimated and plans for financing were developed.

Q. Go ahead, if you would, please, and read also the next paragraph. [4297]

A. Some of these recommendations have been followed and the project completed. Others are in process. However, more than ten years have elapsed since the last

survey. During that time World War II with an accompanying scarcity of materials resulted in the slowing down of the building and replacement program. Also the war and other occurrences during the intervening years have been responsible for a number of important changes in population, birth rate and educational needs, all of which affect school building requirements. [4298]

Q. Now, after you received this report, did it confirm or did it not confirm your opinion that new school facilities were needed?

A. Being new to the system, I had to depend on consultation with my colleagues and such data as I had available. I was persuaded that the system was confronted with very substantial growth, but the study itself seemed to indicate even more dramatic growth than I had expected.

Q. Directing your attention, please, to Exhibit 59 and the page roman numeral VII, I guess it is, v two little iis, the beginning of the Table of Contents, do you have that in front of you?

A. Yes, I do.

Q. The first chapter one deals with community. Would you please explain why you or the people who performed this study were interested in the community and generally what it dealt with?

A. No study focused on the projection of school needs would be worth very much unless the people in the system understood the problems related to community growth.

Consequently, we did attempt to analyze community growth in this study and the prospects for future residential growth.

Additionally, we took a look as nearly as we could within the constraints of time at industrial development and [4299] other factors which we felt would have an effect ultimately upon the size of the school system.

Q. And would you explain, please, Chapter 2 which is entitled "Changes since 1939 in the Organization and

Population of the Columbus Public Schools and Possibilities for the Future." What was the interest here?

A. We wanted to have a historical basis for whatever data was collected and whatever recommendations would be made. We analyzed the form of organization or the structure of organization of the system. We took a look, according to the information that appeared here, at the trend of non-public school enrollments and what impact this would have on the future growth of the school system, and tried to develop in terms of the best knowledge available at the time some trends that would give us guidelines on which to make decisions to recommend to the Board of Education for projects for the future, projects which would have to be submitted to the people for support.

Q. Would you describe, please, what Chapter 3 deals with?

A. Well, that chapter is — it appears here as a restudy of the school plant, its makeup and pupil capacities, and I have addressed myself to some aspects of the content of this chapter. It does give a recitation of the building changes or improvements or additions that had been made since 1939, [4300] some information related to recommendations that appeared in the 1939 study. It addressed itself to portable classrooms and to the capacity of the buildings and made an analysis of the future capacity of both junior and senior high schools.

Q. And Chapter 4 deals with the financial program, and would you explain, please, for the purposes of this record, what this chapter deals with and its significance?

A. Yes. Every school superintendent uses as one index or at that time used as one index the amount of money invested in the education of each child in the school system, the elementary level and junior high school level, in this case, and senior high school level. He also understands the taxable wealth back of each student or needs to understand that or at that time needed to understand that in

order to be able to arrive at any kind of an intelligent conclusion about the kinds of recommendations he could make to people who had to pay the bill through an increase in taxes, principally real estate taxes. So tax bases were analyzed, compared to the tax rates in other communities of comparable size. Capacities were examined and future enrollments fitted into those. Costs per pupil at that time were analyzed, and I might indicate that costs per pupil for the education of children at that time in the Columbus Public Schools were relatively low compared to other communities of comparable nature.

Q. Thank you. And, finally, the report — No, the report [4300A] also then deals specifically with recommendations, and I think they fall generally into two classifications, and would you describe them, please, what they are, what that chapter deals with? [4301]

A. The Chapter, as I recall, is committed to making or drawing some conclusions on the basis of data that had been collected, and then to recommendations, both general and specific, related to the entire school system, the form of organizations, needs for the future and so on.

Q. Did the study make general recommendations or a recommendation with such things as the retention of the K633 program?

A. Yes, it did. As a matter of fact, each study, to my recollection, recommended the continuation of what was then the K633 system as a general recommendation. It was called the vertical form of organization.

Q. And did the study also make recommendations with respect to the adjustment of attendance boundaries to compensate for enrollmentships?

A. Yes. As I recall, the technique used at that time was a very large map of the City on which pins were placed representing a certain number of students and the exact location. We used one color of pins for elementary schools and one for high schools and another color of pin for senior high schools.

When these were completed, our philosophy was to try to get schools to where the people were. We used as a basis for districts, generally speaking, some agreed upon distance. I've forgotten the exact distance now for [4302] elementary children, something like two-thirds or five-eighths of a mile where we felt they could walk with reasonable safety. We took a compass and drew a circle around these areas, each of these areas.

We did the same for junior high schools with a larger radius and another for senior high schools with a still larger radius.

Then we tried to set districts as nearly in conformity with where the people were as we could, leaving some flexibility in the boundary because of growth. If we had too many in one school, they could still walk to another and avoid the cost from very limited sources of transportation.

Q. This is getting ahead a little bit, but I think it's an appropriate time, in view of your testimony, at this point to ask you why the Ohio State University recommended and the system adopted the type of community school or neighborhood school that it did?

A. I'm not sure that I can recall it specifically. It seems to me that, historically, for at least some period of time, we had had this form of organization. Historically, we had had the philosophy of the community school. Historically, we had not engaged heavily in the transporting of pupils for any reason. Historically, people wanted to feel a part of the school in the community where they lived, and [4303] we worked upon the philosophy, and the Bureau recommended a — the Bureau of Educational Research recommended a continuation of that form of organization. We continued to use it because it would avoid, we thought, a waste of resources. Since we were headed in that direction, we could house pupils perhaps as economically if not more economically than in any other way.

Q. All right. Now, the report made specific recommendations concerning the construction of additional buildings and classrooms, and I believe it identifies, if I might, at page 76 of Exhibit 59, the specific recommendations with respect to the senior high school; am I right, or senior high schools?

A. Yes.

Q. And generally, would you summarize those recommendations with respect to the senior and the junior which appears starting with page 77 and then subsequently the elementary beginning on page 81? I'm just talking generally now.

A. Yes. The recommendation urged the system to continue its present senior high school structure and indicated that the boundary lines for the schools be flexible so that the best use might be made for available classrooms.

Essentially, the same recommendation applies to [4304] the junior high school portion of the organizational structure that appears as Recommendation 12, and in general, I think this recommendation applied also to the elementary form of organization.

Q. With respect — if I might interrupt, please, with respect to the senior high school, did the report recommend the construction of additional senior high school facilities?

A. Not entire facilities, because at this point, the school population at the senior high school level was limited and would be for sometime in the future. The focus, as appears in all of our annual reports and in the study, is on, at this point, the rapid growth of enrollment at the elementary school level.

Q. Thank you. And those are taken up — well, for the purpose of consistency, please, starting at page 77, then, appears the specific recommendations at the junior high school level, and I believe that continues through 80; am I right about that?

A. Yes, that's true.

Q. And again, it primarily was dealing with the remodelings and additions as distinguished from new junior high schools, although I believe it did recommend some site acquisitions?

A. That's true. [4305]

Q. All right. Now, turning to the elementary school recommendations, would you tell us, please, generally, what the report did?

A. The report made specific recommendations based upon urging the school system to provide as rapidly as it could adequate school facilities where the people lived. Consequently, every elementary school building and district and all those projected for the future were identified. Each one carried a specific recommendation, either for remodeling of that school or putting an addition to that school or acquiring a site and ultimately building a new school building where people lived.

Q. All right. Now, I would like to leave, temporarily, the 1950 Study, Dr. Fawcett, and ask you if it was necessary to, while you were Superintendent, to have an additional study made?

A. Yes, it was.

THE COURT: This may well be an appropriate time for us to break for lunch. 1:30.

Thereupon, a recess was taken until 1:30 o'clock P.M., of the same day, to-wit, Tuesday, June 1, 1976.

* * * * *

[4307] NOVICE FAWCETT

resuming the stand for further direct examination, having been heretofore duly sworn, testified as follows:

DIRECT EXAMINATION (Continued)

[By Mr. Porter]

Q. Dr. Fawcett, I believe we were at the point at the noon recess where you had completed some general questions concerning the 1950 Ohio State University Study,

and I directed your attention or was about to direct your attention to the one done in May, dated May of 1953, by the Bureau of Educational Research of the College of Education, Ohio State University, Columbus, Ohio, entitled "A Further Study of the Public School Building Needs of Columbus, Ohio," and bears the identification Plaintiffs' Exhibit No. 60, and I would ask you, sir, first, why was it necessary within just a short three-year period to again have Ohio State prepare a study? [4308]

A. The first factor I can recall is that the growth in the student population or enrollment was even beyond our expectations. We realized the logic of the fact that as children entered the elementary school they would ultimately reach the junior high school and later the senior high school level. We knew in terms of the history of the community that we could only gain financial support from the people if we went with a reasonable request and then demonstrated, as a result of having those resources available, an action program that would continue to encourage confidence of the people in the School System.

Q. Was this study again done under the direction of Professor Herrick?

A. As I recall, Professor Herrick, assisted by an associate of his, the 1953 study, and also my representative again was Mr. Francis Rudy.

Q. Do you happen to recall the name of Dr. Herrick or Professor Herrick's associate?

A. I think his name was Conrad.

Q. Marion Conrad, would that be correct?

A. Yes.

Q. I direct your attention, please, to Figure 1, which appears after page 3 of the 1953 study, which is Plaintiffs' Exhibit No. 60, and it's entitled "Distribution of Residential Building Construction, 1950-1952," and would [4309] you describe the major areas of residential growth, please?

A. Other than spotted growth, the same areas that were identified earlier continued to grow very rapidly, namely, the area east and southeast of Bexley.

There was continuing residential development in the area north of Seventeenth Avenue between the railroad and Cleveland Avenue.

There was still considerable growth residentially in the north-northwest section going east and west of High Street over to the Olentangy River and to the north boundary of the corporation line. [4310]

A. (Continued) Some scattered growth continuing in the area that projected between Grandview Heights and Upper Arlington and a considerable amount of additional residential growth in the far west area, principally south of Broad Street.

Q. Now, directing your attention, please, to page 6 of that same exhibit, which is entitled Table 3, "Major Residential Building Projects Scheduled for 1953 and Early 1954 in the Columbus School District," would I be correct in summarizing that most of these projects are located in the northeast, north and east areas of the city?

A. Most of them would be, yes, sir.

Q. At the bottom of page 7 of Exhibit 60 is a statement or a paragraph beginning after the words the 1953 school building survey, which refers to the earlier studies, and would you please read that paragraph and page 8, with the exception of the last sentence on page 8?

A. Within the last 15 years, two studies of the school buildings needs of the Columbus Public Schools have been made. One of the studies was completed in 1939 and the other in 1950. Because of the continued rapid population growth in the City School District and because of the continued high birth rate, it has been found necessary to make another such analysis.

Persons interested in detailed general objectives [4311] of studies of school building needs may consult either the report of 1939 or that of 1950.

Briefly the purpose is to prepare for the Board of Education and the Superintendent of Schools a carefully worked out plan of school locations, construction and financing. The factors usually considered in a study of this nature include:

1. The characteristics of the community and the rate direction of its physical and population development.

2. The educational philosophy of the Board of Education and instructional staffs and the educational program necessary to implement this philosophy.

3. The plan of school organization which the Board of Education proposes to follow.

4. The number of children of school age and the proportions of these attending public schools and non-public schools.

5. Estimates of enrollments which may be expected for the next 10 to 15 years.

6. The adequacy and utilization of the existing school plant.

7. The financial ability of the community to pay for new school building construction and its apparent willingness to do so.

In the present case, since the last previous study [4312] was completed in 1950, only three years ago, some of these factors have been touched upon only briefly. Furthermore, since some action already has been taken on most of the major recommendations made in that study, the survey staff has been able to give special attention to needs arising from the rapid growth of the city and from the continued high birth rate. Consequently, the particular emphasis has been placed upon the need for additional elementary school classrooms in areas of recent development and upon the need for enlarging secondary school capacity in the entire school district.

Q. All right, thank you. These are the same factors that were considered, some of the same factors that were

considered in the 1950 study that you have just enumerated; is that correct?

A. Yes, they are.

Q. Does the 1953 study then go on to make specific recommendations?

A. Yes.

Q. And most of those recommendations dealt with elementary buildings; am I correct?

A. Yes, I believe principally with elementary schools, with projecting site needs in yet undeveloped but potentially developing areas and additional recommendations of a somewhat more general nature perhaps at the junior and high school level. I have forgotten precisely what they were. [4313]

Q. What was your attitude or your position and that of your administration while you were Superintendent of the Columbus Public School System with respect to site acquisition? What policy, if any, did you follow?

A. Basically, the answer to that question, I believe, needs to be divided into two parts.

Historically, sites where existing schools were located were small, and so we examined carefully the need for site expansion where existing schools were.

But, principally, we began to look more carefully at projected growth of the City which seemed to be getting a little bit clearer, but not less rapid, and we projected probable site needs in areas not yet developed, and indeed, engaged, as I recall, in the acquisition of sites for future schools.

Q. Why did you do this?

A. One of the reasons was that, in contrast with 1949 where we had, really, very little to start with, we wanted to be prepared for the growth, and the second reason was that we thought it was economically feasible to acquire land before developments had taken place, at least in magnitude, as an economy move.

Q. Thank you. Was another study done while you were Superintendent of the Columbus Public School System?

A. Yes, it was. [4314]

Q. And that would have been the January Report dated January, 1956?

A. Yes, sir.

Q. And that again was done by the Bureau of Educational Research, College of Education, Ohio State University, dated January, 1956, and is entitled, "The 1955-56 Study of the Public School Building Needs of Columbus, Ohio," and has been marked as Plaintiffs' Exhibit 61 in this case, Dr. Fawcett, and I would ask you again, why was a Study needed in this short period of time after the '53 Study?

A. As I indicated in earlier testimony, at the time I came here, the City appeared to be on the threshold of a magnitude of growth that people really didn't understand. As a matter of fact, I think, if anything, we had not planned for as much growth as actually took place. No one knew at the time exactly whether the birth rate would continue at the same level. Neither did — was it known that the industrial development would continue at the same pace, and thus result in an in-migration of people, combined with the increased birth rate would give us increasing number of people who had to be housed in schools.

Q. This was again done under the direction — or was done under the direction this time by Dr. Conrad of the Ohio State University?

A. Dr. Conrad. [4315]

Q. Am I correct about that?

A. Yes, you are.

Q. Directing your attention, please, to page 9 of Exhibit 61, at the bottom, where it begins, "Prospects for future residential growth," would you please read that into the record. [4316]

A. Area of growth is, of course, a major factor in the future residential growth of Columbus. As sewers and water facilities are extended, home construction no doubt will spurt forward in most of these sections. In the far east area, approximately 3,700 units, and in northeast, approximately 2,400 units are planned for construction. West of the Olentangy River and north of Ackerman Road approximately 1200 dwelling units are on the drawing boards. In the far west, 550 units are planned. The Columbus Metropolitan Housing Authority intends to build a 524-unit project consisting of one, two, three, four or five bedroom apartments near the intersection of St. Clair Avenue and Bonham Avenue.

Q. That's sufficient for my purposes, Doctor. Thank you.

Looking at Table 5, which appears on the next page, entitled, "Major Residential Building Projects Scheduled for 1955, 1956, 1957 and early 1958," would you identify the areas of the city—the general areas of the city on which these projections were made?

A. The first several of those planned projects were east of Bexley. The next several were — three were in northwest Columbus, around Kenny Road. There were three in west Columbus, and I believe probably all the rest of them or almost all the rest of them in northeast Columbus. [4317]

Q. Now, Dr. Fawcett, please turn, if you would, please, to page 13, the paragraph appearing there where there is an enumeration of factors considered in building a building study, and I would ask you for the purpose of brevity if these are essentially the same factors as those which you have read from the 1950 and 1953 studies?

A. Yes, they are.

Q. Did the 1955-1956 study almost make specific and general recommendations to the Columbus Public School System?

A. Yes.

Q. And this was the same basic methodology that was used in the other studies?

A. Precisely.

Q. Now, Dr. Fawcett, do you remember, please, how many new school buildings were built during your tenure as Superintendent of the Columbus Public School System from 1949 through and until you left in 1956?

A. I have some recollection that it was about 28 completely new buildings, exclusively of all of the additions and modernization work that was done.

Q. And, again, as a matter of brevity as much as anything, I believe that the record already shows or reflects in this case that there were some 15 additions made to those new schools and 27 additions were made to other buildings during your tenure, and I would ask you if that [4318] sounds approximately correct?

A. As nearly as I can recall, it sounds approximately correct.

Q. And I believe that you have described the — or would you, possibly, describe again, although it may be repetitive, describe again the nature of the remodeling program that was carried out during this period of time?

A. May I inquire if you are asking about the remodeling principally of the elementary schools, the old elementary schools?

Q. Yes, sir, I am.

A. Most of those buildings in the central part of the city had been constructed in the late 19th and early 20th Century. [4319]

A. (Continuing) Many of them were in such a state of condition that we felt that they could not be salvaged, but most of them could be. We saw no way to solve the problem of trying to meet the needs of such a rapidly growing enrollment other than to attempt a remodeling program of those buildings concurrent with the pursuit of the construction of new buildings in newly developed areas, newly developing areas.

If I remember correctly, we remodeled making essentially fireproof as nearly as we could about 43, 42 or 43 of those old elementary schools, provided libraries and kinds of supporting services in the process of remodeling. In some cases where possible, we enlarged the sites. I recall rather careful consultation with the architect, the school architect, who was also a structural engineer. I had worried whether or not an expenditure of money for the remodeling of those buildings was a wise expenditure. I was assured by the technical people that the plan of remodeling under consideration would have a life expectancy of at least 25 years. I think probably some of those are still in use, so far as I know, and it has been 25 or more years since.

We thought with the life expectancy of 25 years, the speed with which we could remodel those and get the children back into a good educational environment while at [4320] the same time constructing new buildings in newly developing areas, constituted sound judgment as a decision for providing the educational facilities where the people were.

Q. Now, Dr. Fawcett, you described generally at my request these building studies and their general recommendations. I would like to go back now to 1950 and your receipt of the building study from Ohio State University and ask you, sir, what did you then do?

A. After I and my colleagues had analyzed that report and had been persuaded of the logical nature and validity of the recommendations after they had been reviewed in the schools and after they had been read and reviewed and approved by the Board of Education, I was advised by the School Board then to go before a body which I believe was called the Columbus Metropolitan Committee, a Committee that was in place when I came here — I am not sure about the origin of it — a committee made up of leading business, industrial and labor leaders and review the report and its recommendations. I was fur-

ther requested to convey to them the estimates of costs which I believe amounted to \$11,500,000, in those days a kind of frightening amount of money, with members of the Metropolitan Committee.

The Metropolitan Committee after listening and constructively questioning me about the nature of this proposal decided not only upon the support of that issue if [4321] it were submitted as a bond issue to the people, but decided upon supporting it, provided there could be three proposals submitted to the people, namely, the school issue, the resources required for building what is now an almost obsolete airport terminal and the resources by bond issue for supporting the first leg of a freeway system ever to occur in this City.

Q. After you appeared before the Metropolitan Council, what did you then do?

A. We then took the necessary steps to submit a bond issue to the people of the City, of the school district. [4322]

Q. And did you before that was submitted to a vote, did you go before the PTA's and groups of that type?

A. Yes. Despite the fact we had an extremely limited staff, I remember personally going to nearly every Parent-Teacher Association in the city and to other civic groups to interpret what the study done by the Bureau of Educational Research had recommended. I remember further identifying every time I went to a school district exactly what we planned to do, and I remember also that after doing all that and submitting the bond issue, that while it was at a special election, the vote that was cast was considerably higher than had been estimated by members of the Metropolitan Committee.

Q. What happened to the other two non-school issues?

A. I had a feeling — I couldn't prove this, but I had the feeling that at the time we were going to submit the issue, the Metropolitan Committee felt the school issue probably would pass, and I believe that their first thoughts probably were that it would give the need for an airport.

terminal and a freeway system some visibility. If these issues did not pass, they would be resubmitted at a later time and through that process of education people would ultimately accept them.

Internally in the School System, working with our own people, our own school people and parent-teacher groups, [4323] we had concluded that all issues could be passed, a kind of optimistic view, I think, in terms of a good many people who weren't as closely related to the project as we were, and they did all pass.

Q. Do you happen to recall the approximate vote on the school bond issue?

A. I remember the vote on the school bond issue fairly well. It was an excitingly supportive vote, and I think it was around 77 percent approval which, even in a special election, was rather a remarkable supporting vote at that time. The other two issues, of course, passed, but not by that same majority.

Q. Dr. Fawcett, did you go back or did the Columbus Public School System go back to the voters again in 1953 with a bond issue?

A. Yes, they did. After the '53 study, based upon the recommendations of the study. I don't remember the exact date. I think it was a general election.

Q. And what was the approximate size of that issue, if you remember?

A. The bond issue for the schools?

Q. Yes, sir.

A. I think it was about \$14 million.

Q. And you follow the same procedure of going to the community with the — [4324]

A. Yes, we did.

Q. And if you recall, what was the size of that vote?

A. I have forgotten precisely, but I think that the vote at the general election was about 70 percent on that issue. I know we considered it to be sufficient to call it a mandate for us to proceed with an action program.

Q. Now, during the years that you were Superintendent of the Columbus Public School System, there were three renewal levies. I believe the first was in 1949 and the next one in November of '53 and November of '54. Would you please describe those just briefly?

A. The 1949 decision was one that either had been made or was essentially made before I came to the city, and I remember very little about the detail of it. I know that we worked to support it and that it passed. I think it was probably a combination of a renewal and a couple of extra bills for operation of the schools.

The 19 — the next levy was a renewal levy I believe of 7 mills which was submitted at the general election coincident with submitting a \$14 million bond issue. The amount of revenue needed for the operation of the schools was too conservatively estimated, frankly, but to have submitted a renewal and an additional operating levy at the same time it was necessary to submit a bond issue proposal we felt psychologically would endanger one or both of the [4325] issues. Consequently, we sought the approval of the renewal with the bond issue and got that renewal and then submitted, if I remember correctly, a one-mill additional operating levy the following autumn.

Q. And do you happen to recall what that November 1954 additional mill levy, what the vote was on it?

A. It was very substantial. I think in excess of 70 percent, but I do not remember precisely on that.

Q. Did you draw any conclusions from the voter support of the bond issues and levies concerning the attitude of the voters within the School System?

A. Yes, indeed, we did.

Q. What were those?

A. Partly from experience you arrive at a judgment like this and partly from a study of the record, but in any general election it is very difficult on a tax issue to get a mandate that approaches 70 percent of a favorable vote.

We considered those votes as a vote of very great support on the part of a vast majority of the people in the entire community because we had gone to every community and had interpreted as carefully as we could, anyhow, what the project would be and what the educational program would be that would be carried forward within that project. So I considered the vote to be a strong vote of approval on the part of all of the people from all of the school districts. [4326] There may have been some minor exceptions, but I don't recall any.

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[4356] Q. And if you would direct your attention, please, to recommendation — just a moment, please — to Recommendation No. 2, which starts on page 77 of Plaintiffs' Exhibit No. 59, I would direct your attention to that recommendation which continues over onto page 78 and ask you to read the 1950 Recommendation.

A. The 1950 Recommendation is —

Q. Starting at the top where it says "1950 Recommendations" at the top.

A. As has been previously noted, Champion was originally constructed as an elementary school. Therefore, it is recommended that the Champion building ultimately be used to [4357] house an elementary school to replace the Mt. Vernon building.

It is further recommended that when this is done a new junior high school be built in the same area of sufficient capacity to house all junior high school pupils in this section of the city, including the seventh grade, now attending the Pilgrim Elementary School.

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[4375] Q. [By Mr. Porter] During the period from 1950 until you left as the Superintendent of the Columbus Public School System, in the Summer of 1956, there were additions made to school buildings which I believe are, among other places, identified in your report for the period

1955 to 1956 which we've had marked as Exhibit C69; am I correct about that? [4376]

A. Are you referring to the 1955-56 Annual Report?

Q. Yes. I believe it is after page 22 or what would be 22. It appears under the heading "Buildings Expanded, Additions and Major Remodeling Projects in Old Buildings, Additions to Buildings and Major Remodelings in Old Buildings," on the next page.

A. Yes.

Q. Now, in addition there were recommendations made by the Bureau of Educational Research, the College of Education at Ohio State University in the 1950, '53 and '55 studies, were there not, Dr. Fawcett?

A. Yes, there were.

Q. And to your recollection were most of those recommendations carried out?

A. Most of them were.

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[4379] Q. [By Mr. Porter] All right. Now, Dr. Fawcett, were these additions and remodelings and new buildings built in accordance or pursuant to the recommendations by the Bureau of Educational Research at Ohio State University?

A. The only variations from them were variations suggested in the Bureau's report where growth was checked prior to the award of contracts to determine the precise number of rooms that would be constructed.

Q. And, generally speaking, would these projects or at least the new ones and the additions be in there that you previously identified in the building studies as indicating an increased residential density?

A. I believe that we kept the public informed in the records each year through the annual report or through some other means, but they're all recorded accurately, to my knowledge, in those exhibits.

Q. And in order that the record be clear, why were [4380] these buildings built?

A. I guess the American tradition seems to demand that in the light of conditions in our culture, if you have children, you try to educate them, consequently, analyses were made of projected enrollments and steps were taken to provide buildings where the people lived. [4381]

Q. Dr. Fawcett, there has been testimony by you and others in this case concerning the baby boom after World War II and subsequent, and I believe that you have read into this record certain statistics concerning births. I would like to ask you, however, beyond that whether or not there was to your knowledge anything different about this expansion that took place within the Columbus School System during four years as Superintendent as distinguished from other school systems within this country?

A. To my knowledge, this city was identified as the fastest-growing, or one of the fastest-growing inland cities in the country. When you analyze the constant increase in enrollment, I think it is fairly easy to conclude that the burden placed upon a very limited number of central administrative staff people, as well as principals and teachers, was an enormous one.

I guess on reflection I would say that the problem of providing adequate educational facilities in this city during that period by virtue of the fact that almost nothing had been done for more than 20 years was probably as great or greater in this city than any comparable city in the country.

Q. Now, you made reference in talking to me privately about Los Angeles. Would you describe just generally — I think you — [4382]

A. When this question was first brought to light and I attempted to reflect over my memory of conditions that prevailed in school systems, I did recall that at one period the City of Los Angeles, which, of course, is a much larger

city than this, was probably confronted with problems of greater magnitude, but if you consider only cities comparable in size and character to the City of Columbus, I doubt if any of them had problems more acute than we had.

Q. Did you and your people during the period that you were Superintendent and in charge of this program have occasion, at least one occasion, to appear in some type of a national format to discuss your efforts in this community?

A. Yes, I remember one occasion specifically. After we had demonstrated our ability to provide educational facilities as a result of the April 1951 bond issue and had provided school buildings at a somewhat more rapid pace than apparently had been provided in a good many other places at a regional meeting of the American Association of School Administrators held I believe in St. Louis, I was designated by the American Association of School Administrators to set up and preside over a panel that would bring to light techniques used by this system and other systems in the country with the express purpose of trying to be helpful to other cities only beginning to face the magnitude of the problem that had confronted us here.

* * * * *

[4389] Q. [By Mr. Porter] Now, Dr. Fawcett, when you became Superintendent of the Columbus Public School System in 1949, was the teaching staff at the Columbus Public School System integrated?

A. The staff?

Q. The professional staff?

A. May I inquire if you mean teachers and administrators?

Q. Yes, that's exactly what I mean.

A. No, it was not.

Q. And what did you do about it? Excuse me just a moment.

(Discussion had off the record.)

THE COURT: I am sorry, Mr. Porter. You may proceed.

Mr. Porter: Would you read back, please, the last question and answer and then question?

(Preceding testimony read.)

Q. Now, will you go ahead, please?

A. When I became Superintendent of Schools in 1949, as I recall, there were integrated student bodies, but there were segregated staffs. I am not sure what the basis of that segregation was. I have a feeling without being able to prove it that that was a policy toward which the system [4390] had just drifted and probably had some of its genesis in the period of the 1930s during the depression when jobs were hard to get.

I remember I made inquiry about this immediately upon coming into the system, and the answer or the response I got was, "If you look at the total number of teachers employed by the Columbus Public Schools and calculate the percentage of them that are black, you will find out that there are more black teachers and principals employed in the Columbus Schools than in comparable systems."

I also remember that one of the first steps taken by me was to visit each of the schools in the system. I began that before the opening of school and, in addition to preparations for the opening of the school year, I was able to visit perhaps two-thirds of them. Then I picked up on this immediately after the opening of school and was accompanied always by the Assistant Superintendent for Business who had charge of transportation and this sort of thing.

One of the sites I visited was what was then called the American Addition School. That school consisted of two portable I think World War I buildings which after my examination I felt were totally unsafe, no internal sanitary facilities. The school contained between 90 and

100 children and had four teachers. All were black. [4391]

A very short distance from there was the Leonard Avenue School which had four empty, to all intents and purposes, fireproof rooms. I remember of instantly directing the Assistant Superintendent to pick up this school by school transportation I think the following Monday, if I remember correctly, and take them to the Leonard Avenue School, which action was followed through by him, and that became I believe the first integrated staff of teachers in the system.

I worked at this problem as I could in what time was available, and I think the records will show that when I left there were about 38 integrated staffs. [4392]

Q. Were there blacks chosen for the cadet program which you instituted?

A. Yes.

Q. Do you know whether or not there were black principals in 1959 or, excuse me, 1949?

A. Yes, there were.

Q. And did this number change in any way between 1949 and the time that you left in 1956?

A. I can't recall the specific statistics on that subject, but my inclination is that the numbers did increase.

Q. Did you yourself or did you have somebody else recruit black teachers to any degree? Did you do any recruiting?

A. The recruiting of teachers when I first came to the School System was done by the Assistant Superintendents of Schools. The Assistant Superintendent in charge of elementary schools recruited the people for the elementary staff, and the Assistant Superintendent for secondary schools recruited the people for the secondary staff.

Q. Directing your attention, please, to another subject, in the 1955-56 building study at page 16 there appears on — I have got to check that. That doesn't sound right. It isn't. It is after page 16. It is the page after 16.

A. Yes. [4393]

Q. There appear on that Figure 2, along with other information, certain optional attendance areas. Would you please explain for this record your understanding of the use of optional zones while you were Superintendent, please?

A. As I indicated in earlier testimony, when we created school districts, we left some flexibility at the fringe of the district so that in the event, with this rapid growth and overcrowding at one school, there would be children located sufficiently close to another to walk to it, so we left some of those. Often as schools were being built, there were temporary steps taken in that respect.

I don't remember very much about these so-called optional areas mentioned on this or indicated on this map except I see that they are generally located around the fringe of a district.

Q. Do you know whether or not they had any racial significance at least in their selection whenever they may have been selected?

A. The optional area?

Q. Yes, please.

A. To my knowledge, there was none.

Q. Now, you have previously testified concerning the limited amount of transportation that was used during the years that you were Superintendent, and I might I guess ask you a few more questions concerning it. What effect did [4394] it — and I recognize this may be repetitive, but in what respect did the selection of the schools and their locations and their size have to do upon the need or the lack of need of transportation?

A. Well, the policy was based upon the recommendations made by the Bureau and concurred in by us that the schools would be taken to the people. I think this is a matter of record both in annual reports and in the studies. The goal was to locate schools where people could walk in

a reasonably safe manner to the elementary, to the junior high and to the senior high schools. This wasn't always possible because we had areas like what was then I guess identified as Clinton Township where there weren't schools and where we had to pick up children and take them to other parts of the city where we had space available, but it was on a space-available basis when we took them.

Q. Do you happen to recall or do you know of an estimate of the number of pupils transported in say '55-50 — '54-55? [4395]

A. Oh, I can only guess at that. I would say 1,500 to 2,000.

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[4410] Q. [By Mr. Porter] As far as you can recall, did the Board or did the Administration instruct the Bureau to evaluate in any form the impact of school construction, either the past construction or such as might be planned, on the racial segregation of students in the Columbus School System?

A. I have no recollection of race ever having been a matter of discussion in preparing for or the conducting of the study.

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CROSS-EXAMINATION BY MR. ATKINS

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[4414] Q. [By Mr. Atkins] All right. Isn't it also the case that the Superintendent now and then had the authority and the responsibility to determine school attendance boundaries?

A. Subject to the approval of the Board.

Q. It's your recollection that every school attendance boundary that was determined during your tenure as Superintendent was subject — was present for affirmative action by the Board; is that your recollection?

A. Yes, it is.

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FRANCIS RUDY
called as a witness on behalf of the
Defendants, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PORTER

[5011] Q. [By Mr. Porter] Would you state your name and address, please?

A. My name is Francis T. Rudy. I live at 1000 East Cooke Road, Columbus, Ohio.

Q. By whom are you presently employed, Mr. Rudy?

A. I am retired.

[5012] Q. You retired when?

A. September 1, 1973.

Q. And what was your position and your employer at that time?

A. I was employed by the Columbus Public Schools as Assistant Superintendent in charge of business affairs.

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[5014] Q. [By Mr. Porter] Now, you, I believe, were a chemistry teacher in 1949 when Dr. Fawcett became superintendent of the system; is that correct?

A. I was.

Q. And you were placed on special assignment by him?

A. That's correct.

Q. Would you describe what your duties were at that time in this special assignment?

A. I was assigned to do a school building study. This involved generally two categories of data. One category was concerned with the schools themselves, such things as enrollment, enrollment trends, curriculum, curriculum trends and changes that might affect the need for [5015] classroom space, the buildings themselves, that is, their organization vertically, in this case, kindergarten through sixth, junior high and senior high, locations of the buildings, the number of buildings of each type, the locations

of pupils. Of course, a very important aspect was the financial situation of the Columbus schools which might indicate whether or not the School System could finance any construction that might be needed as indicated through recommendations that might result from the study.

The other general category was concerned with the Columbus community. This would be such things as population, population trends, birth rate, birth rate trends, the amount of industry, the type of industry, prospects for future industrial growth, the number of residences, the locations of the residences, annexations, anything that might directly or indirectly affect the need for classroom space.

I might say that coming right out of a classroom as I did, I was a neophyte in this area, so I was assigned to work under the direction of Dr. John Herrick who at that time was the head of the School Surveying Division of the Bureau of Educational Research at Ohio State. So my job primarily was to gather data, the type of data that I have indicated, put it into tables under his direction. For that data, I, of course, went to the various departments of the School System for school data and went to sources in the [5015A] city such as the Chamber of Commerce for population, population trends, their estimates of population at that time. [5016]

Of course, we didn't have the 1950 Census yet, so the latest information that was accurate was from 1940, but the Chamber of Commerce did maintain estimates year to year, and, of course, the City Planning Commission was an important source because any development, especially residential development, had to be known by the Planning Commission. Developers had to go to the City Planning Commission with their plans before they could actually do anything, and I might say that in — as time went on, of course, this enabled us to anticipate to the

best of our ability the residential growth in areas that had not yet been developed.

And then, of course, there was the City Building Department which provided information concerning permits — gave us the information as to the locations of residences through the filing of permits.

Q. The study, the 1950 study which has previously been identified in this record as Plaintiffs' Exhibit 59, was it presented to Dr. Fawcett, the Superintendent of the Columbus Public School System, then to the Board of Education?

A. Yes, it was.

Q. And did the Board of Education or Dr. Fawcett take formal action with respect to that report, and if so, what was it, please? [5017]

A. Yes. The Board of Education accepted the report and its recommendations and decided to place a bond issue proposal on the ballot for November of 1951. That proposal was approved by the people and the amount was \$11,500,000, and as soon as bonds could be sold thereafter, construction proceeded as rapidly as possible.

Q. What happened to the enrollment within the Columbus Public School System during the period subsequent to that report, the near period? I have reference to 1952 through 1955.

A. Enrollment increased on an average, as I recall, of about 3500 pupils per year.

Q. There was a study done by Ohio State University in 1953 which Dr. Fawcett has testified to in this case and which has been admitted as Plaintiffs' Exhibit No. 60, and I would ask you if you had any — if you worked on that with the Ohio State University Bureau of Educational Research, and if so, in what capacity? [5018]

A. Yes. I worked, again, with the Bureau as the liaison person for the Columbus Public Schools. This was with Dr. Herrick again as director of the study, and we used the same techniques and procedures as before.

I believe that Dr. Marion Conrad also assisted somewhat in that study.

Q. As a result of the 1953 study, or after its preparation, did the School Board again place a bond issue on the ballot in order to implement the recommendations of the '53 study?

A. Yes, again, as a result of the study, it was obvious that the city was growing even more rapidly than before, if anything, and, of course, the school system also, as a result of annexations, which was another facet of information that we collected in these studies.

As a result of the recommendations of that study, this time a bond issue of I believe \$14,000,000 was placed on the ballot in November of 1953, and again it was approved by a sizable percentage.

Again, as a result, as soon as bonds were sold, or thereafter construction proceeded.

Q. Did you have occasion to again be assigned by Dr. Fawcett to work with the Ohio State University, Bureau of Educational Research, in connection with the 1955-56 study of the Columbus Public School needs which has been admitted [5019] into evidence in this case as Plaintiffs' Exhibit 61?

A. Yes, I was. This time, as I recall, the director of the study was Dr. Conrad who was also from the Bureau of Education and Research, and we were assisted this time by Warren Beers who helped to work on some of the tables because, of course, the growth was such that we — and we were working on the construction, that is it became a part of my duty to help coordinate that, at least to keep it on schedule, so this study did proceed.

Q. Did the Board accept or approve the Ohio State University 1955-56 study?

A. Yes. The Superintendent again presented the study to the Board of Education which accepted it and placed an issue on the ballot in November of 1956. This time it was in the amount of, I believe, \$12,900,000.

Q. It passed?

A. It passed again, as I recall, by a good size majority.

Q. Are you familiar with the implementation of that building program?

A. Yes, I am.

Q. Did you find yourself again working with Dr. Conrad and Mr. Beers on the building study that is entitled the 1958-59 Study of the Columbus School Building Needs of Columbus, Ohio, and Consultant Service by the Bureau of [5020] Educational Research, the College of Education, Ohio State University, July 1959?

A. Yes, I did, and again it was Dr. Conrad and Mr. Beers. I might say that for this study, I think it was for the first time that we used a new technique for determining the capacity of secondary school buildings. This had to be determined, of course, as best we could. It was a simple thing, relatively, for elementary schools to take the number of classrooms and if you had a pupil-teacher ratio of, let's say 32 pupils per teacher, or per classroom, simply multiply, if he had ten rooms, multiply two times ten, and have a capacity of 310.

Whereas in the secondary school it wasn't so simple, and in fact you could have a capacity in a secondary school which could be extremely large for academic work, whereas you might be quite limited in industrial education work if you had a classroom, let's say of history, used mainly for history, you might have a capacity in that room for one period of 30 pupils and, of course, if you had an eight-period day, departmental as it was, you multiply that by eight provided you utilized the room all eight periods.

And such a classroom, I might add, might have a square foot space of 800, whereas a — say an industrial education shop might have 24 pupil stations because of the machinery. Usually, such classes met for at least two periods, sometimes all morning or all afternoon. But, assuming that the class met for two periods, in an eight-

period day, you could get at the maximum for classes of 24 each, so your capacity for that room might and probably would take at least three times as much space, square footage, as the academic classroom. So your capacity in that area, unless you had several shops, you see, would be quite limited.

Of course, you would have to know, also, what the need was, what the demand was, what your curriculum was, and, as times changed and industrial education became more important, naturally, you would have greater limitations, capacity-wise, in some of the secondary schools. [5022]

Since the high birth rates which occurred immediately after World War II had gone through the elementary school, had proceeded into the junior high school, it was obvious that more attention had to be paid to the secondary schools. This isn't to say that we weren't aware that this was coming. It was simply to say we had been constructing — when I say we, I'm talking about the school system and everybody working together. We had been constructing about as rapidly as we could, bursting our blood vessels practically, but the time had arrived when we had to face the reality of the secondary school needs and, of course, their higher costs.

MR. PORTER: All right. Now, if I may, please, Your Honor, if the Court please, I have here a set of studies with as many originals as we have for the Court's benefit. They have not been marked with exhibit numbers. I think there are others that have been. They are a little more legible, though, for the Court, and there are copies in evidence. I will leave those there for the Court's benefit.

Q. Directing your attention, Mr. Rudy, to the 1959 study which is marked Plaintiffs' Exhibit 62 — and I hope that's the one I gave you?

A. That's right.

Q. First, what had happened to the area, the [5023] geographical area of the Columbus Public School System

between 1954 and 1959? You can answer generally or you may refer to that if you wish. First, let me have a general answer, and I will direct you to some pages in the exhibit.

A. As I recall from having checked over some of the studies, the City of Columbus had grown from about 41 square miles to 85 or 86 square miles during that time, and most of the area had been transferred to the City School District. They called it an annexation when it is a change from the suburban area to the City, but it is a transfer when the change is made from an adjacent school district to another school district. So the area — most of the area had been transferred to the Columbus City School District.

As a matter of fact, in the earlier years of our work, the transfer was automatic. When there was an annexation to the City, that area was automatically to the City School District. This was something that adjacent suburban areas didn't like, so they were successful in getting a change in the law. The change was not automatic thereafter, but up to that time practically all of it, I think, had been transferred. [5024]

Q. Do you happen to remember the percentage growth and the increase of the size of the Columbus School District from 1954 to 1959? Do you happen to recall that figure? If you don't, I direct your attention, please, to page 5 of Exhibit 62.

A. I don't recall that.

Q. Okay. If you —

A. I know that —

Q. If you would, please, turn — okay. Have you got page 5?

A. Yes, I have.

Q. In the middle of the page, it says "Geographical growth, paragraph one," and —

A. Yes. The percentage was approximately 55 percent.

Q. All right. And I believe you gave us previously the growth in square miles of the city itself.

Directing your attention, please, to page 8 of Exhibit 62, would you tell us what Table 2 shows, please?

A. Table 2 shows annexations to Columbus from January, 1954, to January, 1959.

Q. And those annexations with their acreages appear on pages 8 and 9 of Exhibit 62; am I correct about that?

A. Yes, sir.

Q. Now, you have made reference to the fact that not all areas transferred to the City of Columbus became part of [5025] the Columbus City School System. Directing your attention, please, to Table 3 on page 10, does that show areas transferred to the City of Columbus but not to the Columbus School District?

A. Yes, it does.

Q. On Table 3, City Annexation No. 135 says: "Adjacent to Port Columbus," and underneath it it says "Wonderland," and it has at the right "Pending." How do you happen to know whether or not this ever became part of the Columbus Public School System?

A. I believe it did not.

Q. Was that a part of a problem that revolved around some territory near Western Electric?

A. Yes, as a matter of fact, it did involve the area which was utilized later for the Western Electric plant.

Q. Was that a matter of — this was an area which was, up until that time, and remained with the Jefferson Local School System?

A. Yes, it remained with the Jefferson Local School District, a system which is headquartered in Gahanna.

Q. Now, Mr. Rudy, what changes took place in the enrollment from 1955 down to the time of your study, the 1959 study, and I would direct your attention to page 17 and 18 of Exhibit 62.

A. Well, we knew that enrollments had been increasing [5026] and, as noted here, enrollments had been increasing even more rapidly than had been anticipated in 1959 — rather, 1955-56.

Q. Read paragraph, if you would, please, read paragraph — the paragraph starting on page 17, No. 2.

A. Total day school enrollments have increased from 61,650 in 1955-56 to 75,884 in 1958-59. [5027]

This was as of October, 1958.

Q. Would you read the next one and the one on the other page, please?

A. The school population is increasing most rapidly in the outlying areas of the City. However, increases are common in the central areas of the City.

Q. Paragraph 4.

A. Residential growth in territory annexed to the City since 1955 and '56 is so rapid that it is seriously straining school facilities in existence in these areas and draining bond funds available for new school housing in such areas.

Q. All right. Thank you.

Directing your attention to page 30, Table 10, I will simply ask you if Table 10 is a projection of actual and estimated enrollments in the Columbus Public School System 1943-44 through 1972-73?

A. That's true, for grades one through twelve.

Q. Turning to page 48, there is a listing on that page of schools that have been built and sites added and so forth at Paragraphs 1 through 9 dealing with the elementary schools, and then at the bottom of that page, Paragraph 1, would you read that, please?

A. Tables 26 and 29 show that the total capacity in grades one through six in the permanent Columbus [5028] elementary school buildings of 32 pupils per classroom is 43,136, with additional capacity of 2,368 in buildings under construction or planned, and with the addition —

Q. I believe it goes to page 51.

A. — of the Courtright School, the total capacity will become 45,504. Some classrooms usable only in emergencies, kindergartens and the rooms for special classes have not been included.

Q. Would you read the next paragraph, please.

A. Since the projected elementary school enrollments, grades one to six is expected to exceed 50,000 in the next five years, it is obvious that additional elementary school capacity must be provided.

Q. What had happened — what was happening at the secondary level? You have made some reference to it. I wonder if you please would give us the information that appears in Paragraphs 1 and 2 of that page at the bottom?

A. There are 22 secondary school buildings —

Q. No, excuse me. You don't need to read that, please. The Court has that. Read starting at Paragraph 1 under Secondary School Capacities.

A. The first item there?

Q. That's all right, start with it.

A. Tables 27 and 28 show that the total capacity of all secondary schools, including schools in the planning [5029] or construction stage, will be 28,555. With projected enrollments for grades seven to twelve exceeding 40,000 in less than ten years, it is clear that more facilities must be provided for secondary school pupils. Enrollment for grades seven to twelve will exceed 28,555 in 1960-61. Enrollments in the northeast, northwest and far east areas will exceed the available facilities during the 1959-60 school year.

Q. Now, the 1959 Study made certain recommendations, and the general recommendations start on — well, it is entitled "Basic Agreements and Recommendations," and it starts on page 56. Would you explain, please, generally what are the basic agreements?

A. Basic agreements are understandings or assumptions that have to be arrived at before you really know what recommendations should be made. Unless you have agreements — and I am really not looking at this now — but unless you have an agreement, for example, as to the pupil-teacher ratio that you want at an elementary school,

for example, this can make a great difference in capacities and needs for additional classrooms. [5030]

Just a matter of arithmetic of taking 43,000 elementary school children and dividing by, let's say, 34, and then taking that same number and dividing by 32 will give you an increase of many classrooms, about 80, as a matter of fact, as I recall.

And, of course, the same is true in the secondary schools. You have to have agreements as to what the curriculum is to be. You have to have agreements as to walking distances to the various schools so that you can determine whether or not you have sufficient classrooms within the normal walking distance for pupils of various ages, age groups.

Q. Are there also included in these specific agreements — was there also an agreement with respect to the size of the school? I direct your attention to paragraph 4 on page 56.

A. Yes, the — there was an agreement that, generally, the elementary school capacity should not exceed 600 pupils, not counting kindergarten pupils, 1,200 for junior high schools and 1,500 for senior high schools, which, incidentally, is considerably less for the senior high schools than had been in the past, actually, in operation.

Q. These basic agreements are set forth in Exhibit 62, and they begin on page 56 and are of the type that you prescribed; am I correct about that, Mr. Rudy? [5031]

A. Yes, sir.

Q. All right. Then following that are specific recommendations concerning the elementary schools and those recommendations, I believe, start on page 58 with Recommendation No. 10 and go through Recommendation No. 59 on the bottom of page 64. Would you check that, please?

A. That is correct.

Q. All right. And these are specific recommendations concerning new schools and additions and remodelings and acquisition of sites; am I right about that?

A. Right.

Q. And then, there are, similarly, there are recommendations with respect to the secondary schools, and that begins with Recommendation No. 60 commencing on page 65 and goes through Recommendation 77 on page 69. [5032]

A. That is correct.

Q. Do you happen to know how many of these recommendations were carried out, or what percentage of them were carried out?

A. I would say at least 90 percent.

Q. How were the buildings financed, if you remember, this particular group? Specifically to refresh your recollection, there was — was there a bond issue in November of 1959?

A. Yes, there was a bond issue in 1959 in the amount of \$29,950,000, as I recall, which was the largest bond issue I believe ever approved for school construction in the State of Ohio at that time.

Q. In 1964 another study came out. It was entitled the 1963-1964 Study of the Columbus School Building Needs of Columbus, Ohio, Consultant Service by the Bureau of Education and Research, the College of Education, The Ohio State University, and has been admitted into evidence as Plaintiffs' Exhibit 64.

I will ask you, Mr. Rudy, if you are familiar with that study, sir?

A. Yes, I am.

Q. What was your connection with it, if any?

A. Of course, at that time I was Assistant Superintendent, [5033] Business Affairs; however, since I had worked with Dr. Conrad before and with Mr. Beers, I know it was Mr. Beers that is the liaison person for the

Board of Education, but it was natural that he would consult me rather frequently on matters which I was familiar with.

Also, we were constructing, as part of my duty, purchasing, I had to be aware of construction going on because we had to have equipment and supplies ready for schools as they opened.

Q. Was the 1963-1964 study presented by the then-Superintendent, Dr. Eibling, to the Board of Education for its approval?

A. Yes, it was.

Q. Was it adopted and placed on the — a bond issue placed on the ballot?

A. Yes, it was adopted and again a bond issue was placed on the ballot. This time for, I believe, \$34,650,000.

Q. Did that bond issue pass?

A. It did.

Q. Did the school system implement the recommendations of the 1963-1964 study?

A. Yes, construction proceeded on through for the next five years or so.

Q. If the last building was built from that issue in 1969, would that be about right? [5034]

A. I would say yes, yes, that would sound about right.

Q. Directing your attention to Plaintiffs' Exhibit 62 — I am sorry — 64, 1964 building study, would you turn to Page 5 and read Paragraphs 1 through 3, please?

A. The population of Columbus increased by 69,814 between 1940 and 1950. From 1950 to 1960 the population grew from 375,901 to 471,316, an increase of 95,415.

The Columbus Area Chamber of Commerce estimates that population in 1964 is 531,994, indicating that the rate of growth for Columbus is higher in the 1960s than it was in the 1950s.

Only three of Ohio's other large cities gained in population between 1950 and 1960. Dayton grew by only 18,000, Akron by only 16,000, and Toledo by only 14,000.

Ohio's four other large cities, actually lost population between 1950 and 1960. Cleveland lost 39,000 during the period, Canton 3,000, Youngstown nearly 2,000 and Cincinnati more than 1,000.

Conservative projections of future births used in Table 2 are based upon an estimated population for the city proper of 580,000 for 1970.

Q. Thank you. Now would you turn to Page 7 of Plaintiffs' Exhibit 64 and read the first paragraph?

A. From January 1954 to January 1964 the area of Columbus increased from 41.735 square miles to 94.33 square [5035] miles, an increase of more than 52 square miles.

Although some of the areas annexed to the city were within the boundaries of the Columbus City School District already, annexations of areas from adjacent school districts has increased the size of the school district by approximately 60 percent during this period.

Q. Thank you. Turn to the next page, the first page after 7, and I believe that figure is entitled 1 and is captioned Areas Annexed to Columbus, Ohio from January 1955 to January 1964.

A. That's correct.

Q. Am I correct about that?

A. That's correct.

Q. Then Table 4 shows the annexations to Columbus that are depicted in Figure 1, identifies them by date and ordinance number and acreage, and Table 5 shows the areas annexed to Columbus but not transferred to the Columbus School District; am I correct so far?

A. That is correct. [5036]

Q. What is shown, please, upon Table 7, page 14?

A. I'm sorry. I missed a part of the question.

Q. All right. What does Table 7 on page 14 show, please?

A. Table 7 shows the major residential building projects scheduled and/or being planned for 1964 and 1965, 1966 and 1967.

Q. All right. Now, directing your attention, please, to page 54 of Plaintiffs' Exhibit 64. Would you read the Paragraph No. 1 at the bottom of that page under "Elementary School Capacities"? [5037]

A. Tables 29 and 32 indicate that the total capacity in grades one to six in the permanent Columbus elementary school buildings at 31 pupils per classroom is 52,793. With additional capacity of 1,922 in the buildings and additions planned or under construction, total capacities for grades one to six will become 54,715.

Q. Now, would you turn to page 58 which is the next text page and read Paragraph No. 2 at the top of that page which I think is a continuation?

A. Since the projected elementary school enrollment is expected to exceed 61,000 by 1969, it is obvious that additional elementary capacity must be provided.

Q. Now, would you read Paragraphs 1 and 2 at the bottom of that page under secondary school capacities?

A. Tables 30 and 31 indicate that the total capacity of all secondary schools, including schools in the construction stage, will be 38,970. With projected enrollments from seven to twelve exceeding 44,000 in 1969, additional facilities must be provided for secondary school pupils.

Q. Thank you. Turn now, if you would, please, to page 62, and I would simply ask you if on page 62 begins the basic agreements against which this program really is developed that you described, the type of thing that you described earlier? [5038]

A. That is true.

Q. And it again then is followed by general recommendations and specific recommendations with respect to the elementary schools, am I correct?

A. That is true.

Q. And the elementary school recommendations begin with Recommendation No. 9 on page 64 and goes through Recommendation 68 on page 70?

A. That is correct.

Q. And the secondary school recommendations begin with Recommendation No. 69 on page 70 and goes through Recommendation 90 on page 74?

A. That is correct.

Q. And is it your understanding, Mr. Rudy, that these recommendations were in fact for the most part carried out?

A. Yes.

.

[5077] Q. [By Mr. Porter] Where is or was the Sixth Avenue School?

A. The Sixth Avenue School was located at Sixth Avenue and Sixth Streets, east of Fourth Street, south of 11th Avenue and north of Fifth Avenue [5078]

Q. Would you go to Paragraph 11 and read Recommendation 11 and paragraph that follows?

A. It is recommended that a primary center elementary school, Grades K3 — that's Kindergarten through 3 — having seven classrooms and one kindergarten room be constructed on the Board-owned Sixth Avenue site, and that the site be expanded. The elementary school pupil density of the area bounded by High Street on the west, Chittenden Avenue on the north, the New York Central Railroad on the east and Fifth Avenue on the south, has increased rapidly in the last two years.

Although eight classrooms were added to the Weinland Park Elementary School in 1957, more classrooms must be provided.

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[5107] Q. [By Mr. Porter] Directing your attention to Gladstone Elementary School, please, where is it located?

A. Gladstone Elementary School is located just east of Cleveland Avenue, about half way between Hudson Street and 17th Avenue.

Q. I will direct your attention to Page 65 of the 1963 study, and I would ask you to read Recommendation 20, please?

A. It is recommended that a new elementary school having ten classrooms and one kindergarten room be constructed on a site located near Gladstone Avenue and 24th Avenue, which site is scheduled for purchase in 1964.

Q. Is that location, approximate location of the Gladstone Elementary School?

A. It is.

Q. I would ask you to read the comment that appears after the next recommendation starting Recommendations 20 and 21, please?

A. Recommendations 20 and 21 are designed to provide classroom space needed in the area abounded by Hudson Street on the north, the Pennsylvania Railroad on the east, the North Freeway on the west, and 17th Avenue on the south.

These recommendations not only will provide space for growth, but also will provide facilities for approximately ten classrooms of children that will be transported during the 1964-65 school year.

* * * * *

[5136] Q. [By Mr. Porter] Now, directing your attention, Mr. Rudy, to the period 1957 through 1964 about which you testified this morning with respect to new buildings, I would ask you, sir, if my notes and records are correct and if it is consistent with your recollection that during that period of time, '57 through '64, you have identified and there were open some 49 new school buildings within the Columbus Public School System?

A. According to my recollection, that is correct.

Q. And that would be, during the period that you have covered in your testimony today, a total of 70 new

buildings opened between 1957 and 1969; am I correct about that?

A. Yes, that certainly seems correct.

Q. And do you happen to recall the number of new buildings that were open from the time that you became detached from your teaching duties as a chemistry teacher in 1949 by Dr. Fawcett through 1969, the number of new school buildings that were opened by the Columbus Public School System?

A. I believe that — I don't recall exactly, but it was very close to 100.

Q. Thank you. Now, directing your attention to the matter of additions to the Columbus Public School System, we have covered, I believe, the ones shown through the period 1965 through '69, some 52, and there is on the map, purports [5137] to be, the additions that were placed in the period '57 through '64, and I would ask you if it is consistent with your recollection that they total approximately and are shown on that map, approximately 55?

A. Again, that sounds reasonably correct.

Q. And that would be, according to my arithmetic, during the years about which you have testified with respect to new buildings, that would be additions from 1957 through 1959, additions of approximately 107, 107 different buildings?

A. I believe so.

Q. And I believe that — I would ask you if it is consistent with your recollection that for the total period 1950 through 1969 that the additions to buildings in the time that you became on assignment to Dr. Fawcett down through 1969, the total was approximately 158?

A. Again, that sounds about right.

* * * * *

CROSS EXAMINATION BY MR. LUCAS

[5138] Q. [By Mr. Lucas] Mr. Rudy, how long did these reports generally take to prepare?

A. How long did they generally take to prepare?

Q. Yes, sir.

A. I believe that the 1951 report took about eight months. The others took less time, because we were more familiar with the procedures and techniques.

Q. And to some extent, the others were updates of previous reports? You'd take the base data from before and see what changes had taken place since that time?

A. Yes, sir. We did, as you say, take the base data and update it, primarily. [5139]

Q. Were these reports prepared in general in connection with proposed bond issues or millage elections?

A. They were prepared — I wouldn't say that they were prepared in connection necessarily with bond issues. That is, they preceded bond issues, because the recommendations did require bond issues. They were made objectively, and the recommendations were a result of the gathering of the data, and the bond issues were a result of the recommendations.

Q. All right. The School System already knew it needed some new schools. You had increasing enrollments. You had school changes you needed to make. Is that correct?

A. Yes, sir. I believe it was apparent to almost everyone who thought about it at all.

Q. And you went to the Ohio State Bureau of Field Services like Dayton has done, like school systems all over Ohio and even outside of Ohio go to centers like that, and you told them were we looking at our needs in terms of new buildings. We have got increasing population at various levels, and we want you to do a study with us as to what we should do in terms of those schools; is that correct? If I have left something out, you put it in.

A. For the first study, especially, we asked them really to do the study. I was a complete neophyte, for example. [5140]

Q. You were what?

A. I was a complete neophyte in —

Q. You went from chemistry to demographics, I understand.

A. Yes, sir. So we worked very much under the direction of the Bureau of Educational Research, in that case Dr. Herrick, and it was also true in the subsequent studies. They gave us the direction. Naturally as time went on we would have been rather obtuse if we hadn't learned something about the techniques and procedures and been able to carry on these studies much more rapidly because we knew about what they wanted.

Q. And you asked the questions. What should we do in this area? How should we solve our problem in the southwestern part of the city, things like that? This was the kind of questions that you asked them? [5141]

A. Well, the data were gathered and presented. The assumptions were arrived at. The basic agreements were agreed to, and the — therefore, the natural questions were, "What shall we do about these situations?"

Q. So there was some basic assumptions that the Board gave you to work with; is that correct, the Board and the Administration?

A. I would say that the basic assumptions were really, again, a result of the guidance of the Bureau of Educational Research people, because, at that time, we really didn't even know what kinds of assumptions — whether there ought to be assumptions. We didn't have any experience in this, and so they said, "Well, you have to make certain decisions," that is, "the Board and the Superintendent have to make certain assumptions on class size, walking distances and those kinds of things."

Q. What your policy would be in terms of walking distance, in terms of transportation, no transportation, those decisions were made by the Board, were they not?

A. Yes, sir.

Q. All right. And you gave them these assumptions. I take it they often work with graduate students as well

in gathering up the base data, they come in in teams and survey schools, this sort of thing?

A. I don't believe that graduate students were used [5142] in these studies very much. They were used in the first two or three studies in the making up of the — of the spot maps from the data that we had, so they were used in that fashion, but otherwise, they really didn't have much to do with these studies.

Q. They did the base data work; would that be a fair statement, making your base data, making spot maps, this sort of thing, —

A. Yes.

Q. Making up data and charts but not the decisional process; is that fair?

A. Yes, for example, the first study, we actually spotted the pupils on maps, at least the first two studies, as I recall, in that fashion. They took the maps which were spotted in pencil and from that they made the final maps which were presentable in a study.

Q. Okay. I take it when you were assigned to this project you were not at that point already totally familiar with all the schools in the system?

A. I certainly was not.

Q. And that's something you had to make yourself familiar with in order to assist the team?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir. [5143]

Q. In that process you became aware of which schools had black enrollments and which schools had white enrollments; did you not?

A. Dr. Herrick and I went around for the first study from school to school.

Q. So you saw which schools were all white and which ones were mostly black; isn't that correct?

A. I suppose we — if by seeing you mean becoming fully and consciously aware, I would say not.

Q. Did you walk through the schools and look at the classrooms when they were empty or when they were full?

A. We walked through the buildings and we knew that there were pupils present and, of course, if most were white, we were probably aware of that; most were black, we were aware of that, but really we didn't give it any thought.

Q. Did the board give the Ohio State team any directions as to what it should do to minimize the existing concentration of white children in white schools and black children in black schools during any of these studies?

A. No, sir.

Q. Did the board ask the Ohio State people to make any recommendations about steps that could be taken in the course of making decisions about school locations and so forth, which would minimize or reduce existing segregation in the Columbus schools? [5144]

A. No, sir.

Q. Let me go back. Did the board ask the team to take any steps to avoid increasing the degree of segregation in the Columbus schools?

A. No, sir. [5144]

* * * * *

[5148] Q. [By Mr. Lucas] Have you got a copy of PX 59? I wonder if you could locate for me quickly the reference that you made to the annexations and how much annexations there had been in this particular report?

A. The reference to annexations?

Q. Yes, I think it is at page 6. Do you want to take a look? Let's make sure we are looking at the same document. Do you have Plaintiffs' Exhibit 59 rather than the '59 study?

A. I have the 1950 study which is marked PX 59.

Q. Okay. Look at page 6.

A. Yes, I see what you mean, the growth of the [5149] Columbus School District.

Q. Yes, that's what I am referring to.

A. Yes, sir.

Q. That indicates that very little territory had been added since the first study in 1939; is that correct?

A. Yes, sir, at that time that was true.

Q. Let's look at the 1960 study — I am sorry, the 1953 study, Plaintiffs' Exhibit 60. Do you find another reference to the annexation?

A. Yes, sir, on page 3.

Q. Page what?

A. Page 3.

Q. What does that indicate?

A. It is indicated that at that time the only annexation — it says of the city, but really to the city and to the City School District since 1949 was the airport area, so that annexation up to that time had little impact.

Q. Only two families; is that correct?

A. Yes, sir.

Q. All right, would you look at Plaintiffs' Exhibit 61, 1966 study? Do you find a reference to the growth of the district there?

[5150] Look at the bottom of page 2, if you will, sir.

A. Yes, sir.

Q. It indicates a total of 8,112.4 acres had been annexed to the City on January 1, '54, through October 17, '55; is that correct?

A. That is correct.

Q. And then it goes on — perhaps you should read from there, the sentence beginning, "Although some of the areas annexed."

A. Although some of the areas annexed were within the boundaries of the Columbus School District, annexation of the areas from adjacent school districts account for approximately 5,310 acres. Little, if any, of this territory newly acquired by the City, even that which —

Q. Skip to page 5.

A. — previously had been a part of the Columbus School District, not then within the City Limits, had been — has been densely populated at the time of annexation primarily because, for about two years, City sewer and water taps have not been permitted outside the limits of the Columbus municipality. However, as soon as annexation proceedings have been completed, the areas affected have been supplied with sewer and water facilities, residential growth has been rampant in almost every case. Business and industrial construction are also encouraged by the [5151] availability of City services.

Q. In these areas outside the Columbus School District, the Columbus Board did have a policy of acquiring sites, school sites, did it not?

A. Yes, sir.

Q. And so, in addition to sewer and water facilities, the Columbus Board acquired sites for new schools in the developing areas in advance of annexations or additions to the district by transfer; is that correct?

A. That is true.

Q. Mr. Rudy, did you — and I take it probably Mr. Beers worked closely with developers in connection with the location of the school sites, acquiring sites within subdivisions, things of this sort?

A. Yes, we tried to, and were usually successful.

Q. All right. I suppose you're familiar, perhaps you're not familiar with the signs, but new developments that say, "New church to be located here, new shopping center, school to be built on this site" as part of the development of the subdivision? You've seen those in your work with developers?

A. I really can't say that I have, sir.

Q. You haven't seen advertisements indicating that the developers new school was going to be built in a certain place; that the School Board had selected the site in [5152] advance?

A. I — I don't believe we had a lot of that. We — I'm sure that it happened, because I know that people had talked to us. I'm sure that in selling a lot, we'll say, for a — or a house, that salesmen would use that approach.

[5153] But I really can't say that I saw a lot of that in advertising.

Q. You didn't see it in signs?

A. In signs or in advertising in newspapers and that sort of thing.

Q. The Board didn't keep its site selections confidential, did it?

A. No, sir.

Q. In fact, they were publicized in various reports of the Board, were they not?

A. They were, and, in fact, when the Board of Education purchased a site, it was public information and in every case, I am sure, reported in the newspaper.

Q. I show you C-76 which also bears Original Plaintiffs' Exhibit 23. I think they are just printed differently. They both have the same title "To Have a School." Since you are familiar with C-76, let's use that one.

Would you turn to the information about Project '71? That was the Monroe Junior High School; is that correct?

A. Yes, sir.

Q. I show you what has been marked for identification Plaintiffs' Exhibit 51I-5(e) which is a newspaper article with a by-line Betty Daft, D-a-f-t. It is a report dealing with the opening of Monroe Junior High School. Would you [5154] begin reading from the full paragraph that begins "At the same time"?

A. At the same time, however —

Q. I am sorry, that would not give the full picture. Read beginning the paragraph before that, please.

A. Civil Rights representatives present at the meeting acknowledged the advancements made in the report and welcomed the announcement from Dr. Watson

Walker, School Board President, that a citizens advisory council would be formed to sit in on future planning sessions. At the same time, however, they soundly denounced the administration's continuing policy of building more schools in predominantly Negro areas as "going farther into racial imbalance, creating more and more problems to correct."

Monroe Junior High due to open in September was singled out as an example of moving Negro youth studying at the integrated Linmoor to a school predominantly Negro.

Q. The next paragraph.

A. The purchase of land by the School Board Tuesday for a possible future elementary at Gladstone and East 25th Street was also questioned as placing a third Negro School in the immediate area.

[5155] Q. Are you familiar with the Gladstone opening as well as the Monroe Junior High?

A. Yes, I am.

Q. Is that the approximate location where the school opened?

A. Yes, it is.

Q. And they did name it Gladstone; is that right?

A. Yes, sir.

Q. Were you aware that Gladstone opened in 1965? Does that sound like the correct date for physical opening of the school?

A. It sounds about right.

Q. And the record, I believe, reflects that in 1966, the first time racial data was reported on the school, it was 78 percent black, and in '67, 91.2 percent black. Were you aware, sir, that Monroe Junior High opened 100 percent black?

A. I wasn't consciously aware of it. I had no particular reason to note it.

Q. You knew it was in a black area, didn't you?

A. Yes, sir.

Q. I am sorry, when did you retire from the system?

A. September 1, 1973.

Q. You were still with the system then at the time the Cunningham Report, another Ohio State University study, was [5156] submitted to the Board for its consideration, were you not?

A. Yes, sir.

Q. I will refer to Plaintiffs' Exhibit 194 and ask you to look at page 3 and see what Ohio State had to say in the second full paragraph on the page.

A. Do you want me to read that?

Q. Yes, sir, please.

A. Due to a number of circumstances, there are racially segregated schools in the Columbus — I am sorry — in Columbus. See Figures 2 and 3. But there is interest in finding ways to handle that problem. Conflict between the schools and segments of the community exists. It cannot be ignored. There is not enough money, but the survey of householders and employers indicated a willingness to spend more for good schools. There are new services as well as increases in existing services required, but these would seem to be achievable.

Q. Let us refer now to Figures 2 and 3 in the report. Figure 2 is a map done in color by Ohio State University showing percentages of Negroes in the public elementary schools, Columbus, Ohio, 1967-68, is it not?

A. Yes, sir.

[5157] Q. And if we can for the record — I know you can see it, but we have to say it for the record. Let's go over the color code. The areas such as Bexley and Whitehall are in the color blue as not being part of the Columbus District; is that correct?

A. Yes, sir.

Q. And then the circles with less than 1 percent Negro students, in the language used in the report, are

red circles or semi-circles. I don't know what you call them. They look like footballs to me.

A. Ovals or something.

Q. Anyway, they are completely white on this particular map; is that correct?

A. Yes.

Q. And would you give us the various colors for the various other percentages?

A. The percentage 1 percent to 4.9 percent is in yellow. The percentage 5 to 24.9 percent is a red oval with two red dots. The percentage 25 to 49.9 is an oval, a red oval with a red X.

Percentage 50 to 74.9 is a black oval with a figure 8, I believe that is.

Q. That looks like it to me.

A. Figure 8 inside. A percentage 75 to 94.9 is a black — we're talking about outlines now.

[5158] Q. Yes.

A. — black oval with red interior and a white dot inside that. Percentage over 95 percent is a black oval colored entirely red inside.

Q. All right. And those that are colored red are all concentrated in one particular area of the city, are they not?

A. They are concentrated in the central section of the city.

Q. And the white circles are pretty much in the periphery of the city, are they not?

A. Yes, they are.

Q. That's elementary school, and I believe the slightly different coding but essentially the same process, the junior and senior high schools are reflected in the map. I don't think we need to read through the code. And that's figure 3; is that correct?

A. Yes, sir.

Q. Thank you.

I refer you now to Page 20 of the Cunningham Report under the heading "Managed School Integration" and ask you to read that paragraph.

A. The mark —

Q. Yes, down to the mark.

A. The concentration of minority groups in certain [5159] sectors of Columbus requires that policies of managed school integration be adopted. The Commission endorses the recent Board of Education decisions on boundaries for the new Southmoor Junior High School. This new school will achieve a reasonable racial balance in its enrollment and at the same time assure the distributions of black and white youngsters in neighboring schools. It is necessary that this principle and process of boundary revision be extended immediately to other segregated schools.

Q. Do you know whether or not that process was extended to the other segregated schools?

A. I don't recall. As — as I recall, as new schools were opened, and there was a possibility of doing this for pupils living within a reasonable distance of the school, I think that an attempt was made, but, of course —

Q. Would that be true — I'm sorry.

A. But, of course, this would not apply to the schools in the central part of the city which had already been established.

[5162] Q. I refer you now to the summary at page 105. Would you read the section beginning "Managed school integration"?

A. Managed school integration can go forward much more intelligently with the knowledge that new segregations are not cropping up in developing areas of the City. Managed integration linked with carefully chosen compensatory education programming has the prospect of offering Columbus the most outstanding large city educa-

tional system in the nation. Pursuing policies of segregation promised little or no hope. They will lead only to further deterioration of the community's confidence in its schools, large school disenchantment on the part of disadvantaged families, black and white, growth and student unrest and eventually economic decline within the metropolitan area.

Q. And this was a study done for the school system in 1968 by the Ohio State University; is that correct?

[5163] A. Yes, sir.

ROBERT W. CARTER

called as a witness on behalf of the
Defendants, having been heretofore duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. PORTER

[5292] Q. [By Mr. Porter] Would you state your name, please?

A. My name is Robert W. Carter.

Q. And where do you live, Mr. Carter?

A. I live in Worthington, Ohio.

Q. And you previously appeared in this case and have given testimony before today?

[5294] Q. In your duties in your department, were you familiar with the rental of facilities by the Columbus Public School System in 1964 and subsequently?

A. Part of my responsibility was to secure, to locate feasible rental facilities where we had overcrowded conditions in nearby schools to be used to house the students.

[5303] Q. The next one is the Highland Elementary School, '70-71 school year. Tell us about that, please.

A. Capacity at Highland that year was 667 with an enrollment of 701. We sent a pre-K, two pre-K classes to Oakley Baptist Church next door.

Q. Directing your attention to McGuffey, would you tell us about that, please?

A. McGuffey, with a capacity of 696 youngsters and enrollment of 904, we housed kindergarten youngsters at the Cooke Recreation Center and the Linden Recreation Center.

Q. Do you recall approximately how many rooms had to be housed for McGuffey at that point in time?

A. I believe we sent two classrooms to Linden Recreation Center and either two or three classrooms to Cooke.

Q. Thank you. And continuing with McGuffey, was it necessary in the next school year, '71-72 — strike that. I [5304] am sorry. Strike that.

Turning your attention now, please, to the Sullivant Elementary School, what was the situation at that school?

A. It had a capacity of 406 students at Sullivant that year and enrollment of 471. It was necessary to locate the pre-K, pre-kindergarten children at the Columbus Methodist House Association.

Q. Why is it necessary when the fingers would indicate that there is — I am sorry.

Why do you deal with pre-K classes so frequently in this situation in the late '60s and early '70s? What's the reason for it from an administration standpoint?

[5305] A. Pre-K was sponsored and financed through the Title program, the ESEA funds out of the Elementary and Secondary Act of 1965, and they were instituted in the years '66, '67, on through, and they — it was necessary to house them in the areas of — the impacted area, the area that we were serving, the Title area.

Q. Now, if you would get before you, please, Plaintiffs' Exhibit 356A, Dr. Foster has testified in this proceeding, Mr. Carter, that there was space available at Kent — excuse me — that there was space available from which the students at Kent, Hamilton, Highland and Sullivant, those students who went to these churches, that they could have been taken to various schools around the city, and those schools are identified in the record. I would like to ask you some questions concerning several of them.

The first one is Kenwood Elementary School which he said could receive students, and I would ask you whether or not, according to Plaintiffs' Exhibit 356A, Kenwood, whether it was receiving two classes from the Winterset Elementary School at that point in time?

A. This was the 1970 school year?

Q. This was the 1970 school year.

A. Yes, sir, they were receiving two classes of students from Winterset.

Q. And directing your attention to the Parsons [5306] Elementary School which he testified had space available, I would ask you again, referring to Exhibit 356A, whether or not it was receiving classes, three classes, from Cedarwood at that point in time?

A. That's correct, it was.

Q. And I would direct your attention to the Stewart Elementary School which he said had space available and ask you whether or not, according to 356A, Stewart was receiving two classes from the Deshler Elementary School?

A. That's correct, it was.

• • • • •

[5308] Q. Directing your attention, please, to the Cassady Elementary School for the period — for the '72-73 and the '73-74 school years.

A. We annexed Mifflin Township in 1971. That year we were able to house Cassady Elementary School in its own facility, but we were growing rapidly, and we were also transporting out of South Mifflin. Thus, we needed a space in the community to house the overflow from these two schools, and this facility that we later named Crossroads for purposes of identification, we had 14 classroom spaces that were designed and modified by the builder for our specifications. It was air conditioned and carpeted, and we housed the overflow from Cassady there. We also housed the overflow from South Mifflin until additions could correct their overcrowdedness.

Q. And this was done for a period of —

A. A couple years. It is still in use.

Q. Now, Dr. Foster testified concerning the excess, the enrollment over capacity at Cassady in 1972. According to the record, he identified certain schools which had space available, one of which was Marburn, and I would ask you to [5308-A] look at Plaintiffs' Exhibit 356A and see whether or not Marburn was receiving three classes from Winterset at that point in time?

[5309] A. That's correct.

Q. He also testified that Homedale had space available for 122, and I would ask you to look at 356-A and see if Homedale was receiving at that point in time six classes from Alpine?

A. That's correct.

Q. He identified Valley Forge Elementary School as having available 63 spaces, and I would ask you to look and see whether or not Valley Forge was receiving at that point in time three classes from Devonshire?

A. That is correct.

Q. He testified that there were 102 spaces available at Kenwood Elementary School, and I would ask you to look at Plaintiffs' Exhibit 356-A and see if Kenwood was receiving five classes from Winterset at that point in time?

A. That is correct.

Q. He testified that Northwood had 66 spaces available, and I would ask you whether or not Northwood was receiving students from South Mifflin?

A. No, it was not.

Q. The next one on the list is South Mifflin, and you may have covered it, but would you please restate it for the period 72-73 and 73-74 school year?

A. South Mifflin during this period of time had a capacity of 493 youngsters and we had enrollment of 826.

[5310] When we annexed Mifflin Township, South Mifflin was housed in a variety of places, Eastland, I believe, was one place. We continued that for a period

of time, and then we housed them for a short period of time in Arlington Park, and the remainder was housed at Crossroads.

Q. Dr. Foster recommended or said that there were certain schools available with space, and the record will indicate whether or not he used the same schools twice, but he also identified Kenwood, and I believe you have testified that Kenwood was receiving five classes from Winterset?

A. That's correct.

Q. I believe that he identified — strike that.

Your testimony with respect to Cassady and South Mifflin you have covered the school year 72-73 and 73-74; am I correct about that?

A. That's right.

Q. You have covered both school years?

A. Yes, sir.

Q. In the 73-74 school year, Dr Foster found that there was space available at Kenwood again, and I would ask you to refer to Plaintiffs' Exhibit 356-A, and would you tell me whether or not Kenwood was receiving now six classes from Winterset?

A. Yes, 73-74, that's correct, six classes from Winterset.

[5311] Q. He also testified again concerning Homedale, and would you look and see whether or not it was receiving five classes from Alpine?

A. That's correct.

Q. According to Exhibit 358 the Columbus Public System leased additional space at the Crossroads for the purpose of relieving the Mifflin Junior-Senior High and possibly Innis-Cleveland for the 74-75 and 75-76 school year?

A. Yes.

Q. What was the situation, please?

A. This was the same space, the 14 classrooms that we had available at Crossroads. It was used to continue

housing the children from Cassady Elementary School through the 1974-75 school year and then during this past school year, 75-76, we moved the seventh graders over to Crossroads while the Mifflin Junior-Senior High School was going through a renovation program and remodeling.

Q. What is the proximity? What is the relationship of the Crossroads facility to these various schools, please?

A. The Crossroads is about 100 yards from Mifflin Junior-Senior High School. It is approximately a quarter to a half a mile from Cassady Elementary School.

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[5322] Q. [By Mr. Porter] Thank you. Now, I would like to turn to the subject of transportation to relieve overcrowding or what I guess has been referred to in this record as intact busing, and I would ask you to tell us first what is its purpose and — let's start with that.

A. Intact busing was used in the Columbus Public Schools to relieve overcrowding wherein we would take and we would use it basically in the elementary grades where we would take a class of elementary youngsters with that teacher and transport them to a nearby school where we had space because of overcrowding at the sending school.

Q. Would you describe for us the mechanics of this, please?

A. Let me explain the rationale behind the transportation of these youngsters to nearby schools. It would always be done on a temporary basis with some objective in mind where we knew we were going to have a relief through an addition or through a new facility someplace down the pike. [5323] So it was always on a temporary basis.

On the basis of that, we would move a teacher and that class to the sending school, and we would retain the organizational affiliation of that teacher and those youngsters to the sending school, to the home school. Because of this it was not necessary, then, to change or to alter

student permanent records, to adjust the student portfolios, or to change the teacher status. All of this would remain intact with the home school organization.

The school where they were located would have available space, would house this teacher and her class for instructional purposes. These youngsters would be contained or would be kept together as a class through the instructional activities, but, on all other activities, the school would attempt to blend them into the organization. The teacher would be assigned extra duty assignments by the principal of that receiving school. The youngsters would generally take recess with the receiving school youngsters. [5324]

If there were a school-wide movie or some other extra-curricular kind of activity that transpired during the school day, those youngsters would participate in such activities as when the music teacher came to that school, they would be assigned to that schedule, and speech therapist, and all those services that reach out to the school housing, that group of intact bused youngsters would participate in that school organization.

But, for record purposes, they kept their identity with the home school.

Q. Let me ask you, pick up some specifics on this, Mr. Carter, if I may, please. If I would understand correctly, then, this was a temporary situation. I suppose that that meant until the school was built or an addition was put on, or something of that nature?

A. Correct.

Q. Did you attempt to avoid transporting the same children for consecutive years?

A. Unless it was a situation where we just could not avoid it, in almost every circumstance that I can recall of transporting youngsters because of overcrowding, we would avoid the transportation of a youngster a second year.

We would move to another grade level or to another grouping rather than repeat the youngster on a transporta-

tion basis, so that he could then return to his home school [5325] and continue in some sort of a normal fashion with his home school situation.

Q. If schools in the area were not available because they were, let's assume, overcrowded, then would you sometimes turn to rental space as an alternative?

A. Rental was used as an alternative if we did not have available space in schools nearby.

Q. So that what you first looked for was what, please?

A. We looked for available classroom spaces in nearby schools, first of all. If we could not find available classroom spaces within a reasonable distance of the home school, then we would turn to rental spaces as an alternative.

Q. I notice that it was not infrequent that kindergarten children were transported. Why were kindergarten children some times transported, Mr. Carter?

A. Kindergarten children, there were a number of reasons why I preferred to transport kindergarten children. They were not restricted to a minimum hour day, by State standards.

Q. What do you mean by that? I don't understand that.

A. Elementary youngsters we have to have in school five and a half hours, and kindergarten youngsters, because at that point in time it was not mandated, a mandated program by the State, we could restrict the number of hours they had in session, so that was one reason.

Another was that it was half-day sessions; that we [5326] could get them out and get them back to their homes in a half-day period of time, and thus we weren't confronted with a lunch problem because those youngsters that we took out of their home school district, we were confronted with a lunch situation, lunching situation, and with kindergarten youngsters, that wasn't a factor.

Another factor that we would consider — I am trying to recall now; the operations of the standards, the lunch

room, the fact that they were flexible; that was voluntary.

Q. What do you mean by the latter, please, that it is voluntary?

A. Parents did not have — if they were adamantly opposed to their children leaving the home school area, they would not have to send their child to kindergarten. They could choose some other alternative.

Q. So that I understand the lunch program aspect, please, and I am sorry to repeat it, but the point is that at the kindergarten level, the child is not served lunch; is that correct?

A. Kindergarten is a half-day program and we would return them to their home school. The morning session kindergarten would come at 9:00 o'clock and return home at 12:00 and be back to their own residences in time for lunch, but grade children, Grades 1 through 6, it is necessary to keep them the entire day, thus we have a lunch problem. [5327]

Q. Am I correct in some impression that I have from somewhere that you also may have at the kindergarten level teacher availability for a half day possibly, or something of that sort; is that right?

A. That's correct. Kindergarten teachers in Columbus are employed for one session or for two sessions. Two sessions is a full-day teacher, and we might have a situation where a teacher had an assignment of a half day kindergarten in one school and she was available for instruction purposes the remaining half of her schedule and would not have enough youngsters in that particular school to fill another section, so we would combine these kind of situations to conserve financially and to make use of her space, because kindergarten spaces are generally a little larger spaces than regular classroom classes, they have different kinds of furniture and equipment, and so we would combine the use of that kindergarten space plus making use of that available teacher and preventing

us from employing additional staff to handle this extra kindergarten.

Q. The children that were being taken intact, as I understand it, were being taken on a some — what seemed to be a temporary basis. Would I be correct, or would you tell me what the situation was with respect to boundary changes or attendance area changes under these circumstances? Were there any, or did the — [5328]

A. No. When a school became overcrowded, if we had an opportunity to change boundary, or if there was no other alternative but to look for another solution, a more permanent solution to relieve the overcrowdedness of that building, then we would be forced to look at boundary changes, but if we knew, and we generally did in advance, because of the bond issue, that we were operating under, from '64 through '68 and now '72 through to the present time, we know whether a school is to receive an addition or whether there will be a new school located in that general area, and so we have fixed in our mind some rationale, some solution to the problem, so those situations where we transported were temporary, we knew on down the pike that we would have some resolution to that particular problem, and we would not have to change boundaries; that by temporarily transporting them, we could house them in the very near future; maybe two months, six months, a year later.

Q. Did you move first graders?

A. We did not move first graders.

Q. Why not?

A. Basically because we felt that first graders needed to have instruction in their home school. They were beginning school for the first time on a full-day basis. They needed all of the advantages we could supply them and muster, and we tried not to disrupt their educational program. [5329]

Q. In dealing with kindergarten children, what were the requirements, if any, so far as the location of the

space? What I have reference to is, is there a restriction on where the space can be located in the building so far as kindergarten children?

A. Yes. State fire codes prevent you from placing kindergarten, first and second grade youngsters above the first floor of the school building.

Q. In the event that there were full-day students, other than kindergarten being taken, was it necessary or not necessary to have lunch facilities at the receiving school?

A. We had to try to resolve the lunch problem. In certain situations I would — and keep in mind early in my service at the Board we operated under a policy that children should go home, if at all possible, during the noon hour, and thus the elementary organization was such noon hour would be an hour and a half in length and youngsters — or an hour and a quarter in length — and youngsters would have that opportunity to go home for lunch, so we had very few elementary schools with lunch room facilities.

In the beginning I attempted to look for those facilities that could accommodate with a hot lunch program in that receiving school. This isn't always possible, but that was one consideration for taking the youngsters, but we did have a lunch problem on children remaining all day. [5330]

It was an imposition to ask parents who were sending their children to school and then have them furnish a lunch and pack a lunch for their child when we took that child onto the next school, and so it was a severe problem. We tried to deal with it as best as possible, and as the elementary lunch program moved along, we tried to make certain that that elementary school received a lunch program so that we could accommodate those transported youngsters.

Q. With respect to the availability of supplies in a receiving school, was there a policy with respect to at-

tempting to house all of the classes that had to be transported from a sending school, if at all possible, in the same receiving school? [5331]

A. There are good reasons for this. You try to keep youngsters of that particular school together for community relations purposes, as well as organizational purposes, and if — we tried to keep a group of youngsters, classroom of youngsters, together. This wasn't always possible, but we at least attempted to put two classrooms together. This would be one busload or approximately 60 youngsters. So just to accommodate transportation we would generally work in pairs, at least two classrooms. In many situations that I can recall, we would look for maximum amounts of space so we could house the entire transported classrooms in one school to another school.

Q. Now, you have covered some of this before, and I don't want you to repeat it, but I want to deal with the subject, generally the subject of why a class is kept together. You mentioned the organization and record keeping as simplifying that and the fact that it is temporary in nature bearing on that point. I would ask you what happens in these situations so far as the schedule of the group is concerned, its school schedule; does it jibe with the receiving school's schedule or not, or what is that situation, please? [5332]

A. We would attempt as much as possible to have the classroom of youngsters that we were transporting into a receiving school match the time schedule of the receiving school, but this was not always possible. Because of bus schedule conflicts and these kinds of difficulties that we would be confronted with, it would be necessary, from time to time, to alter that schedule, to shorten the lunch period and to reduce or alter recess. To accommodate the time minimum that we had to meet with that transported class and the bus schedule.

Q. Were the classes at the receiving school organized prior to, or what was its relationship with respect to the

principal receiving possible notification that he would have another class?

A. The organizational processes followed in Columbus and one that I adhere to — we began to form classes and to identify and project the enrollments for the coming school year as early as February of each year, so we were working about six months in advance of the actual beginning of the — of school in September, and it was necessary for us at that time to form classes to determine if we could house them all in this school, and, of course, I did not mention earlier and I should, that before transportation from a school, we used every available space in the home school. We would use the multipurpose room. We would use classroom spaces that were not [5333] acceptable, generally speaking, as classroom spaces, but during this temporary arrangement, we would attempt to accommodate the overcrowded school in that situation. We would often times move out of the school special class youngsters. These would be EMR students or LBD students and relocate these youngsters in another situation, do all manner of things to house those youngsters in that particular school before we would take overt actions to transport them to another area.

Q. Now, again, you have identified some of these following matters, and I'll try and avoid duplication, but the principal of the receiving school had the on-site responsibility for the incoming child or children; am I right about that?

A. The incoming principal — the principal of the receiving school worked with the day-to-day problems that would occur within that school. The problems greater in nature or one that would require dealing with the parents would involve the principal of the home school.

Q. Now, with respect to the participation in the school-wide activities at the receiving school, what was the situation?

A. The principal of the school would attempt to organize those extracurricular activities to make these youngsters feel as welcome as possible in that school through their [5334] involvement in the school-wide activities, extracurricular activities of the school.

Q. And what about the scheduling of recesses and assemblies and lunches and field trips, that sort of thing?

A. As much as possible, as much as the organization of the classes would permit, these youngsters would be included in the recess time of the normal school recess or in the lunchtime period, and, basically, it was because that teacher who went to the receiving school was now included in the extracurricular roster of the receiving school, and she took her turn at lunch room supervision or at playground supervision along with the staff of the receiving school, and thus, her youngsters would be treated and involved with — in the routine manner with other students. [5335]

Q. She would be expected — the principal of the receiving school would expect her to take her position with respect to these duties along with the other teachers in the building; is that correct?

A. That's correct.

Q. So far as the parents were concerned, were they — did they participate in the PTA at either school or both schools or neither, or what was the situation?

A. Parents in these situations were invited to both schools. We attempted to retain the identity of the parent with the home school; and the teacher that would have been sent away to another school because of overcrowding would on open house occasions or other occasions come back to the home school and participate in those activities so that she could have contact with parents and make herself available to them.

But in the main, parents of children in a situation that were being transported out of their home school would generally be welcomed and attend PTAs of both schools.

Q. In the situation where there is a kindergarten class — and I guess it would be true of any kindergarten class, not just one that is received from another school — do the kindergarten classes have recess periods that are the same as the children in the first grade and older, or do they differ, or what is the situation?

A. Kindergarten youngsters are generally — they [5336] generally have their recess period and their lunch period at different times from the older children. Because they are smaller, they are kept separate. They generally have a separate play area, so they are restricted from participating with the older children in recess activities.

Q. And with respect — and I suspect you have covered this, and I apologize, but the lunch policy so far as the time is concerned for the children that were brought from the other school, what was the situation?

A. Since these children had to eat at school and, as I said earlier, when I first began, the lunch policy, lunch period, would involve about an hour and a quarter period of time, and that was too long of a period for these youngsters to have lunch and wait for the regular schedule to catch up with them. They would generally eat on a shorter lunch period, and thus they could leave the school and return to their home school in time to take advantage of the school boy patrols to help them cross the streets on their way home from school. [5337]

Q. And finally, generally, was race a factor in the selection of the schools?

A. No.

* * *

[5380] Q. [By Mr. Porter] Now, I want to take up with you, Mr. Carter, the subject which has been categorized as non-contiguous or [5381] discontiguous zones that have existed in the Columbus Public School System during the time that you have been involved with the Division of Administration. My first question would be: What is

the purpose of a non-contiguous zone? Why have it? How did it come about?

A. We have non-contiguous zones in elementary and in junior high school in Columbus. Basically, these are areas that are locked in geographically by a railroad track, three-way river, whatever, and we find it necessary to transport them. They don't — they don't generally fit the area. There's no easy school to take them to. [5382]

We take them to the school that has space. We have used them a time or two to relieve overcrowding in schools by transferring the attendance area but, generally speaking, once established, we have provided some continuity with this non-contiguous area with that receiving school.

Q. The grade structure or the assignment of those students within the school building, how does that take place, please?

A. They are treated just as the normal attendance area of the receiving school. Children are integrated into the entire school on each grade level, no differentiation on assignment within a facility.

Q. Are changes made or are changes always made or sometimes made with respect to these discontinuous zones if space becomes available at a closer school?

A. If space becomes available and it is more logical to uproot them from the receiving school and reassign them, we have done that. I can think of one discontinuous area that this would apply to.

Q. What happens to the child insofar as the school activities are concerned? What effect does this have, if any?

A. As I testified, all the youngsters, to my knowledge, in discontinuous areas are transported. This does limit them somewhat in extracurricular activities after school, especially in the junior high school where we have sports [5383] activities going on after the close of the school. In elementary it is not quite as severe. But during the school day, they are just as any other youngster in the building.

Q. There are how many discontinuous zones generally in the Columbus System?

A. I believe I can — I consider there to be five, to my knowledge.

Q. Were those zones or have those zones been used during the years, at least the years in which you have been connected with the division of administration, has race been a factor with respect to those zones?

A. No, sir.

* * * * *

[5388] Q. Thank you. Directing your attention now, please, to the Medina Junior High School which has a non-contiguous area attached to it, would you tell us about it, please?

A. The non-contiguous area that is assigned to Medina Junior High School is basically the Arlington Park Elementary School attendance area. The history on this goes back, I suppose, to its annexation. It had to come in in '57, '58, '59, along in there, prior to 1960. This area was assigned to Linden-McKinley, which at that time was a junior-senior high school.

Q. Excuse me. Let me interrupt and just clarify that a moment, if I might.

This area had been a part of the Mifflin Township School District prior to 1957 and then was transferred to the Columbus School District at that time.

A. That's correct.

Q. All right. I am sorry to interrupt.

A. When it came in, it was assigned to Linden-McKinley [5389] which at that time was a junior-senior high school. For a period of time, it continued to Linden.

About 1960, because Linden was so overcrowded, so impacted with junior and senior high school youngsters, I believe for one year it was taken to Linmoor which was a new junior high school established in the area in 1957 or '58 to relieve Linden-McKinley, but it was only there for

one year. Then it went back to Linden-McKinley, and it continued there to 1962.

[5390] At that point in time, an attempt was made to remove all of the junior high school youngsters from Linden-McKinley and to make it a completely independent senior high school, and thus McGuffey Elementary-Junior, which was at that time an elementary, was converted to its elementary-junior status. The remaining students from Linden-McKinley were transferred to McGuffey, and this one last island — these youngsters were beyond the limits for walking and, of course, there were safety factors as well, so they were transported. It was decided to transport them to Medina Junior High School which lies to the north of Linden-McKinley, and at that point in time had space to accommodate them.

But in 1962, then, Linden-McKinley became a senior high school with Medina, McGuffey and Linmoor and Clinton Junior serving as the junior high school feeder schools.

It is continued until this day in the Medina district.

Q. The Medina assignment or the taking of the children of the junior high, 7 through 9, to Medina has continued from 1962 down to the present time; is that correct?

A. That's correct.

Q. Directing your attention to the Moler Elementary School, please, which has a discontinuous area which began in 1963, would you describe where it is, please, and what that's supposed to do? [5391]

A. The discontinuous area at Moler is located in the southern portion of the school district. It was part of the original Marion Township transfer to the district in 1957, and at that point in time was a part of the Smith Road School. The Smith Road School was a school established in the Marion Township and was existing when we annexed it, and at that point in time was very crowded.

We built Moler, and it came on line about 1963, and these youngsters, again, were locked because of geographic

barriers, the railroad track on the west and the school district boundary lines on the south and east, and I believe there's a railroad track on the north, so that they were always — it was necessary to transport them, and we simply transported them to the new Moler Elementary School which had space, and those youngsters have continued through to the present time.

* * * * *

[5394] Q. [By Mr. Porter] I now wish to take up boundary changes, and I would like you to first explain why we have boundaries and then we will go through the mechanics of setting it up and the projections that are made with respect to them, and then we will go from there, please.

First, why do you have boundaries? What are their purpose? What's the purpose of them?

A. A boundary serves as a definable area to be serviced by a school facility. It — this boundary is determined based upon its density and the service — the kind of school facility that will service the area.

Generally speaking, in Columbus, elementary boundaries are closely designed boundaries to provide walking distances where at all possible for elementary youngsters, and this is not a hard and fast rule, but generally speaking, we keep walkable distance for elementary youngsters within a mile. Now, there are a few cases where this exceeds it, but generally speaking, elementary attendance areas service children within that walking distance, and that walking distance is within a mile radius.

Junior high school boundaries are a little more extensive, cover a greater area, and yet we attempt — attempt, where at all possible, to keep a walkable distance within two miles, which is the State minimum for a walkable distance to school. [5395]

Q. Excuse me just a moment. Let me correct something.

A. Yes.

Q. Minimum distance while walking —

A. I'm sorry. Maximum distance for walking, yes, and minimum distance for transportation.

Q. After which you become eligible for transportation?

A. That's correct, yes. Thank you.

Q. All right. Go ahead.

A. Senior high schools are larger in respect to attendance and serve a greater area. We'll generally be receiving from two to four junior high school feeder schools and very little consideration is given to walking in these areas. They serve general geographic areas.

Q. What effect does an organization have upon the establishment of boundaries, if any?

A. The organization will have an effect on the boundaries. If it's a primary center, if it's a K-3 center, you'll find the attendance area smaller. We generally try to have an attendance area in the elementary to take in approximately twelve classrooms, ten to twelve classrooms of youngsters as a minimum. This is in the neighborhood of 300 to 360 youngsters, and there's a simple mathematical reason for this, and that is that we like to offer at least two classrooms per grade level in each elementary school. It makes some organizational sense. It helps in the [5396] management of the assignment of pupils in grade levels. You have a choice of teachers, as an example, to assign students, and it provides a more economical base for assignment.

Q. The density of the student population, children population in an area has a bearing, I assume, upon the size of the attendance area, or putting it another way, that the size of the attendance area would be related to density and the capacity of the building?

A. That's correct. The — I used the example of 300, 360 as a minimum realizing presently there are several schools below the 300 minimum, but this is an attempt to

accommodate an organizational-management level, a minimum level.

As a maximum level in elementary, you feel you ought to keep it at 25 classrooms or less, and on an elementary school larger than this, and this takes you from 700 to 750 students per school — any larger than this causes problems because of distance and just the impact of a large number of youngsters at one site.

At junior high school, our spread, we have attempted to work in the range of 900 to 1000 students. This is a range that is most economical in terms of organizational level.

And in senior high school, we find we can accommodate a reasonable comprehensive program, offering a full range of [5397] subjects and selections for youngsters with a thousand to — with 1200 to 1500 youngsters. Now, realizing that some of our schools go above and some are below this, but this has been the range that we try to adhere to, and this has its effect on the organizational — or the district that we're pulling from, and, of course, the density of that district will have an impact on that attendance area, the largeness or smallness of the area. [5398]

Q. What are the safety factors, if any, involved in the establishment of a boundary?

A. We consider safety factors very carefully with youngsters, try to avoid having them crossing railroad tracks, and in the main, to avoid crossing freeways or heavily traveled thoroughfares. Where we do have them cross thoroughfares, we attempt to provide as much safety as possible by adequate cross lights and crosswalks at those sites, but river, railroads, freeways and thoroughfares are considered very seriously in drawing elementary boundaries.

Junior high boundaries, we are a little freer on this one, because the youngsters are a little older and a little more able to handle themselves.

Q. Is the racial composition a factor to you in setting boundaries?

A. Yes, sir.

Q. What is that, please?

A. Where possible, we have attempted to consider race in the development of boundaries, and this has been since approximately 1967 when the Board of Education first set a policy recommending that race be considered in the development of boundaries.

Q. There has been testimony in this case with respect, I believe there has, if not in it, around it, concerning the neighborhood school. Would you tell us what that is, if [5399] anything, and what part it plays in this?

A. The school will serve a community. These communities are definable, generally speaking, by an attendance area. School communities are — in elementary are small in nature, and for the intent of teachers and principals to work closely with parents in the educational development of their youngsters.

Elementary schools — the school community is a closely-knit kind of thing. It may not follow the — a sociological definition of neighborhood, but it is a definable area that the elementary school will service.

In junior high school, the concept of community is expanded somewhat, and in senior high school, even moreso.

Q. Would I be correct, Mr. Carter, in assuming that, given a density, that density will directly affect the number of schools which will be located in a given geographical area insofar — in relationship to their size?

What I am trying to say is that if you have a high density area and if a satisfactory size of school, for example, would be the number of sections or classes that you are talking about — and let's use as an example 700 students — then that is going to dictate the number of schools that are going to be located within that geographical area. Am I correct about this?

A. That's correct? [5400]

Q. And, of course, the relationship would hold true really throughout a school system, I assume?

A. Yes.

Q. Those factors?

A. Yes.

Q. Now, in your years as a director and executive director and so forth of the division of administration, what did you have to do with the establishment of boundaries, and what were the mechanics of doing that, please?

A. My function at the central administration with respect to boundaries was to work closely with the school principals. I relied on them heavily. This is on existing boundaries and existing attendance areas. I relied on principals heavily to make input to me as to their enrollments and enrollment projections, capacities of the building, and where we were having organizational problems, and then would work with each principal to attempt to fit that organization as best as we possibly could.

Principals, I would expect them to, and they did, identify for me when we were to anticipate some overcrowding, and we began working at solutions to the overcrowding.

As I indicated earlier, if it was necessary to relocate a special education unit that happened to be located or placed in that facility, we would attempt to find some other suitable space for it, and one measure — or we would use some [5401] inadequate space that we hadn't used before, or maybe we would convert a library. Oftentimes we would put a divider in the multipurpose room and use it to use or to house one or two classrooms of youngsters. I hesitated in doing this because this deprived the school of a physical education facility and a multipurpose facility for large group construction, but we would do all manner of things to attempt to accommodate that organization.

If we saw some solution down the road in the near distant future in terms of an addition to the school or a

new school facility being placed in the general area to help us relieve the overcrowdedness, we would continue with temporary kinds of arrangements. This included internal reorganization to accommodate, and I might add that we could include increasing class sizes to accommodate that growth, or we could include reducing the number of students in a particular class to have it fit in an inferior room in terms of size. All these things would fit into the organization.

At one point where we saw that we had to do something, if it was a solution, then we would, and we moved outside the school, then we would rent or transport. But if we saw that that wasn't an answer for us and if we had space in a neighboring school district — and this may be one or two districts over — then it became my responsibility to attempt a reorganization of the school attendance areas to [5402] accommodate this overcrowdedness through boundary changes.

At that point in time, the administrative cadets who were assigned to the school system — these were teachers chosen for their potential as administrators and were in training to become administrators and who were assigned to me for specific field work responsibilities — would then assist me in taking a census of that school attendance area. By a census, I mean we would take cards to the school and have the teachers or students complete the cards, and on this card would be such basic information as grade level and address. We would take these cards and bring them back to a central point where we had work space, and we would simply place the cards by street and then numerically by street, numerically group them and stack them by street. It was a very painful process, I might add, of placing a dot on a map or some representative number on a map representing the number of students living on a block-by-block basis on either side of that particular street we were concerned with until we got a visual impression of the impactedness of that

particular area. Then we began searching for solutions in terms of changes, and we would look at all the things that you referred to earlier such as density. We added mobility because some of these districts were moving in and out, and mobility was a precaution we had to take a hard look at, because if we [5403] overextended a facility and we had more children move in, then we anticipated we would again have overcrowding. So mobility was a factor.

We would look at geographic barriers, and we would look at safety, and we would look at race, and we would take these considerations into account. Then we would make a choice. If we needed to vacate one classroom of students, we would attempt to move 30-plus youngsters or so from the overcrowded school to this neighboring school, and so it went.

Q. What did you do with respect to the setting up of boundaries of a new school? How was this done?

A. The new school, the site of the new school would be placed on a map, and basically the same process, except that now I would be working with one, two or more elementary and junior-senior high school attendance areas, and I would simply have these entire school attendance areas plotted on the map with students living on them. I would code them by grade level so that I could have a visual impression of grade level of movement throughout, as well. That was another thing I would have to consider. With this growing population in Columbus, you had to be very cautious of the number of students coming up through ranks so that if you changed an area, you didn't overimpact it because of the number of youngsters in the lower grades. [5404]

I would take these two or three or four school attendance areas and place the new site on the map and then — and knowing beforehand the available space of the new school, the capacity of the school, I work in concentric circles from that school working in the geographic bound-

aries or barriers and safety and race, all these factors, until I reached a point that would service all of these concerns to the best of our ability to do it, and we would draw that new boundary, rough it out. [5405]

My responsibility was to the deputy superintendent of the schools, and I would report to him on my recommendation and give him a chance to review it. From there he would take it to the superintendent. It would be reviewed again, and then finally this would be in the form of a recommendation to the Board of Education, at which time the area was either accepted or rejected. If it was accepted, we would then begin the process of notifying parents the new school assignment for their students, changing the organization within the system. This means pupil personnel changes, and it means changing, modifying, the school district directory so that others could determine by street and house number where the new attendance area was.

Q. It is basic, I suppose, to what you have said, or maybe you even said it, that when you establish a new area you are going to affect or may affect the — well, you will affect the boundaries of at least the contiguous attendance areas. Am I correct about this?

A. That's correct.

Q. And it could well have some kind of an effect beyond that?

A. Yes. Oftentimes you will see a rippling effect, a domino effect, and you would have to move several school districts to accommodate all the youngsters impacted in this area, so at times it was a very complicated procedure and [5406] involved a number of changes.

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[5410] Q. — let me stop you just a moment. I want the Court to be able to see. I'm sorry. That's right. That's right. We'll have to deal with the elementary, first, please,

[5411] Start with the Hudson Elementary School, please. Where is it located?

A. Hudson Elementary is located right here (indicating). It is on the southern side of — south of Hudson Avenue, Hudson Road, and was a part of the Hamilton — originally part of the Hamilton Elementary School attendance area. Hudson Elementary School was put on line as a K-through 3 or 4 organization, basically a primary center, and we simply took the northern portion of Hamilton Elementary School and placed those youngsters K through 4 into the Hudson School.

Hamilton was extremely overcrowded and, as you recall, the year before we had added Gladstone to the eastern end of the Hamilton attendance area also to relieve it.

Q. Now, did this change to the Hamilton area reduce its enrollment?

A. In Hamilton in 1965 we had an enrollment of 1,282 pupils, and in 1966 we had decreased that enrollment to 1,061, so we did decrease it.

Q. Of course, Hudson did not open until the '66 school year; am I right about that?

A. That's correct.

Q. And Hudson opened with an enrollment of what, please?

A. We opened Hudson with an enrollment of 359 students.

Q. And of those 359, were there classes sent initially [5412] to Arlington Park but in that attendance area?

A. Yes. Originally we transported four classrooms to Arlington Park.

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[5440] Q. [By Mr. Porter] Mr. Carter, I would now like to direct your attention, please, to the subject of optional zones, and I would like to inquire as to the purpose or function of an option zone, at least while you were in charge of the section of the division of administration that dealt with such matters. [5441]

A. An option zone is a portion of an attendance area between two school districts that is opened up and made optional for students living within that defined area to attend either school.

When I came on board in 1964 there were a number of option zones that existed for a variety of reasons. During my tenure, I believe I implemented four zones. They were basically, two of them, to attempt to relieve overcrowded conditions in the two contiguous school districts. One was a safety — for a safety factor, and the fourth one was a distance factor. I, during my tenure, eliminated several.

We used an option, also, as an interim movement to change from one school district to — or one school attendance area to another, especially when we would create a new school. We would — always felt the ninth graders, as an example, or the twelfth graders, should finish at the original school with their friends, and then we would perhaps in a — a good example would be a senior high school. The eleventh graders, we would give them the option of continuing at the original school or going to a new school. [5442]

This basically was for the reason that these youngsters would be involved in athletics or band or orchestra some activities at school, and we felt it was wrong to disrupt that activity, so we would usually leave options open to eleventh, and then the tenth graders would be mandatory. The same kind of application would be made for junior high school. Ninth graders finish at their old school. Eighth graders might have the option. They may not, depending if we needed to get them all out, and seventh graders would be mandatory.

Then we would simply eliminate that option a year later and/or two years later, and they all eventually would be in the new school, in the receiving school.

Q. Did you mention, and you may have and I missed it, but did you mention or was an optional zone used to relieve overcrowding and, if it was, would you explain

that, please?

A. Yes. I used an option zone in two situations to relieve overcrowding. You gamble on an option zone to determine if it will relieve overcrowding, because you are relying on the voluntariness of the students living in the area to choose the option.

Both cases where I used this method were in senior high schools. One was between West and Central, and the other was between Eastmoor and Walnut Ridge. Both options were eliminated. [5443]

The Central-West option was eliminated when we built Briggs, and I refashioned the attendance area for Briggs. The Eastmoor-Walnut Ridge option was eliminated when we created the attendance area for Independence.

At Eastmoor-Walnut Ridge it worked fairly well. West-Central was unsuccessful.

Q. You could accomplish the same adjustment in a different way, couldn't you, and that would be by redrawing the lines?

A. That's correct. I could make it mandatory and refashion the lines, the boundary lines, and force the movement from the district into the school I wanted them to attend.

Q. And is this voluntariness that sometimes is the basis you are saying for the use of the optional zone, as well as the other reasons which you have described?

A. Yes, right.

Q. Why — well, let me ask it this way: You have eliminated or there have been eliminated from the Columbus System several optional zones, which I will identify briefly in a moment, since you took over this particular department or division within the administrative section, some of which you started and some of which you did not, and my question is why were they eliminated?

A. As I had indicated a moment ago, the opportunity presented itself for two of these options involving West-Central [5444] and Eastmoor-Walnut Ridge when I

worked with the attendance areas for Briggs and Independence High Schools, and it just happened that those options fell within the main portion of the attendance area for the new schools. Thus, I could eliminate them. They had served their purpose.

In addition to this, I saw an opportunity to eliminate other zones, especially with Central at the same time, and it was basically because the Board and Superintendent felt that overall they didn't have a very good record in other cities, and perhaps if they served no further purpose for us, that we should strike them from our district. [5445]

Q. How does, mechanically, the zone work? Is it listed in the school directory or on the maps, and so forth, or how is it done?

A. Yes, the school directory is prepared with the streets in the optional zone reflecting that option and some house numbers and street — street names will indicate the choice of the district.

We did require, though, that once a youngster chose the optional school, once he opted for that particular school, then he must finish that school, spending the three years or whatever length of time that was necessary for him to complete that level. This avoided Fifth opting back and forth between districts.

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CROSS EXAMINATION BY MR. LUCAS

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[5461] Q. [By Mr. Lucas] Thank you.

Now, let's talk about these options that were in existence before you came to the central office.

I take it you're in the same position pretty much as to those options, in that, of your own knowledge, you don't know whether race played any part, was not part at all, or was the total reason for any of those before you were in charge; is that correct?

A. It's very difficult for me to grasp the reasons.

* * * * *

[5466] Q. I wonder if you could point to the large map, the Alum Creek School?

A. Alum Creek School is located here just to the north of the railroad tracks and west of Alum Creek Drive in the Alum Creek Apartment complex.

Q. All right. And where is this discontinuous area that you talked about in your direct testimony?

A. The discontinuous area is immediately south of it severed by the railroad tracks here and here and they live in this general area.

[5467] Q. What school do they go to now?

A. They now go, as they have since 1963, to Moler Elementary School.

Q. And at what time did they go to Barrett?

A. To Barrett?

Q. Yes. Didn't they go to Barrett at one time?

A. No, not to my knowledge.

Q. Is there another discontinuous area that went to Barrett?

A. Not to my knowledge. Barrett is a junior high school in our system.

Q. Was there another discontinuous area to the east of the Alum Creek that you discussed in your direct testimony?

A. I was talking about Barnett.

Q. I am sorry, I meant Barnett.

A. Yes.

Q. Excuse me.

A. Okay. There is an area here around Petzinger Road, Washington Square Apartments, that is discontinuous, and we have taken it to Barnett.

Q. What route would you follow on a bus to get to Barnett or by car?

A. You would probably go — you have to come out this way to College Avenue, and you come up through and over [5468] Livingston and up.

Q. Would you go up to Colgate, Livingston, to Barrett?

A. You would follow this general direction up, yes.

Q. And how would you go if you were going to Alum Crest from there?

A. From this area you would need to come down the College Avenue extension of Route 33 to Refugee, and you would go I suppose westward on Refugee and up Refugee.

[5469] Q. All right. Would it surprise you to know that you can go from Washington Square Apartments to Barrett in nine minutes, 3.6 miles, and go to Alum Crest, and it is 2.4 miles, and you can do that in seven minutes?

A. No, that doesn't surprise me.

Q. How long did Alum Crest have 12 empty classrooms which you rented out to another group?

A. Alum Crest had spaces that the Council of Retarded Children used for — I suppose since 1970.

Q. You rented that space out to them, didn't you?

A. That's correct.

* * * * *

[5470] Q. Are you familiar with the East Linden School?

A. Briefly.

Q. All right, and it shows transportation from South Mifflin to East Linden I believe on the third page of the exhibit, doesn't it?

A. Yes, it shows it in 1973, that's correct.

Q. And South Mifflin was 83.4 percent black when students were transferred intact to East Linden at 10.7 percent black?

A. That's correct.

Q. And were you aware that they were placed in a basement room at East Linden and that they had to take their [5471] recesses at separate times and had to eat at separate times from the East Linden children?

A. I wasn't aware of that.

Q. And that took place — what year was that transportation?

A. 1973.

Q. The Sullivant transportation, do you see that also on page 3 of the exhibit?

A. Yes.

Q. How far away is Bellows?

A. It is very close in terms of distance. It is very close.

Q. All right, you had apparently from '69 through '73 an overcapacity situation at Sullivant; is that correct?

A. That's correct, yes.

Q. Was that a situation where one school — well, let's see, Sullivant was 61.4 in '69 and in '73, 70.2. Bellows ranged from 4.1 to 9.5 percent black?

A. That's correct.

Q. Is that a situation where you could have paired the schools and desegregated them on a permanent basis rather than having the intact busing and keeping them in segregated units within the Bellows School?

A. I am sure there are other options that one could have considered. The problem with redistricting is that West Mound [5472] Street that separates the two is a very busy intersection and that, of course, as you may or may not know, has now become a portion of the west freeway which separates the two which made it rather difficult for redistricting purposes.

Q. You are already transporting the students, aren't you?

A. That's correct.

Q. That wouldn't have been a problem to pair them and transport the students across whatever barriers that existed while you transported kindergarten kids; is that right?

A. Our transportation was a temporary attempt at relieving the problem.

Q. It went on for five years; is that right?

A. That's correct.

Q. Would it be a fair statement from examining Plaintiffs' Exhibit 356A to say that the system does not hesitate to transport children in the lowest elementary grades on a regular basis?

A. We generally transport primary age level, second and third grade youngsters, yes.

[5473] Q. As a matter of fact, you select that particular option as a matter of preference rather than going to the higher grades whenever you can; is that correct?

A. That's correct.

Q. As a matter of policy, you prefer to transport younger children?

A. That's correct.

Q. And that includes, I think, in a couple of instances even pre-kindergarten children; is that right?

A. There were rare instances where pre-kindergarten children were transported. They were generally located within that attendance area, and that's because of regulations within the Title programs to locate those services within the Title I eligible schools.

Q. So you were involved in 1967 in the intact transportation between Lexington and Leonard and Brentnell, were you not?

A. Yes, that's right.

Q. Lexington was a hundred percent black?

A. That's correct.

Q. Leonard was a hundred percent black?

A. That's correct.

Q. Brentnell was 87.2 percent black, right?

A. That's correct.

Q. You mean you couldn't have found another option in [5474] the system that would not have — that would have avoided taking blacks to black schools?

A. I'm sure that we could have found a space that would have been more accommodating in terms of racial balance. This was —

Q. That was after — I'm sorry.

A. — a temporary period of time while Lexington was being completed, and Leonard Avenue was in a declining situation. We had available space there, and if I recall — the number of classes, by the way, is an error. I'm quite sure we took the entire school out rather than two classrooms as this exhibit shows.

Q. How many classrooms would that be?

A. My recollection would say that it would have to be 10 to 12 classrooms, the majority of which went to Leonard Avenue, and I believe only a classroom or two at Brentnell.

Q. Thank you.

But after the finished construction at Lexington, you took them from the hundred percent black Leonard and put them back in a hundred percent black Lexington, right?

A. That's correct.

Q. Look at the — on the same page, if you will, sir, the Fair transportation. The Fair School between 1967 and 1970 ranked from 91.5 percent black to 95.6 percent black, [5475] and Pilgrim in 1967 was 99.5, and you sent children from Fair to Pilgrim, and you sent them from Fair to Eastwood in 1968, '69 and '70, and the Eastwood was 66 — I'm sorry — 97.6, 98.7 and 97.6 percent black during that period?

A. That's correct. These were the two closest schools to Fair with space.

* * * * *

[5479] Q. You indicated that since 1967 the racial composition of the schools has been a factor that you considered along with other factors; is that correct?

A. The policy of the Board of Education approved the summer of 1967, or roughly thereabouts, indicated that we would consider ethnic distribution where feasible.

Q. You mentioned in your direct testimony that you looked at various neighborhoods and various areas in discussing the neighborhood school concept as you utilized the term; is that correct?

A. I define it essentially as a school community, yes.

Q. All right. You said that it wasn't quite a sociological community in that sense, but you did define it as a school community; is that correct?

A. That's correct. That's correct.

Q. A school community is an interest group, an interest community, is it not?

A. That would be a way of defining it, yes.

Q. Is that a definition that you would accept as one you'd use?

A. I would live with that — I can live with that, yes.

Q. All right. And the interest community is the group, usually the group of people who have children enrolled in that particular school?

A. That's right.

[5480] Q. That's your interest group, that's your pressure group, that's your PTA, whatever it may be?

A. That's correct.

Q. Now, if the School Board determines the interest community by where it draws the attendance boundaries for schools, does not the School Board determine the neighborhood?

A. The school community is defined by the boundaries.

Q. And the boundaries are drawn by the School Board; is that correct?

A. By the Board, accepted by the Board.

* * * * *

[5481] Q. You mentioned that at each boundary change you had sort of a ripple effect, I would call it, or domino, or whatever term you find convenient. Do you recall that in your testimony?

A. Yes.

[5482] Q. And I believe you stated that you had more opportunities to make boundary decisions in 1967 than at any other time before or since; is that —

A. 1966, that's correct.

Q. '66. Effective for the '67 school year or —

A. For the '66-67 school year.

Q. Isn't it true that each time you have opportunities to make boundary changes which have ripple or domino effects, each time you have opportunities to assign students in relieving overcrowding that each of those is an opportunity which can be exercised to reduce racial separation in the schools?

A. It depends upon the composition of the communities that you're working with. If the total community is black or a majority black, then that reduces considerably the opportunity to consider race in the distribution of youngsters in the receiving schools. If it is a well-integrated community, then that opportunity presents itself more clearly.

Q. Isn't it a question of how much effort you want to put into it, whether or not you — you've already got the children on a bus, say, to relieve overcrowding? You can send them north on College Avenue or you can send them south and make a couple of turns, maybe go only the same distance and so some desegregating of the school, can't you?

[5483] A. Our charge was to provide the best possible education program for boys and girls to keep the children as close to home school base as possible, to retain the community of the school as nearly as possible.

Q. Well, that's a community that's already been determined by the School Board when it drew the boundary, though; isn't it?

A. That's the school community.

Q. And it's the School Board that makes the decision to exercise certain limitations or choices on you as an administrator as to whether you can go beyond their original decision as to what the community would be when they drew the boundaries; isn't that correct?

A. They make the policies.

Q. And you have to follow them?

A. Yes, sir.

Q. And if their policy is designed in such a way that the foreseeable effect of them is that you're going to end up with black children going to a black school to relieve overcrowding, that's the decision of the School Board and not something you decide personally; am I correct?

A. The transportation of children to relieve overcrowding was a decision that the Division of Administration made, not the Board.

Q. But you had to make it, and make the decisions within [5484] the ambient of the Board's policy?

A. I never received direction from the Board of Education through policy where to send children.

Q. Then you could have sent them to a school further removed and in another direction and provided for desegregation that way if the administration had decided that was something that ought to be done; is that correct?

A. Our charge in our administrative procedure was to send children to the nearest available school with space.

Q. I'm not trying to get into an argument with you. That policy was dictated by the Board, wasn't it, the nearest school?

A. Not necessarily, no.

Q. Oh, that was the decision of administration?

A. That was a decision of administration.

* * * * *

CROSS-EXAMINATION BY MR. ROSS

[5486] Q. [By Mr. Ross] Did you at any time prior to 1963 record the race of students — this is during the period of time that you were teaching — on a white sheet?

A. As a teacher I can never remember being asked to account for the number of non-white students in my classrooms, no.

* * * * *

CROSS-EXAMINATION BY MR. LUCAS

[5495] Q. [By Mr. Lucas] Are you saying that Title I money will follow the child into the classroom at a receiving school because he shows up on the books and records of the sending school?

A. As long as we keep him on the books and records of the sending school, he is a part of that home school area as far as calculations for eligibility for that school are concerned and for, thus, the services.

Q. By the services, you mean the services would be transported to him or her at the receiving school; is that what you are saying? The money is going to follow the child?

A. Services will be rendered to those children who are eligible for it, that's correct.

Q. They will take it over and they will get served and specially treated inside the receiving school; is that what you are saying?

A. I am saying they are serviced inside that school.

Q. Are you telling me that if a school system desegregates, reassigns its priority area of children so that they are evenly dispersed throughout the system, that it is going to lose its Title I money?

A. I understand that — and I can't speak with authority on the matter — that there is some discussion on this issue, that there perhaps is a ruling in schools of a [5496]

desegregated nature, but it would be something very seriously to look at.

Q. You are aware that there are literally hundreds, if not thousands, of school systems in the south receiving Title one money that are under desegregation plans, aren't you?

A. With dispensation from the HEW.

Q. There are different rules when you desegregate than when you segregate; isn't that right?

A. Yes, I understand.

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JOSEPH DAVIS

called as a witness on behalf of the
Original Plaintiffs, being first duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. ROSS

[4053] Q. [By Mr. Ross] Will you state your name for the Court, please?

A. Joseph L. Davis.

Q. And what is your occupation and position at this time?

A. I am Assistant Superintendent in charge of Special Services for the Columbus Board of Education.

* * * * *

JOSEPH DAVIS

called as a witness on behalf of the
Defendants, having been heretofore duly sworn,
testified as follows:

CROSS EXAMINATION BY MR. LUCAS

* * * * *

[5282] Q. [By Mr. Lucas] Now, I want to show you a Board motion from the minutes of the Board of Education dated December 5, 1972, and this deals with the subject I believe you touched on in your direct testimony, the

recommendation for an advisory committee on school sites. Do you recall that?

A. Did you say 1972?

Q. Yes, sir.

A. Okay. This is entitled, "Proposal for the selection of an advisory committee on school sites."

Q. That's Plaintiffs' Exhibit 44; is that correct?

A. Yes, and it is dated December 5, 1972. Okay.

Q. Read, if you will, the third paragraph, the duties of the advisory committee on school sites as proposed.

A. Okay. May I read the read-in so it will make complete sense?

[5283] Q. Sure.

A. The duties of the advisory committee on school sites shall be the following: There is one, two, and number three says: Solicit assurances from lenders, developers, realtors, realists, builders and employers that equal housing and employment opportunities be made a reality through affirmative action. These assurances and their fulfillment would be a factor in the determination of school sites.

Q. Would you turn to the second page and tell me what the vote was on that?

[5284] The vote was ayes three, noes four.

Q. Would you identify the person who made the motion?

A. The motion was made by Mrs. Castleman, seconded by Dr. Walker.

Q. The ayes were?

A. Mrs. Castleman, Dr. Hamlar, Dr. Walker.

Q. The noes?

A. Mr. Langdon, Mrs. Prentice, Mrs. Redden and President Moyer.

Q. It indicates the motion failed, and the minutes —

A. That's correct.

Q. — and the minutes are shown as approved December 19, 1972?

A. That's correct.

Q. Is that split along racial lines, sir?

A. That is split along racial lines.

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JOHN ELLIS

called as a witness on behalf of the Defendants,
being heretofore duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. PORTER

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[5709] Q. [By Mr. Porter] Dr. Ellis, there has been substantial testimony in this case concerning the Columbus Plan by other witnesses than yourself, and you have also testified concerning it and you have given your opinion concerning whether or not it is working, and you have identified and put into this record figures from the various school records and exhibits in this [5710] case which support that position.

I would ask you, sir, at this time whether or not in your opinion the Columbus Plan can be improved, and do you intend to improve it?

A. Yes, it certainly can, and, yes, I certainly do. We are only in the third year of the plan and it is obvious that a lot more has to be done.

Q. What are some of the things that have to be done?

A. For example, I personally think we need more alternative schools. We need schools such as Montessori School. I think we have to expand schools as a foreign language school to try to teach bilingual education in an arena where pupils can learn French, Spanish, Russian, Chinese, a variety of language and learn to speak them fluently.

I think that would be highly attractive to some people. Certainly not all like that kind.

We need more informal schools, more traditional schools, more IGE schools, so one basic thing that has to happen is many more alternatives must come on stream, and obviously some are coming on stream.

Q. What are some of the other things that you feel should be done and that you would intend to do?

A. We need to give more attention to encouraging the white pupils to transfer to majority black schools. It is obvious from the data we have presented that there is a [5711] strong flow of black pupils to predominantly white schools, and that has been alluded to in previous testimony and criticized in previous testimony.

We have to develop far more ways of encouraging white pupils to move into majority black schools. We are doing some things, not previously stated. There are 33 white pupils who, on a half-time basis, attend Linden-McKinley High School, so it is something that is now happening, but in my judgment not happening sufficiently.

This Fall we are opening the Douglas Developmental Learning Center which is a school constructed to insure that we had an additional capacity to accommodate pupils from outside the area, and we are involved in a vigorous recruitment effort, and I won't say it's a Woody Hayes effort, but Woody only recruits 25 or 30 people a year, and we have recruited far more than that.

We are recruiting white pupils to go to that particular school.

Community meetings, film strips, personal contacts, teachers will be on the telephones, making home visits all Summer. We have got a vigorous effort going there, but I personally think that this is one of the shortcomings admittedly of the Columbus Plan that has to be improved.

I think we need a better support system for the students who attend the schools. They need more support [5712] in adjusting to the new school, more counseling, perhaps some additional instruction.

We have to stress more a welcoming attitude on the part of the receiving school, and for the most part we have tried to do some of this already.

I think also that we need to continue the use of field trips and exchange trips to develop positive images about one another and about the various schools in the city.

In my opinion the bringing together of various schools, and having children see one another in a positive fashion, visiting the different schools, can and should produce an attitude that the schools are all good and that might be a good place to go.

I recognize that testimony was introduced this morning, and I wasn't present, about one incident or something or other that happened, but I have received numerous calls and statements and letters from people, including one from a child that said, "I wish their school that we visited this afternoon was located across the street because those kids are so nice."

We have had a lot of positive effects, and I personally think that this helps break down the racial isolation, the attitudes, the concerns that people might have that we are all alike, we are all human, and that all schools in this city are good. [5713]

I think also we need to have a lot more publicity, and we have had considerable so far, and better recruitment. Maybe we will have to employ Woody as a consultant, but I think we are doing pretty well, but I am not satisfied.

Q. In your opinion will the Columbus Plan insure that every school is perfectly racially balanced within the next five years?

A. Probably not.

Q. Why not?

A. Whenever you give people choices, some variations exist. The Columbus Plan though can insure that the doors of all schools are open to everyone, and that no child is denied the right to an education that is meaningful and appropriate for that particular child.

The Columbus Plan should reduce racial isolation, improve racial balance, and contribute to integration, particularly if we can gain support from all sections of the community.

Q. Dr. Ellis, as a superintendent of an urban school system, how do you see this whole process of integration proceeding in the large cities of this country?

A. That's a rather massive question, but basically I think that we can't lie on schools alone the burden of integrating society. The schools can help. They can help substantially, but they also need help. [5714]

In my judgment, working in an urban setting, appraising the conditions that change, that are present in every large city, with which I am familiar, we need a stronger enforcement of open housing laws.

I think we need a loan guarantee program that encourages home purchases in racially different areas. [5715]

A. (Continued) I don't think there's enough happening in this area at all. I think we need a wider dispersal of public housing so that the Federal Government isn't guilty of contributing to racial isolation. I think the churches in this community and every other community need to practice what they preach and be an example of integration rather than continuing to demonstrate on Sunday morning one of the most segregated hours in America.

I think we need to strengthen the family structure through adequate jobs, housing, recreational and educational activities. For example, we know that if we want quality education, the children have to come to school able to learn, and we now know that pregnant mothers who have an inadequate diet probably give birth to children that will already have an educational handicap. We are beginning to understand that protein and protein development in the brain creates serious disabilities in children. It is apparent that some of these consequences are reversible, thank goodness, if there is a diet that is sufficiently adequate with children.

We need to have homes where children have good motivation. A bottom line on all this is you can't have quality schools without help and cooperation from the home.

I think also we need a stronger commitment to integration on the part of the national and state leaders and legislators rather than having them focus primarily on [5716] pro or anti busing sentiments.

I also think we need develop approaches in America and here in Columbus on such matters as the Columbus Plan or an improved version of it or an expanded version of it, a plan that relies more on quality schools, choices and incentives rather than on a judicial decree which relies too frequently on fixed ratios and that pejorative label, forced busing.

And finally I would think we need to make city schools so strong that we won't have flight to the suburbs for a variety of reasons. City schools should be of such high quality that people will be pounding at the doors to have their children enrolled. This will take money, commitment, and energy, but I am just naive enough and hopefully optimistic enough to think that it can get done.

* * * * *

HOWARD O. MERRIMAN

called as a witness on behalf of the Defendants,
having been heretofore duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. PORTER

* * * * *

[5499] Q. [By Mr. Porter] All right. I would like you to describe for us, please, briefly, what the situation was so far as facilities were concerned when Dr. Ellis became Superintendent of this System in the summer of 1971?

A. At that time, there were 171 operating buildings. 164 of these were elementary and secondary schools

throughout the School District and serving pupils from the geographically defined attendance areas.

The other 7 facilities were — included the special education schools such as Neil Avenue School for the physically handicapped, A. G. Bell for deaf pupils, Fairfax for the emotionally disturbed, Third Street for EMR girls, [5500] plus the adult education centers, adult day school, adult evening school and the adult education center on Starling Street that served the entire district of 7.

Q. Now, we have had considerable testimony during this trial, much of which was elicited by me, concerning the schools' construction program from 1950 down through 1969, but I wonder if, for the purposes of the record, you could tell us the number of buildings that were in existence in 1971 and the years of their original construction by groupings, please?

A. The original sections of the building — because in many cases there were additions, but I'll use the original sections of the building as a way of categorizing age.

Ranging from the oldest building, which was constructed in 1864, that's the Third Street School, to 1889, there were 10 buildings; from the year 1890 to 1919, 33 buildings; from 1920 to 1949, 24 buildings; and then from 1950 to 1971, 104 buildings.

Q. And this is a total of the 171 that you previously described?

A. That is correct.

Q. All right. What was the date, in order to get this into perspective in this part of the record, please, what was the date of the last approval prior to Dr. Ellis's becoming Superintendent, approval by the voters of a bond [5501] issue for the Columbus Public School System?

A. November, 1964.

Q. And the amount of that, please?

A. \$34,650,000.

Q. Had there been efforts made since November of 1964 and prior to the summer of 1971, made to have the voters approve additional bond issues and, if so, would you describe that?

A. In September of 1969, a special election was held. The voters defeated a proposed \$63.8 million bond issue.

Q. What was the vote on that?

A. 29.3 percent for.

Q. And everybody else against?

A. Everyone else against.

Q. And was there a subsequent issue, or rather, a subsequent attempt made prior to August of 1971?

A. Yes, there was.

Q. And what was that, please?

A. In May, 1971, a primary election, an issue was on the ballot for a bond issue, \$75,950,000. That was defeated. The percentage voting for was 34.3 percent.

Q. Now, would you describe just very briefly for us the growth of the City and the School District during the period from 1960 to 1970?

A. The Columbus City population during that time [5502] period, the ten years from 1960 to 1970, increased by 68,361, which was about a 14½ percent increase. The base population in 1960 was 471,316.

Q. What was the pupil population of the Columbus Public Schools System in 1960 and its growth to 1970?

A. The 1960 population was 83,631 in 1960. It increased by 25,698 to a total of 109,329 in 1970. [5503]

Q. Would you tell us, please, what had been the situation or the increase in dwelling units within the City from January of 1968 to December of 1971?

A. There were 30,000 new dwelling units reported by the City Development Office being built during that period of time, 12,000 of which were built in 1971.

Q. Were there any new school buildings started during that period?

A. No, sir.

Q. What was the situation with respect to the increase in the area of the City of Columbus from 1950 to 1972?

A. In 1950 Columbus had an area of 40 square miles which increased to 147.8 square miles in 1972.

Q. And what was the situation with respect to the Columbus School District?

A. Very similar, but not exactly the same, since there are some instances where the school district and the City of Columbus are not coterminous.

Q. What had happened with respect to the number of school buildings in the district between '50 to '71?

A. There were 70 schools in 1950, and in 1971, there were 171 schools.

Q. I believe it is my recollection and I think the record reflects that in 1971 the State Board of Education approved the transfer of 14 land areas to the Columbus Public [5504] School System. Would you tell us briefly what those areas were and the approximate acreage and the approximate number of students that were estimated living in the areas in 1971 and then, finally, what it was when it got all resolved in Court?

A. In 1971 there was an area involving Washington Local and Upper Arlington District that had four parcels in it which totalled approximately 182 acres, and the tax valuation estimate was 2.6 million with no record of students in the area in 1971.

In the Madison Local-Reynoldsburg School District area, there was one parcel, 802 acres, three-tenths of a million tax valuation and one family at that time.

In the southwestern district there were two parcels, approximately 1200 acres, one and a half million tax valuation, no record of students in the area.

Westerville, six parcels, approximately 1,600 acres, estimated tax valuation — approximately 3.6 million, no record of the number of students in the area in 1971.

Grandview Heights, one parcel, approximately 910 acres, estimated tax valuation — 18.3 million and no record of students in the area in 1971.

Mifflin Local School District, approximately 6,000 acres. It was transferred intact, estimated tax valuation, 29.1 million, approximately 3,600 students involved in that [5505] transfer.

Q. What is the approximate pupil population of those areas at this time?

A. The Washington Local area is approximately 205 students. Estimate of the Madison Local-Reynoldsburg area referred to is estimated between two and three-hundred. The southwestern area, 120. The Westerville area, 2,770. Grandview Heights, 2. Mifflin Local, 3,582.

Q. Now, would you describe for us the situation in 1971 —

MR. LUCAS: Would it be possible for us to get some indication what the source of that information is, those estimates?

MR. PORTER: You mean the latter ones?

MR. LUCAS: Yes.

MR. PORTER: Do you want that now or do you want it on cross-examination?

MR. LUCAS: Anytime.

Q. (By Mr. Porter) With respect to the physical — the school facilities in the summer of 1971, what was the situation so far as their ability to handle the matters which they should have been handling, if that makes any sense? Were they overcrowded?

A. Yes, increasingly so.

Q. What was being done about it?

A. There were three major techniques being used. One [5506] was intact transportation at the elementary level, double or extended sessions at the secondary level and really larger class sizes at all levels. That was one way. Then there were other techniques used to a lesser extent,

including placing some classes in multipurpose rooms within buildings, some rental of facilities and, of course, the use of that one portable at Alpine.

Q. And would you describe the situation in the elementary schools, specifically in the elementary schools?

A. Yes. Intact transportation was a continuing method to relieve overcrowding. The information from 1965-66, there were 58 classes, and the peak or the 1970-71 period, there were about 50 classes transported, increasing to a peak in 1973-74 of 77. At the present time that's down to 8 classes.

There were classes housed in the multipurpose rooms of 11 school buildings in the 1970-71 school year and 7 buildings in '71-72 and 9 schools in the '72-73 year. This was an option that could be used in instances to house students within the buildings to which they were assigned.

Q. What was the situation with respect to rented facilities?

A. In the 1970-71 school year, there were overflow of classes from 5 elementary schools in rental facilities; from 3 schools in '72-73; and from 2 schools in '73-74.

Q. What was the situation at the beginning of the [5507] '71-72 school year with respect to the size — with respect to class size, and what had it been during the preceding six years? I am sorry, that isn't what I mean.

What was it — what was the situation with respect to class size in '71-72, and what had it been a year or two prior to that, and what had happened to it subsequently? [5508]

A. Well, in 1971-72, more than half, 50.6 percent, of all the elementary classes in the system exceeded 31 pupils. Prior to that time, the percentage in 1970, for example, was 39 percent that exceeded class size of 31.

In 19— in the years following 1971, the percentage above 31, 1972 went to 31.2 percent; 1973 to 21.7 percent; 1974 to 22.6 percent; and 1975 to 17.5 percent.

Q. Directing your attention now, please, to the secondary schools, what was the situation with respect to the secondary schools insofar as double or extended sessions were concerned?

A. 21 out of the 39 secondary schools in operation were on double or extended day sessions to handle the overflow enrollment. The major peak in terms of overcrowding was in 1972-73 when 9 schools were on double sessions and 17 others were on extended day schedules.

Q. Give us, please, the number of secondary pupils affected by double and extended day schedules?

A. In 1970 there were — of those 21 schools affected by double or extended day sessions, 24,650 pupils were affected. That represented 55.5 percent of all pupils.

Q. Would you continue?

A. In 1971, 29,232 were affected, and that was 62.6 percent.

In 1972, 31,925 pupils were affected, 68.7 percent.

In 1973, 30,586 pupils, 66.8 percent. [5509]

In 1974, 25,936 pupils or 59.6 percent; and

In 1975, 25,892 pupils, 60.6 percent.

Q. What was the situation at the secondary level with respect to class size for the school year 1971-72, and what is it for the school year starting in 1975?

A. In 1971-72, 14.4 percent of all secondary classes exceeded 33 pupils.

In the '75-76 year that had been reduced to 11.9 percent.

Q. All right. Now, you have given us briefly some of the problems, physical capacity problems, that faced the System in the summer of 1971. I would ask you now to describe what the System did with respect to this problem, and I have specifically in mind, Dr. Merriman, the convening of Project Unite and what its origin and intent was and its structure, please.

A. Project Unite was proposed to the Board at a Committee of the whole meeting in November of 1971 by Dr.

Ellis approximately four months after he was appointed as Superintendent of Schools. At the Committee of the whole it was favorably received, and on December 7, 1971, the Board unanimously adopted a resolution authorizing its implementation. [5510]

The project was intended as a community-wide effort to identify and solve many pressing school problems. The structure was — consisted of 7 search and solve teams, search and solve being to search for the problems and solutions to those problems and propose recommendations.

The teams were composed of interested citizens and assisted by school personnel. A citizen chairperson was appointed for each of the 7 search and solve teams. Those teams were educational programs, building needs, staff resources, finance, long-range organization, urban problems and communications.

Besides the 7 teams was a community coordinator, coordinating the relationship of each of the study teams.

Q. Now, was that later Mr. Hellerman?

A. That is correct.

Q. And I think you identified him as an executive from Nationwide on loan for this Project Unite?

A. That is correct.

Q. And without identifying the individuals, there were, then, seven people from the community who chaired these seven search and solve teams; am I correct about that?

A. Yes. These were lay people who were asked to head up the committees or teams in each one of these areas.

The recruiting effort for personnel to staff the teams was on an entirely voluntary basis. We accepted — [5511] phone calls, letters, radio stations, TV stations and news media and print media were very helpful in helping us recruit persons, and anyone that volunteered to help was part of the action. We didn't turn down anyone.

Q. What then happened subsequent to the Board approving the project, happened between, let's call it, Phase 1 from January through March of 1972?

A. In this first phase, there were over 2,000 citizen participants, volunteers, representing community, business sectors, PTAs, professional staff and other educationally-related organizations as well as students exploring these seven areas of concern, listening to new ideas, discussing them and deciding what should be considered, and by the time the work of the citizen volunteers had been completed in mid-March, all of the different groups and so forth had held about 298 meetings, and at that time we had made an estimate that approximately — well, slightly more than 31,000 manhours had been devoted to the project by the volunteers.

Q. The teams produced or their reports produced, if I remember correctly, recommendations with respect to each area, did it not?

A. Yes, each of the areas produced recommendations related to their particular area.

Q. And what was the total or the aggregate in recommendations?

A. Slightly more than 600. [5512]

Q. What happened, then, after the recommendations were submitted by the search and solve team?

A. These were printed intact in a tabloid newspaper type publication and delivered by PTA and Model City representatives to Columbus households. Over 200,000 were printed and delivered. Funds for doing that were made available by Battelle, Borden Foundation and the Columbus Foundation to print this 12-page summary of recommendations.

Q. What happened then?

A. Then, during the period April 26 to May 11th, there were nine public forums where the representatives of each of the search and solve teams formed a panel,

presented their major findings and listened to questions and concerns by the citizens attending the meeting. There were approximately 750 citizens that attended, and besides this, there had been a community reply card, a giant post-card included in the tabloid which people could react to the report to indicate their particular interest or concerns or reactions to the report and send it back in, as well as taking telephone calls and written letters on the subjects from anyone that was interested. This was all feedback from — we presented the recommendations to the community: Now, what's the feedback from the community?

Q. And what happened then?

A. On May 30th of 1972, the steering committee of [5513] Project Unite presented its official report to the Board of Education.

Q. Now, for the purposes of here I am not going to review the numbers of recommendations and of what they consisted. I think they probably are in exhibits, and they're quite voluminous. I would, however, ask you to describe what happened subsequent to the submission by the steering committee of the final distillation of these recommendations and submission to the Board? What took place?

A. Well, one of the things rather significant is the Board responded to recommendations made by the committees. One of the committees in particular was the Building Needs search and solve team, and in — the Board did respond to the recommendation by the search and solve team to place a bond issue on the ballot in November of 1972 to meet the building needs that had been identified.

Q. Was there a planning process paper reviewed with the Board which described each building recommendation with respect to each building and each facility as to what would take place with the funds from the bond issue?

A. Yes, that document would be what has been encapsulated in Promises Made.

Q. And I believe that that is an exhibit in this case, and I will get the number for it in due course. [5514]

Of what did the Promises Made document consist, please?

A. It contained the June 27, 1972, building proposal that had been presented by the Board of — presented to the Board of Education and acted upon, a planning process paper reviewed with the Board at the Committee of the whole meeting in September, 1972, the priorities — statement on priorities for implementing the building program, a summary of features of the building program which relate to the process of racial integration and a summary of vocational career center implementation plan.

Q. This program was subsequently made known to the community and to the news media; am I correct about that?

A. The document?

Q. Yes.

A. Yes, it was. It was widely distributed. [5515]

And there was, in November of 1972, a bond issue that was voted upon by the public?

A. On the November 7th election, the voters approved the \$89.5 million bond issue, and the percent supporting the issue were 55.7 percent.

Q. Let me hand you, Dr. Merriman, a copy of Plaintiffs' Exhibit 49, entitled "The Bond Issue-1972 Promises Made, Columbus Public School System," and I'd ask you if that is the document to which you have just made reference?

A. It is.

Q. I'll give you back, Dr. Merriman, this exhibit, and direct your attention to the first page inside the cover page, and I would ask you to read that letter which appears there.

A. This is on Columbus Public Schools Administrative Offices' letterhead stationery.

It is vital that the Columbus Board of Education and school administration keep the promises they have made while promoting the school bond issue. Public faith in

all public institutions appears to be low. One way to help rebuild good faith is to follow the principle that a promise made should be kept.

One source of confusion to the public is that comments by various officials may vary. Furthermore, a fact [5516] passed from person to person can become distorted.

It is important to have a single source document that clearly establishes what has been promised. This minimizes the chance that something promised will be omitted or that people will claim that a promise wasn't fulfilled when it was never made.

The following document describes a complete building program and planning practices authorized by the Board of Education and the Superintendent of Schools. This document covers all promises made. Any item not appearing in this document was not promised by anyone authorized to do so. The document consists of:

1. The June 27, 1972 building proposal presented to the Board of Education;

2. The planning process paper reviewed with the Board at the committee of the whole meeting on September 26, 1972;

3. The priorities for implementation of the building program;

4. A summary of features of the building program which relate to the process of racial integration;

5. A summary of the vocational career center's implementation plan.

It is possible and, in fact, probable that slight modifications will occur. No planning is so perfect that it [5517] will meet all possible circumstances, but the basic intention is to fulfill every promise that is possible within the law and financial resources available to the Board.

Sincerely yours, John Ellis, Superintendent of Schools.

Q. There are five major needs identified as critical needs within this document, and I believe that they appear on page 3. Would you please read that material?

A. Page 3 —

Q. Starting on page 3 of Exhibit 49, No. 1.

A. No. 1. Classroom space to solve overcrowding.

Due to overcrowding, nine secondary schools must operate on split sessions during the 1972-73 school year, and 17 others on extended schedules. It will be necessary to transport 62 classes of elementary children from the schools they would normally attend to those with available space. Columbus is continuing a period of unprecedented growth with 30,000 housing units constructed from 1968 to 1972, while the School System's facilities have remained virtually unchanged during the same period. [5518]

Item 2. Housing for necessary career-vocational program. The present lack of facilities is severely hampering efforts to offer students important career-vocational programs to equip them for successful employment. Employment trends and student surveys make clear the needs and desire for such programs, but the schools can make little progress without new construction.

3. Installation of modern school libraries. New State standards now in effect call for a modern library in each elementary school equal in size to the space of two classrooms. Only 38 of the School System's 129 elementary schools have libraries at the present time, and even these fall far short of meeting the new State standards. At least 250 additional classroom spaces are needed to install modern libraries in the remaining elementaries and to bring the present facilities in line with the standards.

It is also necessary to upgrade libraries in secondary schools so that they will meet State standards and serve as valuable components in the learning process. A modern library that contains adequate facilities for independent study and can be equipped with newly-developed audio-visual learning materials is a must for every school. Libraries can play a key role in strengthening the reading program at all levels, filling a serious gap in the present [5519] educational program.

4. More and better facilities for handicapped pupils. Because of the shortage of space, nearly 500 children identified as educably mentally retarded cannot be placed next year in State approved special education classes, which require a smaller class size. Facilities are also badly needed for neurologically handicapped, physically handicapped, blind, deaf and emotionally disturbed.

5. Replacement of aged facilities. Several schools in Columbus remain in use far beyond their planned life span of 50 years. Twenty-four buildings were originally constructed prior to 1900 and have been in use from 73 to 103 years. Wherever feasible, these older buildings must be modernized or replaced if we are to offer an up-to-date program under safe conditions to all pupils. [5520]

Q. Now, Dr. Merriman, the Exhibit 49 then continues and sets forth six major provisions of the building program, and would you please identify those, and I think they also appear on Page 4?

A. Six major provisions:

1. Construction of six new secondary and ten new elementary schools, a new school for the physically handicapped and four career-vocational centers.

2. Total replacement of one secondary and two elementary schools that are aged and inefficient.

3. Partial replacement of the sections of one secondary and four elementary schools that are aged and inefficient.

4. Additions to 21 secondary and 37 elementary schools, as well as the school for the deaf.

5. Expansion and improvement of the existing sites of 11 secondary and 22 elementary schools.

6. Site acquisitions limited to those needed for new construction and rapidly developing areas, including five secondary and four elementary school sites, and locations for three career-vocational centers. Early involvement of community people, realtors, planners and developers is necessary in locating these sites.

Q. How did the program propose to satisfy the needs, please, and I believe this material appears also on page 4, [5521] starting at the bottom?

A. Yes. No. 1 would be a response to overcrowding. This building program would allow for the elimination of split sessions by coupling new construction with increased efficiency, using the buildings for longer than the regular school day. It would also make unnecessary the transportation of pupils due to overcrowding, and would permit a substantial reduction in the hundreds of classes whose size alone impairs the learning process and limits the individual attention that can be given students.

2. Career-vocational education. The program would enable the school system to extend to some 8,000 students increased opportunities for career-vocational education, offering a wide range of programs to prepare them for jobs in a variety of fields. Where employments justify, career-vocational programs that do not require facilities for extensive specialized equipment will be offered at the local high school, while programs requiring large areas for highly specialized equipment will be made available to several high schools at the four career-vocational centers. This combination will provide the most economical and efficient approach to improved career-vocational opportunities for students.

3. Libraries. The building program will provide for modern library facilities in every elementary school in [5521A] the school district, and upgrade libraries in all secondary schools so that they will meet State standards and serve as valuable components in the learning process. [5522]

Libraries will contain adequate facilities for independent study, can be equipped with newly developed audio-visual learning materials.

4. Handicapped pupils: Included in the building program are provisions for increased space and improved facilities for special education classes. A new school for

the physically handicapped will be constructed to replace the crowded and inadequate facilities at Neil Avenue. The program calls for converting Clearbrook Elementary into a school for the emotionally handicapped, providing a newer, more flexible and better located facility for the children who are now housed in the congested and aging Fairfax School.

5. Aged buildings: The program would make possible replacing some schools which have been used far longer than intended or should be expected. The total and partial replacements provided for in the building program would insure that students are housed in safe facilities that enhance rather than inhibit the atmosphere for learning.

Q. All right. Now, would you identify for us some of the specific — what some of the specific needs include or are to be found as being corrected by the program?

A. This would be the general needs which would generalize across the System, basically, space for [5523] overcrowding; space for program expansion at the junior and senior high level; space for vocational career education in the high schools and career centers; space for special education programs in the elementary schools; space for hot lunch programs in the elementary schools; space for multipurpose rooms in elementary schools which had an undersized multipurpose-type facility; space for special programs such as the Title I and State DP-PPF programs; and spaces for small group instructions such as reading and tutoring.

Q. And how were these spaces to be met, please?

A. They could be met by new construction in the case of a new facility, by adding to an existing school the space that was needed or converting within existing space where it is available for those spaces needed or, in another instance, converting existing classroom space such as to a library learning center and building a new replacement space to replace that which had been converted.

Q. Did the program contemplate the modernization of facilities?

A. Yes.

Q. If so, would you describe that, please?

A. Modernization was a major factor in the building program, even though new spaces weren't being added at many locations. That would include such changes as improvements [5524] in heating and ventilating systems, window replacements, plumbing system improvements, electrical system improvements and improvements in fixed and loose furniture and equipment.

Some of these were related to energy-saving moves. Some were related to replacing worn out or outmoded systems and equipment like the ventilating system in a facility. Some were related to upgrading a facility to meet building code requirements, the health and safety requirements that were necessary.

Q. Was there an effort — was there to be an effort made to coordinate these various modernization and construction projects, and would you describe that, please? [5525]

A. Yes. Efforts were made to coordinate and relate modernization and construction of new space where it occurred or conversion of space. Each project, whether it was a new building or an existing building, had a planning committee, and the planning committee consisted of a convenor chairman who was the school administrator of an existing building or, in the instance of a new building, an administrator appointed by the superintendent.

It also included members of the faculty, parents, classified staff, community and business leaders and, in the case of secondary schools, students.

The purpose of the planning committee was — or their mission was to develop educational specifications for the project.

Q. Would you give us, please, what the charge was to the planning committees?

A. Yes. There was a memo which was addressed to the members of the advisory committee on educational program and facilities for the planning project, whichever project this was. This was directly from the superintendent's office, and it spoke to the responsibilities of the advisory committee, and it read as follows:

As a member of an advisory committee on educational program and facilities, you have an unusual opportunity to influence the quality of education in your community for many [5526] years to come.

The purpose of this memo is to provide specific information on what is expected of your committee and to establish a common set of expectations for all such committees. Within this framework, your committee will have an ample opportunity to employ originality in identifying and describing the unique requirements of your construction project.

Authority to create your committee was granted by the Columbus Board of Education when the Board adopted a comprehensive document about the proposed construction program that included the following policy statement:

Planning the new facilities is critical. When new buildings are constructed, we will involve the faculty, citizens and administrators with the architect to consider what education should be. We cannot now say that the proposed rooms will be square or round. The sizes, shapes and relationships will be forged in the difficult intellectual planning process.

The architects will be requested to develop a building design to accomplish the educational specifications of the planning committee. With such an approach, the curriculum will be improved and the facilities will be educationally and structurally and economically sound.

The memo goes on: [5527]

In accordance with this Board of Education policy, the school administration has established the following expectations for your advisory committee:

Your committee will prepare the educational specifications for the educational program it would like to see accommodated within the facilities. Educational specifications are a word picture of the programs that will be offered, the activities that will occur, the number and kinds of people who will use the building and how the students and staff will be organized. Sometimes educational specifications are called user requirements; what you need in order to offer the desired program. [5528]

The Planning Committee does not have to draw anything. In fact, architects prefer that you not draw. Simply describe what you intend to do and how you intend to do it. The architects will then draw the space they believe will meet your program. You inspect the drawings, walk around mentally within the proposed facilities, try out mentally the various things you intend to do in the building, and propose modifications to the architects.

The second step is the educational program your committee describes in writing should be stated in the most specific terms possible, should meet the requirements of State law on file with the convenor chairman, should meet standards of the State Board of Education also on file with the convenor chairman, should meet commitments of the Columbus Board of Education and the school administration delineated in the Promises Made Document on file with the convenor chairman and should include a statement of priorities specifying items that could be deleted from your proposal for items that could be added to it if funds are available.

When completed by your committee, the educational specifications should be submitted to the office of the Superintendent on or before the deadline specified in Item 2 of Attachment A.

When the educational specifications have been approved by the office of the Superintendent, the project [5529] architect will be authorized to complete preliminary plans.

Your committee will be expected to maintain communications with the project architect throughout the planning process, to make itself available to the architect while preliminary drawings are being prepared for the purpose of interpreting the educational specifications, and to work with the architect in modifying your proposal to stay within the budget specified in Item 3 of Attachment A.

Your committee will assess the completed preliminary drawings, prepare a statement expressing your assessment of these drawings, and submit this statement to the Executive Director of Development. These services will complete the assignments of your committee.

Members of your committee will be expected to maintain two-way communications with their respective constituencies, teachers, classified employees, parents and secondary students, throughout the planning process. This is interpreted to mean that committee members will make progress reports on the committee's activities at regular intervals and will actively seek the advice and counsel of their respective constituencies.

Throughout the planning process committee members will be expected to be aware of the following criteria which [5530] project architects will be required to observe in developing the building design: Flexibility, adaptability, expansibility, simplicity and compactness.

You have an exciting challenging task. Please think imaginatively and draw upon the consultant services available to you.

Q. Now, was there a committee appointed with respect to each one of these projects?

A. Yes.

Q. And was the committee and its membership furnished with the memorandum that you have just read?

A. Yes.

Q. Would you describe, please, what happened with respect to these committees and how they operate? [5531]

A. Okay. Each committee was provided with a project description which included the information and basic direction for the project. Basic direction for the project was a means of describing how the commitments in Promises Made could be met and the known needs related to that facility which have been collected from various sources since the last construction program at that school.

An architect was appointed by the Board of Education to work specifically with each planning committee. The architect was expected to meet with the planning committee; and as the planning committee discussed and wrote about their project, the architect was expected to express their written and spoken statements in concrete graphic form.

The result of this process was a set of preliminary drawings which were then to be approved by the planning committee as meeting their priorities and reflecting their program intent as nearly as possible within the existing constraints. A letter was required testifying to that effect from each planning committee.

These preliminary drawings were then reviewed by the Board of Education and presented to the Board for their approval prior to the architect proceeding into the working drawing stages of the project. After the architect proceeded through working drawings, if significant changes were required due to budget problems, program needs or previously [5532] unidentified construction problems, these changes were carefully identified to the Board of Education and related to the chairman of the planning committee.

Every effort was being made to keep all parties informed to the extent possible. Whenever official board action was taken related to any of the projects, copies of the Board resolution were automatically sent to the chairman of the committee with the intent that this could then be reported back to the planning committee. Monthly

written reports were prepared to reflect the status of each project in the building program. These reports were distributed to Board members and any interested parties.

The cover letter, of course, in Promises Made indicated the possibility that some changes might be necessary in the program in that not all planning is perfect. In some instances, changes were relatively minor, were made within the budget, and did not conflict with the commitments in Promises Made. Such changes were usually made at the request of the planning committee. Changes of a major nature were done only involving committees, community, the administration and the Board of Education.

Q. What are examples of some of the major changes, please, that occurred?

A. An example of one major change occurred in the area which had been the Mifflin Local School District. Originally [5533] the project called for the remodeling and addition to the existing Mifflin Junior-Senior High School that became part of our district upon annexation of the Mifflin District and additionally called for the construction of a new junior-senior high school to be located in the area of Mock Road and Sunbury Road.

A number of questions were raised by committee members and community members that led to a re-examination of these proposals, developing several alternatives to these proposals, testing the alternative with the planning committee and with the community in making a recommendation to the Board of Education that the existing Mifflin Junior-Senior High School be converted to a junior high through adding to it and remodeling and that a new high school be constructed.

Q. This would be a — this was to be a new senior high school that would serve presumably the area, the same area that the Mifflin Junior High School would then serve, or approximately?

A. That is correct. Rather than have two junior-senior high schools in that geographic area, as the original pro-

posal would require, this would mean one senior high school serving the entire geographic area and one junior high school serving the entire area.

Q. Was there also as an example of major changes a [5534] change in the problems dealing — some problems with the Marion-Franklin High School?

A. Yes, there was.

Q. What was that?

A. In this instance, it was found that the amount of work that was necessary to provide the program space required and to do the modernization work necessary was much more extensive than the original project, scope and budget. This involved community and faculty and planning committee and, of course, administration and, finally, the Board of Education.

Q. Now, directing your attention, Dr. Merriman, to the area of new schools, would you describe briefly for us several categories of new schools, the first of which are the career centers?

A. Vocational career centers are specialized school facilities designed to offer students important vocational career programs to equip them for successful employment. These centers would provide career education using appropriate space and the more costly equipment installations for which enrollments would be too low if they were located at each high school building.

In-school youths would remain enrolled at their resident high school, their normal high school, and would be transported to the vocational career center on a half-day basis. Of course, an ancillary use of these centers would be [5535] in late afternoon and evening to use them for adult programs.

There are four centers that are contained in Promises Made and are on their way to completion. There are some basic programs that are offered in some relative form at all four centers and unique programs available at each of

the centers. Each one has a flavor or unique characteristic. Then students attend the centers on the basis of the programs they select and the proximity to the centers where the appropriate programs are available and the racial composition of the enrollees in order that we maintain racial balance at the career centers. [5536]

The State plan that was developed to meet State requirements for vocational career education establishes the basic rationale for how many spaces need be offered. That is by 1978, the five-year plan called for providing space for 40 percent of the junior and senior high classes of the Columbus Vocational District, including our System, Westerville, Worthington, Arlington and Grandview, or the equivalent of 8,000 spaces — spaces for 8,000 students enrolled in vocational education.

Q. Now, directing your attention to the new secondary schools that were and are contemplated or were contemplated in the Promises Made, Doctor, would you describe them, please?

A. Yes. Promises Made called for the construction of three new junior-senior high schools, and that three included the Mock-Sunbury School that I just discussed previously in relation to Mifflin, two high schools and a junior high school in the construction of the new Franklin Junior High School to replace the existing Franklin and an addition to Fulton School to become a junior high developmental learning center.

One junior-senior high school, Independence, is completed and opened in January, 1976. Beechcroft Junior-Senior High School will be ready for opening September, 1976. Briggs High School is completed and opened on April 26, 1976. [5537] Centennial High School will be completed and open September, 1976. McCutcheon area High School which replaced the proposed Mock-Sunbury Junior-Senior High School, as explained previously, will be completed and open in September of 1977.

THE COURT: Mr. Porter, perhaps we better stop for the day.

Thereupon, the further trial of this cause was adjourned until 9:00 o'clock, A.M., June 10, 1976.

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THURSDAY MORNING SESSION,
June 10, 1976.

[5539] THE COURT: Good morning.

MR. O'NEILL: Good morning, Your Honor.

MR. PORTER: If the Court please, I can't help but comment that the presence of Mr. Lyter here I consider to be a rare and distinct pleasure.

THE COURT: Day of enlightenment; pure justice today.

MR. PORTER: We will see if we can't do something wrong with the exhibits.

HOWARD O. MERRIMAN

called as a witness on behalf of the Defendants, having been heretofore duly sworn, testified further as follows:

DIRECT EXAMINATION (CONTINUED)

BY MR. PORTER:

Q. Now, Dr. Merriman, when we stopped yesterday, you had described for me a number of new secondary schools that were being constructed, and I believe that we had gotten down to the new Franklin Junior High School, and would you continue your description, please? [5540]

A. Yes. The new Franklin Junior High School, which is replacing the older building and will be the Franklin Junior High Developmental Learning Center, will be completed and opened in September of 1977. Promises Made called for the Fulton Developmental Learning Center to be redeveloped on the site of the present enclosed Fulton Elementary School. That is in a holding status due to the increasing enrollment at the junior high level and the resulting need to reassess the need for construction of that project.

The junior high school proposed for the Westerville transfer area, which was pending completion of litigation over that transfer, is now under review to determine if capacity exists within the area to house junior high students. This required a census of the community and a review of potential development to occur in the area.

Q. Would you describe for us, please, the new elementary schools that were included within the proposal, the Promises Made proposal?

A. Yes. There were ten new elementary schools listed in Promises Made, one to be constructed near Dresden Avenue and Arlington Avenue, that was to be a developmental learning center, a second near Beechcroft Road and State Route 161, a third near Schrock Road and Skywae Drive, a fourth near Morse Road and Cleveland Avenue, a fifth near Bethel Road and Godown Road, a sixth near Cleveland Avenue and Innis [5540A] Road, a seventh near McCutcheon Road and Stelzer Road, an eighth near Brice Road and I-70, a ninth near Brownfield Road and Refugee Road and tenth near Noe-Bixby Road and Refugee Road. [5541]

Q. Would you give us, please, the status with respect to the various elementary schools which you have just described?

A. Yes, I will.

Q. And identify them, if you would, by name.

A. All right. By number, again, and I will give the name of those that have been named, and the numbers would coincide with the ones previously given as listed in Promises Made.

The first one is called Linden Park ICE School. That was completed and occupied in September of 1975.

Item No. 2 near Beechcroft Road and State Route 161 is in the Westerville transfer area, and that was part of the area completed — to be completed for transfer in July of 1976. The building has not been begun.

No. 3 near Schrock Road and Skywae Drive is also in the Westerville area and similar status to Item No. 2.

No. 4 near Morse Road and Cleveland Avenue, same status as Item No. 2, Westerville transfer area.

No. 5 has been named Gables Elementary. That's to be completed and occupied in September of 1976.

No. 6, Innis Elementary is completed and was occupied in September of 1975.

No. 7 near McCutcheon Road and Stelzer Road is in a hold for development and the need for capacity in that area. [5542]

No. 8 near Brice Road and I-70 is in hold pending development and capacity needs in the area.

No. 9, Brownfield Road and Refugee Road, is in hold pending development and capacity needs in the area.

No. 10, Liberty Elementary, has been completed and was occupied on April 26, 1976.

Q. All right. Now, in Promises Made it also provided or identified the construction of one or more elementary schools to replace facilities. Would you describe that, please?

A. Yes. Promises Made also included the construction of a new elementary school on an expanded Fifth Avenue site to replace the old Fifth Avenue, Ninth Avenue and Michigan Elementary Schools, which are in that same area, with a new facility. That project is under construction. It is to be completed and occupied in September of 1976.

A new elementary school designated as a developmental learning center to replace the existing Douglas Elementary School was proposed. That facility is under construction. It is called the Douglas Learning Center, and it is to be completed and occupied by September of 1976.

Q. There are also, if I recall correctly, a new school, some new special schools or new facilities for some of the special crippled children and so forth. Would you describe that? [5543]

A. A new school for crippled children to replace the inadequate Neil Avenue facility was constructed on the site of and connected to the Colerain Elementary School. That facility was completed and occupied in December of 1975.

The school for the emotionally disturbed formerly housed at Fairfax School was constructed as an addition to the former Clearbrook Elementary School, and that was completed and occupied by April 15, 1976. [5544]

Q. Would you identify for us, please, what I think you have now described as 24 new schools — strike that. Just a moment.

Would you identify for us, please, the seven completed schools and the 12 that are presently under construction with their planned opening dates?

A. The completed schools are the Southeast Career Center, which opened in September of 1975;

Linden Park ICE Elementary School, which opened September of 1975;

Innis Elementary School, which opened in September of 1975;

Colerain School for the physically handicapped, which opened in December of 1975;

Independence Junior-Senior High School, which opened in January of 1976;

Briggs Senior High School opened in April of 1976 and Liberty Elementary, which opened April of 1976.

Q. Now, I may have misspoke. Did I say — I meant to say that the ten schools that are under construction. I'm not sure that that is what I said, but that's what I meant.

Would you identify the ten that are under construction and their planned opening date?

A. Yes. Those are Beechcroft Junior-Senior High, the planned opening is September of 1976; [5545]

Centennial Senior High, planned opening September of 1976;

The Fort Hayes Career Center, planned opening is September, 1976;

Gables Elementary School, planned opening September, 1976;

The new Fifth Avenue Elementary, planning opening September of 1976;

The new Douglas School, planned opening September, 1976;

McCutcheon Senior High School, the planned opening September, 1977;

Franklin Junior High School Developmental Learning Center, planned opening September, 1977;

The Northeast Career Center, the planned opening September, 1977 and the Northwest Career Center, planned opening September of 1978.

Q. Thank you.

Would you describe for us, please, the additions to the existing buildings?

A. Yes. Additions to existing buildings were in each instance related to the general needs discussed previously as we reviewed the Promises Made and what it responded to. Examples given would include an addition to relieve overcrowding, an addition to replace an old, smaller multipurpose [5546] room with a new standard-sized multipurpose room space, in addition, to provide for a library learning center or a teacher work preparation center or a space for a hot lunch facility and space for storage.

Now, in some instances, planning committees found it necessary to convert existing classroom space to meet program needs and construct additional space to replace the classrooms which were converted if they were attempting to find a new way to house students. In such cases, there would be no increase in capacity to house programs. It would be a trade-off of library space for classroom space.

Additions at the secondary level were for the relief of overcrowding, expanding program offerings such as in the vocational area or a second art room or a second home economics room or for library expansion to meet new State standards. Specific information for each school project is identified in the Promises Made, and the actual space added was described in the background statements for each project as it was approved by the Board of Education in the working drawing's stage.

Q. Has it been possible in some instances to convert space in existing buildings to meet the needs that were found and identified in the Promises Made document?

A. Yes, it has.

Q. In how many instances has that taken place, please, [5547] with respect to the library learning center at the elementary schools?

A. For example, to this point in time, at 62 elementary schools it's been possible to convert classrooms into library learning centers.

Q. Now, there have been other improvements made, I believe, based on school-by-school needs to — this is with respect to existing facilities. Would you describe what they are, please, generally?

A. Yes. This would be improvements to the heating and ventilating plans, plumbing systems, the electrical systems, fixed equipment installations, replacement of windows, site expansion and site improvement. [5548]

Q. The planning committees that you described and about which you explained through the reading of that

long memo at my request were involved in the establishment of priorities with respect to the needs of these buildings in this area of improvements?

A. Yes. Generally there had been needs identified by staff at the school and at the central office in the operating and maintenance department that would relate to electrical systems or heating plants and plumbing needs and that kind of improvement. Input from the planning committee, including the classified personnel and so forth, made it doubly certain that we didn't overlook the kind of hidden problems that might exist at a school, and they were able to then express their priorities in those needs so that we wouldn't overlook such a problem.

For the most part, many of these improvements were related to health, safety and comfort of building occupants and to the proper operation of the facilities.

Q. It might be appropriate at this point to remind the record, I guess, that subsequent to your acting as liason to Project Unite and the passage of the bond issue, what was your job then as of — my recollection is January of 1973; am I right about that?

A. January of '73 I was given the responsibility for the development office which was to implement the building [5549] program in Promises Made.

Q. And you occupied that position until when?

A. Until January of 1976.

Q. And that's when you became Assistant Superintendent of Instruction?

A. Yes.

Q. Now, also in Promises Made there appears the material dealing — recommendations dealing with site expansion. Would you describe that, please?

A. Well, site expansion improvement in some cases were required due to using existing space or expanding the building or adding to the building, in other words, if you built a new multipurpose room that used up some area on

the existing land and that area needed to be replaced to maintain a balance of outside area. In other cases an effort was being made to continue the Columbus Board of Education's program of upgrading school sites at existing buildings.

Q. The rationale for the — would you describe, please, the rationale for the construction of some of the educational programs that were to go into these buildings?

A. Well, a substantial part of the educational building projects has been to house program; for example, the facilities for Vocational Career Education both in the high schools and, of course, in the new Career Centers. [5550] The library learning centers in elementary schools were substantial additions to the educational program facilities that did not exist before. The teacher work preparation areas, areas where teachers offer the resources to prepare materials and to do planning work. Space for small group construction; this would include reading instruction and other small group-type activities that would not take place in a regular classroom setting. Space for special education programs required by increases in special education units. Spaces for tutoring of children, either by the tutoring program or volunteer tutoring that's been organized in many of the schools. Spaces for special programs such as the Title I and State DP programs that had not been housed in adequately arranged spaces previously or were additional programs that had been added at the building.

A substantial part of the program is support-service oriented, such as this provision for the teacher work preparation areas, for the hot lunch kitchens that were going into each of the elementary schools and the storage spaces for office support areas. Then the other portion of the construction program was to relieve overcrowding in existing buildings occurring in the growth areas of the city or the growth that results from the development of housing that would result from previous, present and future possible annexations to the Columbus School District.

* * * * *

[5568] Q. [By Mr. Porter] Now, I wish to — another cleanup question, if I might, please, before I turn to the Division of Instruction, and that is that while you were involved with Project Unite and the Building Program, was there a set of site selection criteria which were used by your office or by the School System in its process of helping to select a school site?

A. Yes, there was.

Q. Do you have that in front of you, or, here, I'll give you mine.

A. Yes, I have it. [5569]

Q. All right. Would you give us the criteria, please?

A. The following factors are given consideration when selecting school sites:

1. Location of existing buildings in the Columbus City School District and adjoining school districts.
2. Land use pattern, including the actual and proposed development of the community.
3. Availability of satisfactory land, including size, shape, contour and related characteristics.
4. Availability of basic services such as gas, water, street, storm sewer and sanitary sewer.
5. Traffic patterns, natural boundaries and related factors and the future development of appropriate attendance areas.
6. Desirable size of schools, including the type of outdoor facilities desirable for the school and community.
7. Short-range, intermediate-range and long-range site and construction plans for the district.
8. Economic factors, including initial cost and development costs.
9. Degree to which the site enhances the probability of providing an integrated school population.

Q. Now, that which you have read from was a written set of criteria that was used by your department; is that [5569A] correct or not?

A. Yes. This was used by the development office in conjunction with the planning committees that were involved in cases where a site had to be selected for a school.

Q. Did, as a matter of my information, Dr. Merriman — I know — I believe — it is my recollection that the Planning Committee, the Community Committee, worked on the site selection with respect to the vocational centers other than Fort Hayes; am I correct about this?

A. That's correct.

Q. What about the committees that you have described yesterday and which you read about; did they function also with respect to other sites?

A. In instances where a site had not been owned by the Board of Education and was not designated as a specific location for a new school, the site selection or the Planning Committee was involved in site selection.

* * * * *

JOAN FOLK

called as a witness on behalf of the
Intervening Plaintiffs, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[6013] Q. [By Mr. Lucas] Would you state your full name and your occupation, please?

A. Joan Folk. I am a counselor, elementary counselor in the Columbus Public Schools.

[6014] Q. How long have you taught in the Columbus Public Schools?

A. About 20 years.

Q. All right. When did you first come to the Columbus System?

A. In 1953.

Q. Would that have been the '52-53 school year or '53-54?

A. '53-54.

Q. All right. And where were you teaching or counseling at that time?

A. I was a teacher at Southwood Elementary School.

Q. Do you recall the grade you were teaching at that time?

A. Yes, third grade.

Q. At that time, as a teacher, were you required to fill out regular reports on the enrollment in the school?

A. Yes. In the spring, we had a State form, an enrollment form that we completed.

Q. Would you describe that form, please?

A. Well, it was two sheets. We had one sheet for boys and one sheet for girls, — it was very exacting — and we placed the names in alphabetical order and the addresses and the race.

Q. All right. Was this a preprinted form from the State?

[6015] A. Yes.

Q. All right. What was the color of the form? I think there's been a reference earlier in the record to that.

A. I think it was yellow.

Q. What did you do with the form after you filled it out as a teacher?

A. I gave it to the principal.

Q. All right. Is there any particular reason why you remember this form from 1953 where it showed the race of the student?

A. Yes. As I said, it was an exacting form, and I made an error. You were not permitted to place nicknames on the form, and it was difficult for my principal to get another form, but he did get one.

Q. You had to do it over?

A. I did it over.

Q. All right. Now, you left the Columbus Public Schools and taught in other school systems for a number of years; is that correct?

A. Yes.

Q. And approximately when did you return to the Columbus Public Schools?

A. In the fall of 1960.

Q. 1960?

A. Yes.

[6016] Q. Let me go back, I'm sorry, to 1953.

Did you have to prepare any other form in which you had to indicate race to the Columbus Board of Education or the State Board?

[6017] A. Yes. I recall we had a white 4-by-6 or 5-by-7 card that at the end of the year was called a promotion card, and, again, along with other identification information, we completed the race for each child.

Q. And that was turned in to the principal of the building at that time by the teacher; is that correct?

A. Yes.

Q. Now, you say you came back in the fall of 1960. When you came back in the fall of 1960, were either or both of these forms still required to be filled out by teachers?

A. I don't recall the state form, but I do remember the promotion card.

Q. And were you required to indicate race in 1960?

A. Yes. It was the same form.

Q. Same procedure, you turned it in to the principal of the building; is that correct?

A. Yes.

Q. Do you recall how long after 1960 that procedure was followed?

A. No, I don't.

Q. Do you recall that at some time thereafter you no longer filled out the promotion cards with the race on them; is that correct?

A. Yes.

MARTIN W. ESSEX

called as a witness on behalf of the Defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. O'NEILL

* * * * *

[6073] Q. [By Mr. O'Neill] Were there any properties around that the State Board [6074] could have had access to and could have transferred to the Columbus Schools?

A. Yes, there were some municipally annexed properties which had not been transferred for school purposes. Ultimately it was decided to transfer territory from seven suburban districts to the Columbus School District. [6075]

Q. On what basis could those transfers be made?

A. Because there had been municipal annexation, and this is within the authority of the State Board.

Q. You mean that the city of Columbus had annexed portions of these outlying areas for city purposes, but those portions had not been transferred to the Columbus City School District?

A. That is correct.

Q. The State Board would have the right to approve the transfer of those districts to the Columbus City School District?

A. It has a right to order such a transfer, or we thought we had the right.

Q. Okay, and did the State Board then order the transfer of those outlying areas to the Columbus City School District?

A. Yes, and started the due process of hearings which led into litigation, and the litigation was ultimately consummated in December of this year. It went on for years.

Q. You mean the outlying school districts resented the loss of these territories and attempted to prevent the State Board from carrying out its order?

A. Yes. For example, not far from here just across the river is the Golden Finger of sizeable tax value but

very few children which is associated with the Grandview [6076] Heights District. This has been protected with great tenacity down through the years and, hence, the Grandview Heights District considered this an action which would be very unacceptable to them. It was necessary for them to go back to their electorate and vote an additional levy to carry on their school functions.

Q. Do I understand, sir, from what you have said that the resistance offered by the outlying school districts ended only last December, December of '75?

A. Yes, this winter.

Q. With an Ohio Supreme Court decision that upheld the power of the State Board to order these transfers under the statute giving the State Board that power?

A. Yes, that's precisely what took place. However, it is a complicated matter. Perhaps the Court wouldn't be interested in all the complications through Franklin County and the Board's limited power. The Board could not assign Mifflin to Columbus. It had to go through the Franklin County Board.

Q. What am I interested in establishing, sir, is what has been the racial impact of the match-making efforts by the State Board of Education in this connection?

A. In the seven districts were very few black youngsters and, hence, the land transferred. For example, the Westerville section to the north of Columbus now [6077] with approximately 2,600 youngsters is primarily white, and this gave Columbus, the Columbus School District, additional areas in which largely white persons would be residing. The same was true in the other seven districts in which the transfers took place.

Q. Did it also give to Columbus the Mifflin area which was then increasingly black?

A. Yes. It was moving toward a third black, as I recall.

Q. Would it be fair to say that the overall effect of this effort by the State Board in connection with the

Mifflin - Columbus consolidation has been integrative rather than segregative?

A. Yes, and in the quality of education, there has been a great boon. The Columbus Board has proceeded to take the existing high school, spend more than a million dollars in remodeling it for a junior high school, proceeded to construct a new senior high school, construct elementary schools, provide proper housing and good management. Hence, we have not heard from Mifflin since that time.

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CROSS-EXAMINATION BY MR. STEIN

[6184] Q. [By Mr. Stein] It didn't join at any one portion. Another was Mifflin, and, as to Mifflin, you made a statement that the overall effect of the transfer of the Mifflin District to Columbus was integrative, and you said that seven other districts gave property and transferred territory to Columbus which had already been municipally annexed. What were those seven districts?

A. Southwestern City, Grandview Heights, Washington Local, Westerville City, Reynoldsburg Local at that time, now a city, Madison Local and Upper Arlington, as I recall them, and I am fairly well aware of antagonizing all of those superintendents, so I recall them rather vividly.

Q. And I believe you mentioned that Westerville — strike that question.

Which of these seven districts had students transferred with it to Columbus?

A. All of them.

Q. All of them?

A. I think. There could have been some exception to that. Westerville would have had the largest number of [6185] the seven because —

Q. How many would have been there?

A. The last figures that I saw, and it's been in the newspapers repeatedly over the past year or so, and 2600 was the last figure I believe that I saw.

Q. And do you know how many approximately from Upper Arlington?

A. I am not sure that there was much of a transfer of students from Upper Arlington. It involved a transfer in two directions to clear up boundary lines and to relate to certain property wealth. A part of the transfer took place from Washington Local, the Dublin District, as you might term it, to Upper Arlington and to Columbus, and then some transfer from Upper Arlington to Columbus or Southwestern. It was a very complex transfer arrangement involving, as I recall, several parcels of land, not just seven parcels of land, but numerous parcels of land.

Q. The major industrial parcel is the Golden Finger? Most of the others were residential?

A. Yes. The very high valuation area is the Golden Finger, as you know, along Route 33 and across —

Q. Do you recall how many students came from Reynoldsburg to Columbus?

A. Not very many in the Reynoldsburg instance. Reynoldsburg didn't contest the transfer. They accepted it. [6186]

Q. When you say not very many, do you mean a couple hundred?

A. I really don't have — it's been so many years ago that I don't have a figure.

Q. Would you have an estimate for the entire seven districts, Westerville, Upper Arlington, Southwestern, Washington Local, Madison Local, Reynoldsburg, Grandview Heights all together?

A. No, I have never tabulated the total number of students. We were more concerned with the wealth factor, whether or not this was going to compensate or be adequate to effectuate the inducement of the Franklin County Board of Education to make the transfer and Columbus

to accept.

Q. But we know it is over 2600 because those came in from Westerville?

A. Oh, yes.

Q. Do you know how many students were in the Mifflin District?

A. As I recall, when we initiated the action, it was 3200, and then it moved upward because there was rapid movement inward. It may have been 3600 before it was consummated, perhaps even more. I think we lost count because Mifflin was transferred and they began to receive the services of Columbus very early. The litigation continued. The court required us to retry it again with new [6186A] data, and then it went back to the Supreme Court again, and it was just consummated in December of this winter.

Q. Do you have any approximation in your mind of the racial composition of Mifflin today? [6187]

A. Mifflin was not — did not have a large number of black youngsters. The movement was in that direction in the low cost or the low rental housing, but the percentage was not high.

Q. It was probably around 50 percent, would you think?

A. No, no, it wouldn't be nearly that. Probably more nearly half that.

Q. If I refer you to your testimony once again in the Dayton deposition in November of 1972, when asked about the percentage of — what was the percentage of the district, you were asked whether you thought it was approximately 90 percent or more, and your answer was: No, it would have been much lower than that. I suspect no more than half. Perhaps maybe not half.

A. Essentially that's the same statement I am making now.

Q. You said that to me. I suggested 50 percent. Then it was suggested 90 percent.

A. I said much lower. I certainly in that statement —

Q. So if you have 25 percent of the district at the time that Mifflin near Columbus was black and you have testified that these other seven districts were predominantly — and I am assuming 90 to 100 percent white —

A. Higher than that, actually.

Q. Higher than that? [6188]

A. Well, they are more than 90 percent, I am sure.

Q. Where is the integrative effect?

A. The integrative effect is to provide the Columbus District with room for expansion and the opportunity for expansion and the retention of white homeowners, of white persons in the school district, and we are of the opinion that the Mifflin District will not become a black district. The Sunbury Road area is an attractive home picturesque territory, and we would see it as a desirable place to live, and it would not be low income. If it were to induce black persons to move there, no doubt it would be middle class upward mobility rather than this early impact on a relatively small district that couldn't manage, couldn't handle, couldn't take care of the responsibilities of educating the children, and our first concern again had to be — because we had no other legal premise, our first concern had to be the quality of education of the youngsters.

As I said to you, when I addressed their convocation and visited their schools, I returned to the judgment that they would not be able to manage the impact that was upon them.

Q. So the integrative effect of this transfer was to allow seven districts in the surrounding area to add additional white pupils to Columbus?

A. And space, as well as this number, this ratio, was [6189] not going to be detrimental to the Columbus School balance.

Q. Okay. Testimony in this case has indicated that as of last year, the Mifflin area or what came in with the transfer from Mifflin is approximately 50 percent black at this time. Are you aware that those pupils attending school in the Mifflin District prior to the transfer continue to attend schools in the same geographical district that was Mifflin after the transfer?

A. That would be my assumption, but I could not attest to that.

* * * * *

MARILYN M. REDDEN

called as a witness on behalf of the Defendants,
being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PORTER

* * * * *

[5660] Q. [By Mr. Porter] I wish to ask you a few questions concerning it, Mrs. Redden. They are very simple. I would ask you if you first support the Columbus Plan, and I would then ask you after you answer that question, to tell us what you see for the Columbus Plan?

A. I certainly support the Columbus Plan.

Q. What do you see the Columbus Plan accomplishing? I am speaking now — I am asking you in your capacity as a member of the Board, not for the Board. You cannot testify for the Board?

A. That's correct.

Q. I am asking you for your own opinion.

A. All right. My opinion in the beginning of the Columbus Plan is not too much different than my opinion today of the Columbus Plan, if there is any difference. I see the Columbus Plan as one accepted by the community, primarily because it is a voluntary plan, one that gives parents choices as to what kinds of programs their children may have, and I believe that people want choices. They get it through the Columbus Plan.

It is also a plan that truly integrates children as it provides programs that, yes, attract children, and then students have much in common as they come to these programs or types of learning and are very naturally integrated by their common goals and common interests.

Q. Do you personally support the proposition that the racial balance within the Columbus Public School System is a desirable result and should be one sought after; that it should be improved?

A. Yes, I believe that it should be improved.

Q. Do you visualize that the Columbus Plan will accomplish this?

A. Absolutely.

* * * * *

LEON MITCHELL

called as a witness on behalf of the
Intervening Plaintiffs, in rebuttal, being first
duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[6236] Q. [By Mr. Lucas] State your full name and your occupation, please?

A. Leon A. Mitchell. I am Elementary Principal at Gladstone Elementary School here in Columbus.

Q. Mr. Mitchell, you received a subpoena to appear here today?

A. Yes, I did.

Q. How long have you been employed in the Columbus Public Schools?

A. Nineteen years.

Q. Did you serve for a period of time as the principal at the Alum Crest School?

A. Two years.

Q. And could you tell us when that was, sir?

A. 1966-67 school year. Wait a minute. From September, 1966 to June, 1968.

Q. Was there a housing development associated with the Alum Crest School?

A. I believe it was called the Alum Crest Apartments at that time.

Q. How many empty classrooms were there in the Alum Crest [6237] School when you were principal?

A. There were approximately 11 that were rented out to Franklin County Children's Trainable Program, I believe it was called.

Q. And that was not under your administration in any way, shape or form, was it?

A. No.

Q. Were there students, primarily white students, being transported past the Alum Crest School from an area south of the school?

A. Yes, there were.

Q. And what area was that?

A. The Lawndale-Koebel Road area just south of the school.

Q. Where were they being transported to?

A. Moler Road School.

Q. Was Moler a whiter school at that time than Alum Crest?

A. Predominantly white.

Q. And Alum Crest was what, about, at that time?

A. About 80 percent black.

Q. Did this go on for both of the years when you were at Alum Crest?

A. Yes, it did.

[6238] Q. All right. Do you know Mr. Carter from School Administration?

A. Yes, I do.

Q. Did you have a discussion with Mr. Carter about the children being bused past the Alum Crest School to the Moler School?

A. Yes, I did.

Q. And did you advise Mr. Carter as to whether or not, even with the 11 classrooms rented out, whether or not there was capacity in the Alum Crest School at that time for the students being bused past the school?

A. Yes, I did. We had 11 teachers and 210 students, and it is my recollection about 70 youngsters were bused past the Alum Crest every day.

Q. And as principal, did you advise Mr. Carter that you had room for those children, those white children being bused past?

A. I don't know whether I advised him because he was well aware of our numbers. In fact, that was his responsibility, but I did ask him why this was being done because I could stand from the playground and throw a rock into the bus, and he said, "We have always done it that way," and he ended the conversation.

Q. All right. Did you take any further action at that time?

[6239] A. No.

MR. LUCAS: I have no further questions of this witness.

* * * * *

CROSS-EXAMINATION BY MR. LOVELAND

Q. [By Mr. Loveland] Mr. Mitchell, you testified you were principal at Alum Crest in '66 school year and '67 school year; is that correct?

A. Right.

Q. And I believe you testified that 11 classrooms were rented out to the Franklin County — what's the name of it?

A. I can't give you the exact title. It is Franklin County trainable program for trainably retarded children.

Q. And how many teachers did you have at your school in 1966?

A. I had eleven.

Q. How many teachers in 1967?

A. Eleven.

Q. And each of those teachers, I assume, had his or her own classroom?

A. Right.

Q. And how many classrooms were rented out to the Franklin County Welfare Department?

[6240] A. None, none.

Q. How many classrooms were rented out to the Franklin County Child Welfare Board?

A. I don't know who ran that program. You said Welfare Department; none. To the Franklin County trainable program, they leased space in the building. They had their own section with their own office. My responsibility was to coordinate the effort with I think her name was Barbara Applegard.

Q. You said they had their own space in the building. Was that the — what part of the building was that?

A. The school faces Winslow and the park faces Winslow and taking up two rooms coming up toward the front of the building, and some of it ran alongside Alum Creek Drive.

Q. Would it be the northeast corner part of the building?

A. No, it would be the south and southeast corner.

Q. What size rooms were rented out?

A. Regular classroom size.

Q. Isn't it a fact —

A. A couple of the rooms were partitioned to make them smaller for special classes, but — and then we also shared the gym with them. They had a special time that we worked out that they used the gym.

[6241] Q. Isn't it a fact that Alum Crest was built originally with 12 classrooms and had an addition of four classrooms?

A. I don't know when it was built, sir. It was built when I got there.

Q. When you were there, where were your 11 teachers assigned?

A. Which section of the building?

Q. Yes.

A. One teacher was assigned — that building sets kind of cater-cornered, so it is pretty hard. The only way I could explain it is that the building runs this way and back that way (indicating). It runs kind of odd-shaped. Our teachers were assigned in one section, and they were divided in another section.

[6242] Q. And the section that was rented out, isn't it a fact that those were four partitioned rooms which made eight rooms?

A. They also had a couple rooms down the other wing from us. We had a third grade class that abutted there next class, first class.

Q. Mr. Mitchell, isn't it a fact that the students that you described that were transported to Moler in 1966 were transported, also transported to Moler in 1963?

A. I have no knowledge. I was in a classroom in 1963. I know they are still being transferred there today.

Q. Isn't it a fact that in 1963 when they were transported to Moler that that was a new school, Moler?

A. I can't answer that. I was in the classroom at Windsor Elementary School.

Q. So you have no knowledge of the enrollments or capacities at Alum Crest or Moler or Smith Road Schools in 1963?

A. No.

Q. You have no knowledge, I assume, of the enrollments or capacities at Moler or Smith Road in any other years; is that right?

A. You mean prior to —

Q. Anytime since 1963?

A. I don't understand your line of questioning. No —

[6243] Q. You don't know how many students were at Moler School in 1966 then?

A. No, I don't know how many was there.

Q. Now, you say that the students were transported from what area? What was the name of the streets?

A. Well, it is south of Refugee. I do know a couple streets down there, Longdale and Koebel, so I call it the Longdale-Koebel Road area.

Q. I wonder if you could step up to this map here for a second and point out that area on the map?

A. If I could find it. Livingston.

Q. Is it the orange block in green down here?

A. Yes. Here is the creek, this area here.

Q. Would you read off the names of those streets for the record, please?

A. Bellview, Longdale, Liston, Koebel.

Q. And the color of that area where those streets are is what on that map?

A. Orange.

Q. And for the record, this is Plaintiffs' Exhibit 252. Resume your seat.

Mr. Mitchell, isn't it a fact that the Moler School in 1975-75 was 56 percent black?

A. 19 — I don't know. I would have to check the record. I don't know about Moler School. I would assume it is.

[6244] Q. Do you know the racial composition at the present time of the Alum Crest School? Does 80 percent seem about right? 80 percent black?

A. I have been away from Alum Crest for eight years. I have no knowledge about that.

Q. Mr. Mitchell, isn't it a fact that the students on the streets that you pointed to on the map prior to going to Moler were assigned to Smith Road Elementary School in 1962?

A. Once again, I have to remind you, I can't answer that question because I was a classroom teacher. Classroom teachers aren't privy to that type of knowledge.

MR. LOVELAND: No further questions. Thank you.

THE COURT: Anything further?

MR. LUCAS: Just one question.

• • • • •
REDIRECT EXAMINATION BY MR. LUCAS

Q. [By Mr. Lucas] As principal of the school, you would have sent the actual enrollment as you knew it to be whenever the enrollment counts were taken in the records to the main office; is that correct?

A. Pupil Personnel, yes.

Q. What was your testimony again with respect to the number of pupils in the school, the Alum Crest School, as you [6245] operated it?

A. I would say around 210, as I recall.

Q. And regardless of how many classrooms were leased out to some other entity other than the Columbus Board of Education, did I understand your testimony that these students could have been accommodated in the classrooms you were operating?

[6246] A. I felt they could.

Q. Did you see the bus go by?

A. Daily.

Q. And were the occupants in the bus black or white?

A. Predominantly white.

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HARRIET LANGSTON

called as witness in behalf of the

Intervening Plaintiffs, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. LUCAS

[6271] Q. [By Mr. Lucas] State your full name and your occupation, please.

A. Harriet Langston, and I am a school teacher.

Q. And you are employed by the Columbus Public Schools?

A. Yes, I am.

Q. Are you here pursuant to a subpoena served upon you?

A. Yes.

[6272] Q. How long have you been a teacher in the Columbus Public Schools?

A. Three years.

Q. And I believe your mother is a teacher, also, and has been for many years?

A. Yes.

Q. Were you assigned to teach at the East Linden School?

A. Yes, my second year of teaching, I was a teacher at South Mifflin, but due to overcrowding, we were assigned to be bused to East Linden.

Q. All right. You were originally assigned to South Mifflin, right?

A. Right.

Q. Was that a predominantly black school at that time?

A. Yes, it was.

Q. And what year was that?

A. The school year of 1973-74.

Q. All right. And did the teachers or the pupils all go over to East Linden in the same bus?

A. Yes, the teachers and the students went intact from South Mifflin to East Linden.

Q. And was East Linden a predominantly white school?

A. Yes, it was.

Q. All right. Was there more than one class sent from [6273] Mifflin to East Linden?

A. Yes, there were two classes.

Q. All right. And I assume, therefore, there were other teachers with them?

A. Right.

Q. What kind of classroom was your class put in?

A. My classroom was a very old — an older part of the building, the intermediate part. The room that I was in had been previously a detention room. The lighting was very poor in the room. The floors were warped and just waved (indicating), and we were right beneath the cafeteria where a fan blew constantly where we could barely hear. I had to speak loud; the children had to speak loud. It was really kind of a bad room, I thought.

[6274] Q. All right. Were the children permitted to take recess with the white children at East Linden?

A. No, they were not.

Q. I take it most of the children in your class were black; is that correct?

A. Yes, they were.

Q. And were your children permitted to eat lunch with white children?

A. No, they weren't.

Q. Now, when did you have to take your class to lunch?

A. We had to take our class for lunch at 11:20 before any of the rest of the school ate. We had to be out of the cafeteria by 20 minutes of 12:00 so that the children could go outside and be out of the cafeteria by the time the East Linden children started to eat.

Q. All right. Were you served the same food the East Linden children were?

A. On three occasions we were not served the same food that the other children were served. They have a menu board, and we could see it as we came in, you know, getting off the bus. The children would look at the menu to see what they were going to have for lunch.

When they went to get in line for lunch, on three different occasions it was something different. They asked why, you know, they were getting something different than [6275] what the menu said. The cook would say, "Well, we don't have enough of, you know, what the menu says,

so therefore we are giving you this." But I always thought that when they ran out, it would be at the end and not at the beginning.

Q. Did you protest or complain in any way about the separate lunch times, separate menus and separate recess periods for the children from Mifflin?

A. Yes, I did. On the day before school was to start, we had an all-day meeting at East Linden with the principal and the faculty there, and we were told that our separate — about our separate lunch schedule and recess schedule.

After the meeting at the end of the day, I went to see the principal there, and I asked him why we would be on separate lunch schedules. Why wouldn't we be with the rest of the children? Just because we were, you know, being bused, you know, because we were overcrowded, we should still be together with the rest of the children, and the children should be on the same recess and the same lunches. He said that he preferred to do it that way, and that was the end of it.

Q. Did you express any concern about whether or not the children and teachers should have been fully dispersed throughout the school at East Linden rather than kept in a [6276] separate class?

A. Yes. I told him that I felt that, you know, that the children, they would feel like they were different if they were separated, and I told him I didn't think it was fair, you know, that they should be with the rest of the school because it was the same educational system, the same — you know, we were just bused because we were overcrowded, and not because we are different or because we are taking different courses. We are taking the same courses. We are doing the same educational program, and I felt that we should be with the rest of the students and that we as teachers should be with the rest of the faculty.

Q. Did you observe in the children any differences in their feelings and attitudes because of their being kept separate and intact and away from the other children?

MR. PORTER: Objection.

THE COURT: Overruled.

Q. (By Mr. Lucas) Go ahead, you may answer.

A. Yes, I did. The children felt hostile at times because they noticed a difference, and you — it is difficult to tell them that there isn't any difference when they know that they are separated and there is.

Q. Did the — did you have a parents' night for the children in your class?

[6277] A. Yes, we had open house like we do every year.

Q. All right. And when you had the open house, where did you have the open house for your classroom?

A. We had to have our open house at East Linden in our own rooms.

Q. And the day you had open house at East Linden, was the building full or empty? In other words, was East Linden having its open house, too?

A. No, there were just the two teachers, me and another teacher, and we were the only two in the building other than the janitors.

Q. So that the black parents who came in to see what their children were doing came into the empty school except for your two classes; is that right?

MR. PORTER: Objection.

THE COURT: Sustained.

Q. I take it with the black children, most of the parents were black; is that correct?

A. Yes.

Q. When they came to the school, were there white parents of children who were assigned to East Linden at that school for open house, teachers' night or whatever you may call it?

A. No, they weren't.

Q. Who else was there besides you and your children [6278] and the other teacher and her children?

A. No one but the janitor.

Q. No one but the janitors.

Were you in this particular situation one year or more than one year?

A. One year.

MR LUCAS: I have no other questions.

THE COURT: Cross-examine.

MR. PORTER: Yes, Your Honor.

CROSS EXAMINATION BY MR. PORTER

Q. [By Mr. Porter] Mrs. Langston — it is Missus; is that correct?

A. Yes, that's correct.

Q. Am I correct in assuming that you disapprove of the concept of taking a group from one school because of overcrowding, placing them in another school and maintaining that class intact in the second school; am I right about that?

A. No, sir, I don't object to that. I don't object to the busing intact at all from one school to another and keeping that class — keeping the classroom as such, you know, with the teacher in their room. I object to the fact that the children at recess time should be together with the other children in that building and that the [6279] teachers should be — share the duties equally with the rest of the faculty.

Q. All right. So that I understand you, please, and if I don't, I would appreciate it if you would tell me —

A. Yes, sir.

Q. Then you do not object to the concept itself, where you have overcrowding, you do not object to the concept to take children to another physical facility and maintain that class at the second physical facility as a group; am I correct about that?

A. No, sir, I do not object to that.

Q. All right. But what you do object to is what you would consider discrimination in this case because you say that the — or infer that the children from South Mifflin had a different recess time and a different eating time, and I've forgotten what the third is; am I correct about that?

A. Yes, sir.

Q. All right. Now, you do recall, do you not, that the South Mifflin Elementary School, during the period after the Mifflin School System was annexed to the City of Columbus, that it was experiencing enormous overcrowding in the South Mifflin School; am I right about that?

A. Our school was very overcrowded, yes.

Q. And it is my understanding that it was necessary [6280] to move about six classes a year over a period of several years; am I not right about that?

A. Yeah, the particular year that I was bused, there were over six classes.

Q. And two of them went to East Linden, and some went to Crossroads and some went to Arlington Park; am I right about that?

A. Yes, sir.

[6281] Q. And the two classes that went to East Linden, there was yourself as a teacher and a white teacher, I believe; is that right?

A. Yes, sir.

Q. All right. And you and she had the same schedule at East Linden; is that correct?

A. Yes, sir.

Q. All right. Now, it's also my understanding that initially — initially, you and/or somebody on your behalf or on behalf of the other teachers asked that you not be included within the normal recess scheduling; am I not correct about that?

A. No, sir, you are not.

Q. It is true, is it not, that in October, approximately October of 1973, the scheduling of recess teachers was changed and you were included along with the other lady

with the normal East Linden recess program of handling the people out on the playground; am I right about that?

A. No, sir.

Q. All right. Now, it is also my understanding that your class started the day at East Linden at the same time that the East Linden children started the class; is that right?

A. No, sir, we did not start at the same time.

Q. Oh, you didn't? When did you start?

[6282] A. We — due to the bus ride, we started at 9:00 o'clock, and their class took up at quarter of 9:00. We were enroute between quarter of 9:00 to 9:00 o'clock.

Q. So that your schedule was different, wasn't it?

A. We got there about 15 minutes, you know, later than they did.

Q. And if I understand correctly, and you correct me, please, if I'm wrong, your schedule was such that you got back, you were brought back by bus to South Mifflin; isn't that right?

A. Yes, sir.

Q. And you arrived back at South Mifflin in time to be dismissed with the total South Mifflin Schools; isn't that true?

A. Yes, sir.

Q. All right. And that meant, that meant that the time available for classroom curriculum or non-bus riding, if you wish, was decreased, was it not?

A. No, sir, not really. Even though we did not start at the same they did, the 15-minute period for the bus ride did, not really take up that much of the class time. During a 15-minute period from quarter of 9:00 to 9:00 o'clock, you take attendance and the lunch count, and that's about all you get done. We had reading promptly at 9:00 o'clock. Therefore, it did not take us that much time.

[6283] Q. Miss Langston, I am not going to argue with you, and that's not my question. I will ask it again, please. If you came back to South Mifflin and you got out

of class at the same time that the youngsters who attended South Mifflin did, it meant that you had lost some time in transportation between East Linden and South Mifflin, did you not?

A. Oh, yes, we did.

Q. And if I recall correctly, that time was picked up by dropping out an afternoon recess, was it not?

A. No, by dropping out a morning recess.

Q. All right, it dropped out one of the two recesses?

A. Right.

Q. Now, there were, I believe, in East Linden approximately 500-and-some students; am I right about that?

A. I don't know.

Q. There were several hundred, weren't there?

A. At East Linden?

Q. Yes.

A. I don't know what the enrollment was at East Linden.

Q. Let me ask it a different way. The record in this case will show what the enrollment is, so let me ask it a different way. The dining room at East Linden was not large enough to handle all of the student body at East Linden [6284] at one time, was it?

A. No, it wasn't.

Q. And, as a matter of fact, they had a staggered or stacked noontime lunch period, did they not?

A. I don't know what you mean by staggered or stacked.

Q. All right, I will explain what I mean. The first and second graders at East Linden came into the cafeteria, got their lunch and took their lunch back to their rooms and ate it, did they not?

A. Yes, they did.

Q. And the group from East Linden came in and they got their lunch and they sat down after those first and

second graders had moved through the cafeteria line and gone back; isn't that right?

A. Yes.

Q. And then the remainder or rather another group of East Linden came in, got their lunch and sat down at the same time the group from South Mifflin was sitting there and eating; isn't that true?

A. No, sir, we did not eat together.

Q. And they were followed in turn by a fourth group; isn't that true?

A. No, sir.

Q. All right. When did — strike that.

[6285] Your class was a fourth grade class; am I correct?

A. You are correct.

Q. And I believe, if I have worked this through correctly, and you please correct me, that this group had not been taken to a school on an intact busing situation before, or had they?

A. Some of the children had and some hadn't.

[6286] Q. In looking at the program for a period of years during this period of time, it appears as though there is an effort made to see that a child does not go to — by bus two years in a row; am I correct about that?

A. That's correct.

Q. As a matter of fact, you have only gone the once; isn't that right?

A. That's true.

Q. But your children, some of the children that you have taught have been to South Mifflin, Arlington Park and East Linden and possibly Crossroads; am I right about that?

A. That's true.

Q. Now, you have described the physical facilities under which you taught?

A. Yes.

Q. And I would like to ask you some questions about that, please. The first is, it is my understanding that the East Linden Elementary School was a part of the Mifflin, the old Mifflin School District. Am I correct about that?

A. I guess so.

Q. And it is my understanding that it was built in about 1911. Is that — it is an old building, is it not?

A. It is an old building.

Q. You were located in I believe Room 6; is that right?

[6287] A. I guess so. I don't remember the room number.

Q. It is on the second floor; isn't it?

A. Yes.

Q. And on the second floor adjacent to you were the regular fourth grade classes from East Linden; isn't that right?

A. Next door.

Q. Well, let's — there was a teacher by the name of Hall who taught fourth grade at East Linden; is that right?

A. That's right.

Q. Is that Miss or Missus or Mister?

A. Mrs. Hall.

Q. And she was by your room, was she not?

A. Next door.

Q. And there was a Ferguson; is that right?

A. Right.

Q. Miss or Missus?

A. Mrs. Ferguson.

Q. And she was there right by your room, was she not?

A. She was across and down some steps.

Q. And then there was a teacher by the name of Grow, Miss or Missus?

A. Mrs. Grow.

Q. And she was there on the second floor adjacent, was she not?

[6288] A. Yes, she was.

Q. So that your classroom was immediately adjacent in complete proximity to the other fourth grade classroom at East Linden; isn't that true?

A. Yes, sir, that's true.

Q. So that the cafeteria noises and the fan noises that existed over your room were exactly the same as existed over the others, were they not?

A. No, sir, that's not true.

Q. Did you have any white youngsters in your class?

A. Yes, sir.

Q. Approximately how many?

A. About three.

Q. Were there any black youngsters at East Linden?

A. Yes, sir.

Q. Some in the fourth grade classes at East Linden?

A. I don't know.

Q. Are the youngsters at South Mifflin now all back at South Mifflin with the exception of a kindergarten class?

A. Yes, they are.

Q. So they are all housed back in that building?

A. Yes.

[6289] MR. PORTER: Just a few more questions, Ms. Langston.

* * * * *

RECROSS EXAMINATION BY MR. PORTER

Q. [By Mr. Porter] I understand in addition to these other matters about which you described for Mr. Lucas or, rather, in that description, you have said on three occasions during the year you were served food that was different from the food that was served to the children whose normal, permanent school was East Linden; am I right about that?

A. Yes.

Q. And you made no — you did not say, nor do I assume do you claim that the food was inferior, do you?

A. No, sir, I don't claim that it was inferior.

Q. It's just that it was different?

A. It was different.

Q. You would agree, would you not, Ms. Langston, that the principal at South Mifflin did have a significant problem in his own building in the handling of these children for about five years; isn't that right?

A. I don't know, sir. About the problem?

Q. Do you know about the overcrowding?

A. Oh, as far as the overcrowding?

Q. Yes.

[6290] A. The building was overcrowded.

Q. And it is true, is it not, that this put a burden upon the teachers and the students at South Mifflin insofar as the necessity of dealing with that overcrowding, using facilities that were too small and going to other classes, other buildings; isn't that right?

A. I wouldn't say so. We just did our job.

Q. All right. And would you agree that it placed, the overcrowding placed upon Arlington Park and the other schools, Eastland and the other schools which made room for and housed the students from South Mifflin, it created a problem for them, too, didn't it?

A. I wouldn't say so, sir, because they had the room to house us.

MR. PORTER: I have no other questions of this witness.

MR. LUCAS: I have a couple of questions.

* * * * *

REDIRECT EXAMINATION BY MR. LUCAS

Q. [By Mr. Lucas] Ms. Langston, Mr. Porter asked you about the teachers who taught across the hall, down the stairs and on either side of you, and so forth.

A. Yes.

Q. Was the noise or the fan from the cafeteria or [6291] heat or whatever it was from the cafeteria, or whatever you were speaking about, different from the classroom you were assigned to?

A. Yes, sir, because we were on an outside room. Well, it would have been outside except for the cafeteria was right under us right here (indicating). The other rooms had the streets. They didn't have the cafeteria at all. The cafeteria was right here (indicating) in a long building, right next to us. The fan would come on — we had windows all along the — L-shaped, and when the fan came on, even though we closed the windows, you could hear it constantly and it connected right through the — not the heater, but the — you know, whatever that thing is, the vents, and the fan continually went and we heard it through the vents. We did not have — on that side of the room, they did not hear it.

Q. All right. Did you have any problem in teaching the children in your classroom when they were in class and the rest of the white children of the school were out at recess? Did that create difficulty?

A. Constantly.

MR. PORTER: Objection.

A. They played outside. After reading, we did not have a morning recess, and the children outside — they had two different primary and intermediate recess times, and it [6291-A] did disrupt, especially during the spring-time and early in September.

[6292] Q. All right. Did you speak to the principal about it and again urge that the recesses be made at the same time?

A. Yes, sir, I spoke to him several times about it.

* * * * *

TRANSCRIPT OF JULY, 1977 REMEDY HEARINGS MOTION BY MR. PORTER

[4] MR. PORTER: If the Court please, there are several issues to which I would like to speak and address two motions to the Court, and in doing it, I would like to guess review what I consider to be the law applicable to the matters before the Court at this stage of this proceeding, and to make some comments with respect to it and the Court's opinion and order of March 8th and of last week.

At the outset, I respectfully point out to the Court and counsel that this is a matter which is bifurcated; that the issue of liability has been tried and has been determined by this Court; that the matter before this Court at the present time is one of remedy and that, under the traditional rules governing an action of this type where equitable relief is sought, the matter at issue is entitled to treatment to the same degree of legal refinement as the previous part of it. [5]

By that, what I mean is this is not a sentencing, but rather is a hearing under the traditional Rules of Evidence and Burden of Proof dealing with the remedy that the Court must ultimately adopt.

On June 27, 1977, the Supreme Court of this country, in Dayton Board of Education versus Brinkman vacated a Sixth Circuit Court of Appeals decision which had upheld a remedy plan requiring that the racial distribution of each school be brought within 15 percent of the 48 to 52 percent black/white population of the Dayton schools.

Justice Rehnquist set forth the following duties of the lower courts in school desegregation cases:

The duty of both the District Court and the Court of Appeals, in a case such as this where mandatory segregation by law of the races and the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which

was intended to and did, in fact, discriminate against minority pupils, teachers or staff.

All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate.

If such violations are found, the District Court, in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted. [6]

When that distribution is compared to what it would have been in the absence of such constitutional violations, the remedy must be designed to address that difference, and only if there has been a systemwide impact may there be a systemwide remedy. Obviously, I am going to refer to that language a number of times in my comments this morning.

I would make this initial comment: That in the part of the statement on what the Court must determine; that is, how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, is a critical question. It is a question or a test which, to a large degree, deals with the responsibility of the Court in fashioning a remedy to rectify violations of the Constitution which took place sometime in the past.

What I have reference to is that if there has been a violation of the Constitution, that unless there is presently present, but for that violation, no effect, then there is no remedy to be fashioned by the Court.

I will come back to this a number of times because I think that it is the critical issue. I think it is the United States Supreme Court struggling with the whole problem of affirmative action and what responsibility this generation has for problems that may have taken place years in the past.

If the Court will remember, the Court addressed to me about ten months ago in this room the question of [7] the responsibility of the Columbus Board of Education. I think the example your Honor used is what responsibility, Mr. Porter, does the Court have or does the school have, if it discriminates with respect to Pilgrim Elementary School. What must it do in 1976?

That is paraphrasing your Honor's question to me, and I believe that my answer was that if that school system, that school is presently racially balanced the way it is because of the housing patterns that exist there and has nothing to do with prior acts of discrimination that may have taken place, then it has no responsibility, and I believe that is the way I answered that question.

I believe that is exactly what this particular test of the United States Supreme Court is dealing with at least in part.

The Columbus Defendants respectfully submit that Dayton requires the Court to determine the incremental segregative effect of the constitutional violations identified on March 8, 1977, in an opinion and order, before any remedy can be required. The Dayton case also instructs the Court in the method of determining such effect.

The Court must compare the racial distribution of the Columbus school population as presently constituted to what the racial distribution would have been in the absence of the constitutional violations found.

It is the difference yielded from that comparison that must be remedied. [8]

The applicability of Dayton to other school desegregation cases was illustrated on two Supreme Court cases announced on June 29, 1977.

In both cases, the Supreme Court vacated lower court judgments.

In the Omaha case, the District Court had originally found in favor of the school system. On appeal, the

Eighth Circuit reversed and held that the segregation in the Omaha schools must be eliminated root and branch and remanded with directions and guidelines with development of a systemwide remedy.

The Court of Appeals in that case found: "We conclude that in five decision-making areas, the Appellant produced substantial evidence that the Defendants' actions and inactions, in the face of tendered choices, had the natural, probable and foreseeable consequence of creating and maintaining segregation."

The five areas include: Faculty assignment, student transfers, operational attendance zone, school destruction and deterioration of Tech High.

The proof in each area was sufficient in and of itself to trigger the assumption of segregative intent.

We also conclude that the Defendants failed to carry their burden of establishing that segregative intent was not among the factors which motivated their actions. Accordingly, we hold that the segregation in the Omaha Public Schools violates the Constitution and must be eliminated root and branch. [9]

The Supreme Court denied certiorari in 1975 on that case. On remand, the District Court ordered a comprehensive systemwide student integration plan in accordance with the guidelines.

The plan was affirmed by the Court of Appeals. The Supreme Court, on January 29, in its decision, vacated the Eighth Circuit's decision, affirming a systemwide remedy because neither that court nor the District Court had addressed, "the inquiry required by our opinion."

If the court said, neither the Court of Appeals nor the District Court in addressing themselves to the remedial plan mandated by the earlier decision of the Court of Appeals addressed itself to the inquiry and required by our opinion in *Dayton Board of Education versus Brinkman* in which we said that if such violation are found, the Dis-

trict Court in the first instance, subject to review by the Court of Appeals, must determine the incremental segregative effect these violations had on the distribution of the Dayton school population as presently constituted when that distribution is conformed to what it would have been in the sense of such constitutional violations.

The remedy must be designed to address that difference and only if there has been a systemwide remedy, may there be — systemwide impact, may there be a systemwide remedy.

The petition for certiorari is accordingly granted and the judgment of the Court of Appeals is accordingly vacated for reconsideration in the *Village of Arlington Heights* in Dayton. The systemwide remedy order in Omaha was vacated, pending the [10] determination of the incremental segregative effect of the specific constitutional violations found.

The Court of Appeals' broad declaration that a systemwide remedy was required were not sufficient, absent the more specific determination required by Dayton. On the same day, the Supreme Court applied the Dayton case to the Milwaukee school segregation litigation, *Brennan versus Armstrong*. As in Omaha, the Supreme Court vacated the judgment of the Court of Appeals for reconsideration in light of the *Village of Arlington Heights* in Dayton.

In the Milwaukee case, the District Court originally found intentionally caused segregation in the Milwaukee system and said the Court concludes that the defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and facilities, and have intentionally brought about and maintained a dual school system.

"The Court therefore holds that the entire Milwaukee Public School System is unconstitutionally segregated." The Seventh Circuit Court affirmed this finding by the lower court and the school board sought a Writ of Certiorari from the United States Supreme Court.

On March 17, 1977, the District Court ordered implementation of a systemwide plan of desegregation. On June 29, the Supreme Court, in vacating the Seventh Circuit decision, said neither District Court in ordering development of a remedial plan nor the Court of Appeals in affirming, addressed itself to the inquiry mandated in our opinion by the case of *Brinkman* in which we said and the Court again quoted [11] the lines I have read.

"The Petition for Certiorari is accordingly granted and the judgment of the Court of Appeals is vacated and remanded for reconsideration in the light of the *Village of Arlington Heights versus Metropolitan Development*."

Notwithstanding, the lower Court's general pronouncements that the violations or liability in the *Milwaukee* case was systemwide, the Supreme Court remand required the lower Court to address and to make the specific determination of incremental segregative effect as defined in *Dayton*.

Respectfully, I submit that this Court is also required to address itself to the inquiry mandated by the Supreme Court's *Dayton* opinion. As in *Dayton*, *Omaha* and *Brennan*, this Court must determine how much incremental segregative effect these violations had on the racial distribution of the Columbus school population as presently constituted when that distribution is compared to what it would have been in the absence of such constitutional violations.

As made clear in *Brennan*, the required inquiry should be made when it is ordered the development of a remedial plan. Only in that matter will the Court and the litigants know what type of remedy must be designed to address that difference.

The Court's March 8 opinion and order, like the decisions in *Omaha* and *Brennan*, finds constitutional violations and holds that the liability is systemwide.

In its memorandum and order of July 7, the Court [12] said that it would not, "order implementation of a

plan which fails to take into account the systemwide nature of the liability of the Defendants."

In view of the recent decisions of the Supreme Court, this Court is required to do more. It must determine the difference between the present racial distribution in the Columbus Public Schools as compared to what it would have been in the absence of such constitutional violations.

It is only that difference, the incremental segregative effect, that must be remedied under constitutional principles.

Because of the mandatory considerations now required by *Dayton*, *Omaha* and *Brennan*, the findings of fact contained in March 8, 1977 opinion and order of this Court are insufficient to permit the formulation of an appropriate remedy. It is respectfully submitted that a remedy cannot be fashioned in accordance with constitutional requirements until the Court first defines the contemporary effects of the constitutional violations described in the March 8 opinion and order.

In the *Dayton* case, the Court said, the District Court said, that the ultimate conclusions that racially imbalanced schools optional attendance zones and recent board actions are cumulative. A violation of the equal protection clause. This appears at page six of the Slip opinion by the United States Supreme Court.

This Court in its memorandum and opinion that was issued last week, stated the Court found that the Columbus Public Schools were officially segregated by race in 1975, and further found that the Board of Education never actively [13] set out to dismantle this dual system.

The Court discussed in detail — and I am quoting from your opinion and order — "a variety of post-1954 board decisions and practices, such as creating and maintaining optional attendance zones and additions contiguous to attendant zone areas and choosing sites for schools which had the natural formal intent of enhancing rather

than reducing racially imbalanced schools that were purposely established by the board in 1975."

In the Dayton case, the United States Supreme Court quoted from the Court of Appeals' decision and it quoted at page nine of the Slip opinion and it stated that in the Dayton case, there was a three-part cumulative constitutional violation amply supported by the evidence and they imposed a systemwide remedy and the Court then went on and said it had — the Court of Appeals had no warrant for imposing a systemwide remedy.

There was no showing that such a remedy was necessary to eliminate all vestiges of the state-imposed plan.

The Court seems to have reviewed the structure of the Dayton School System as a sort of fruit of the poisonous tree. The point I wish to make is that in the Dayton case, there was a finding of three violations, racially imbalanced schools. That is a total systemwide type of finding.

Optional attendance zones, recent board actions; those are three general statements by the Court of Appeals and the District Court. When you turn and look to the basis of the support for those conclusions, then, you pick up [14] specific pieces of evidence or specific schools or specific acts, and the Court is saying, I respectfully submit, that they are saying that in this situation, there is nothing the matter with the three statements that are made. They are general, but they are not supported by the evidence.

In your Honor's decision, you have made also general statements of this type and you have relied on five pre-1954 schools and you have relied on certain acts since 1954, and the same type of thing can be done, I respectfully submit, with your decision or anybody's decision. Or anybody's decision.

I would like to move from that for just a moment to what I respectfully and very respectfully submit is this Court's approach to this case, and in doing this, I want to refer to your March 8 opinion and order.

In talking about real estate in page 58 of the Court's

opinion, it is stated, "It is not now possible to isolate these pictures and draw a picture of what schools or housing would have looked like today without the other influence."

I don't think that such an attempt is required. I spoke earlier of your question addressed to me concerning Pilgrim and I think it was Pilgrim, but it doesn't matter. It was one of the pre-1954 schools and my response to that.

I would submit that your Honor, I believe, takes the position that if there was a violation at some point in time, there is an affirmative duty to act today.

I think that this is demonstrated in several places [15] in your Honor's very fine opinion at page 60. There is the statement made again, which I would like to quote, that in discussing — it is under the burden of proof, I believe — no, it was dealing with the five schools.

"Nothing has occurred to substantially alleviate that continuity of discrimination of thousands of black students over the intervening decades." This appears at page 60.

Again, at page 61, "Defendants have not proved that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of the segregation — of their segregated acts and omissions," and at page 75, "It is extremely difficult to roll back the clock and determine what the school system would look like, had the wrongful acts and omissions never occurred." [16]

In your Honor's memorandum and order of last week, it is stated that the Defendant school board must certainly have the opportunity to provide to meet their Swann burden concerning predominantly white schools which remain identifiably white under a substituted plan. I would submit to your Honor that the substance or the purpose or the thrust of the Dayton case is to provide information to this Court and the District Court and the Court of Appeals.

It does provide a standard, and that standard is the one that I have read several times, and I think that there has to be a finding as to what the situation would be, but for, and absent that, I think that the Supreme Court three times last week or the week before said that if you don't have that, then, there is no basis for such a remedy.

Now, I would submit that there is nothing unusual about this. There is nothing unique about it. I agree with your Honor's statement that — it is a traditional approach. I think that is correct. It sounds a lot like normal tort language that we are all familiar with. It is a causation problem, in part, and I see that this is not unusual.

I think it is really the traditional function of the Court, and I recognize that in the Dayton case, the United States Supreme Court recognized the difficulty of applying this type of standard as a matter of fact; that it is difficult to do, that they also stated that this is [17] what the requirement is.

The Court in its opinion of last week, and I should read it, comments that two days after the Dayton decision with three justices dissenting, that the Omaha and Milwaukee cases were vacated and remanded. The Court then says, "The Seventh and Eighth Circuit Court of Appeals and perhaps, ultimately, the Supreme Court will decide whether the cases cited by the Supreme Court have any impact upon the Omaha and Milwaukee litigation."

It may be that I am missing the point of the language, but what I understand that to be saying is that the Supreme Court has not acted. I would suggest and respectfully submit that the Supreme Court has acted and it has said that where there is a finding of a systemwide violation, there still must be a determination of what the system would be like but for the violations of the Constitution, and I don't understand how, I respectfully submit, that I don't understand how the Omaha and Milwaukee case can be ignored.

I think that one came up on a liability. One came up on a remedy. They both did substantially the same thing,

and the Supreme Court of the United States sent it back and said, "You can't do that. You have to make these findings."

I recognize that there are great difficulties in a case of this type, and I recognize that they are emotional and that they impose an enormous burden upon a court and counsel. Unfortunately, I suppose, that we all [18] approach matters with some preconceived ideas, and the difficulty of sorting that out is hard. We certainly all recognize that it is not the function of the Court to replace the legally elected officials of the school system or to take over the responsibilities, even though one might do it differently. [19]

There certainly has been, in some decisions elsewhere, a tendency to sometimes reach far.

There was a very interesting article within the last week that appeared, I think, in the New York Times, dealing with what appeared to be a trend in the judicial — at the Supreme Court level and the Legislative and Executive Branches of government with respect to the conceived idea of what is the responsibility within the legal system because of past practices. How is this dealt with?

I would suggest to the Court that the Dayton case really is struggling with that problem. I would suggest that this is exactly what it is dealing with. It is one aspect, I suppose in a way, of the struggling with the so-called affirmative action problems.

I understand that the NAACP has taken the position, as recently as yesterday, that there is a responsibility on government to rectify wrongs that were committed in the past. I am suggesting that in the Dayton case and the Omaha and the Brennan cases, the U. S. Supreme Court is not saying that is wrong, but they are saying you have got to find that there is a causal connection, and you have got to find out what it is but for that, and that is what the responsibility is, and I submit that that is a traditional con-

cept and a legitimate function of the Court and one that has to be indulged in and pursued here.

In the Milwaukee case, the lower courts said, in referring to Milwaukee, they have knowingly carried out [20] a systematic program of segregating affecting all the city students, teachers and school facilities and have intentionally brought about and maintained a dual school system. They found it existed with respect to boundary, busing, open transfers, faculty, additions to schools.

In the Omaha case, they said the system must be dismantled root and branch there. They found there was discrimination in faculty assignments, student transfers, operational attendance zones, school construction and zoning with Tech High School.

These are broad decisions, but yet they were remanded and sent back for a specific finding; findings that there must be a determination of what this would be but for.

I don't suggest to know the answer. Alpine Elementary School, I submit, is not white because of any action by the Columbus Board of Education. I submit that Pilgrim Elementary School is not black today because of any action by the Columbus Board of Education, and I would submit that Linden McKinley is not black today because of any action because of the Columbus Board of Education.

These schools were built, as the Court pointed out on pages 13 and 14 of his opinion on March 8th, were built in accordance with recommendations by Ohio State University.

They are what they are because of housing patterns that existed around them, not because of any action by the Columbus Board of Education in an attempt to [21] discriminate.

To say that a school built on the edge of a school district sometime after 1954, in an area that wasn't in the district in 1954, and built in response to recommenda-

tions by Ohio State University that it must be racially balanced under a rule which says the remedy must rectify the violations is to read something into that rule that, I submit, is not there.

I don't propose to, and I am sure not permitted, but I don't propose to make an opening statement at this point. I wish to make a comment, if I might.

I think the evidence will show that the plan that was submitted on June 10, by the Columbus Board of Education, was a bona fide and legitimate effort made by the Board to deal with the Judge's decision of March 8th.

The plan submitted by the Board on July 8, is a bona fide attempt to interpret that decision in light of Davis, Omaha, Brinkman.

Now, it may be that the advice or the recommendations to the Board are bad, but I assure you that is what gives rise to it, and I would submit that a reading of the Dayton case, a reading of the Dayton case and a comparison of the general language that exists in Judge Rubin's decision and exists in the other cases and exists in this case, when you bring it down to the specifics of the matter, and attempt to deal with the problem of what is it that a Board must do, what must it rectify, that the Board of Education has attempted to do that, and it has dealt with those things which the Judge has identified. [22] Now, we would ask the Court to, and so move, determine how much incremental segregative effect the constitutional violations found in its March 8, 1977 opinion and order, had on the racial distribution of the Columbus Public School population as presently constituted, and each elementary, junior and senior high school when that distribution is compared to what the racial composition of what the Columbus school population would have been in the absence of such constitutional violations in each elementary, junior and senior high school in the system.

We would respectfully submit that that is what the Supreme Court requires, and we would respectfully sub-

mit that it is consistent with the traditional approaches and concepts which govern legal matters, and would respectfully ask the Court to do that, and I would point out that it is not, is not a question of burden shifting.

The burden, I would respectfully say, by the way, never did shift, but putting that aside, the question of burden shifting has nothing to do with this problem. This requires specific findings, and if it is not done by the Court or by the Plaintiffs or if the Defendants are ordered to do it, and they fail, there is no basis, there is no basis for the Court acting consistent with that decision.

It is simply a matter of the Plaintiffs sustaining their burden with respect to an element of their case, to wit, damage or remedy.

I have a second motion that is very short, and [23] that is we respectfully move the Court for an order directed to the Plaintiff to submit a plan which the Plaintiffs believe complies with the Court's opinion and order of March 8th.

I am not going to belabor it. I will simply say that it is not to abdicate the responsibility of Columbus Board of Education to submit a plan. We have done that, and we will continue to comply with the Court's orders.

I do not believe any proceeding that has gone on for four years with the type of expertise that the Plaintiffs have and the talent they have that they have demonstrated in this courtroom, professionally and through experts, that they take the position that they have no responsibility to submit a plan. That makes no sense to me, and I think they should be required to do it, and I think they should face up to what do test decisions mean and what do they mean.

I thank you for your Honor's patience.

THE COURT: Mr. Michael, the Court notes that this morning you caused to be filed a motion for supplemental finding. Would you wish to speak to that?

MR. MICHAEL: Very briefly, if I may, your Honor, to supplement what Mr. Porter has already said. I don't

wish to belabor the points Mr. Porter has already made, and I believe our motion speaks to the same issue.

A motion was filed on the same basis, that is [24] that the Dayton, Omaha and Milwaukee cases require this Court to go further in its fact finding than an application of presumption, which we feel is how the Court has gone to systemwide remedy in its plan.

I think that is reflected in the Court's July 7 order, on page five, where it stated, and I quote, "Systemwide liability is the law of this case pending review by the Appellate Court. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which Defendants owe no responsibility. This they did not do."

I would respectfully suggest that the Dayton, Omaha and Milwaukee cases do require this Court to make specific findings outlining the contemporary fashions of the present city school system of past segregative acts.

This Court did recognize the difficulty of making such determination in those portions of the March 8th order that Mr. Porter has already recounted.

I think the Dayton case was foreshadowed by some of the language in the case pending, specifically page 189 of Keyes, where the Court stated, "In Swann we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of finding de jure segregation warranting judicial intervention."

I think what the Court has said in Dayton is that [25] this Court must make specific findings, findings that that relationship in specific areas in the city, specific school systems has not become so attenuated.

To put it another way, I think Dayton suggests that while Keyes permits an influence of segregative intent insofar as the remainder of the school system is concerned,

that Dayton demands that this Court examine the present composition of the remainder of that system and determine whether or not that intent is actually the cause of the effect or the present racial imbalance.

I think the language regarding the fruit of the poisonous tree, as referred to at page 10 of the Dayton Slip opinion, allows us to draw that kind of conclusion.

Thank you.

THE COURT: The Court is going to take a ten-minute recess.

(Short recess.) [26]

THE COURT: Mr. Lucas, you may argue.

MR. LUCAS: May it please the Court, I am not sure if the Defendants are relying on this argument at all, and it was mentioned, for whatever reason, they recited that the Court in Dayton set a ratio in the assignment of pupils, racial ratio. I might simply point out that although it was a major point of argument in the Defendants' briefs in the Supreme Court that the Court had set a ratio, and it was our response that that was simply a starting point and a flexible one at that.

The Supreme Court expressed no disapproval of the flexible ratio set by the District Court in Dayton despite a major dispute about that issue.

Going on to the rest of the Defendants' argument, I think it is safe to say that what the Defendants are suggesting here is, A, a retrial of the case, and B, an analysis of the Columbus Public Schools that requires the Court to treat it as 172 systems instead of one system with a number of schools.

Perhaps it is appropriate to discuss a little bit about what the Supreme Court said in Dayton and did not say. The Supreme Court noted in Dayton that the case was important obviously because of the important constitutional issues raised, but it was every bit as important for the issues raised as a proper allocation of functions between the District Court and the appellate courts.

Very simply, the Supreme Court's opinion, I think, may be fairly characterized as a critique of a District Court opinion which did not reach a number of issues and [27] which used a phrase which the Court of Appeals, the Supreme Court, and the parties found to be ambiguous, and that is the human violation phrase. It seemed to mean different things to the District Court at different times and different things — different possibilities as pointed out by the Supreme Court. [28]

The Supreme Court makes reference to the duty of District Courts, no matter how difficult, to make the kind of detailed findings of fact which this Court made in its opinion in March. It points out that the District Court in Dayton simply did not make those findings.

It then goes on to discuss the opinion of the Court of Appeals, and it notes that while the Court of Appeals gave a far more detailed analysis of both the historical facts and some of the present facts and expressed some concern about a variety of areas of constitutional concern usual in school cases, such as on page ten, serious questions as to staff assignments, school construction, break structure, realization, transfer and transportation, the Supreme Court pointed out in what I could only describe as frustration that the Court of Appeals had failed to resolve those issues.

It said that not so much as a criticism of the lower courts, but rather, to indicate it is the sort of situation where everybody assumes that the other person knew what they were talking about, and perhaps the language of both courts, in the words of the Supreme Court was stated in too conclusionary terms.

That is not the situation we have here. What the Supreme Court sent the Dayton case back for in major pressure was to determine what constitutional violations there were in the first instance. As was pointed out in their opinion, all parties conceded that if you conceived [29]

of the violations as being only the three as articulated in the Petitioner's brief in the Supreme Court and summarized by the Court in its opinion, that no one said that standing alone was enough.

As Mr. Justice Rehnquist pointed out, however, there are a number of other factors in the record. In fact, there are quite a volume of facts in the record which were not decided by the District Court in some instances and not resolved in any instance by the Sixth Circuit, and that there should be further consideration of that matter.

The defendants argue that there needs to be a concern by this Court with matters in the Dayton case. The Dayton case says that there must be new findings and conclusions as to violations in light of Washington versus Davis and Village of Arlington Heights.

This Court considered both of those cases and made its findings, conclusions in consideration of the principles expressed in both of those opinions. So that is an inquiry this Court has already accomplished because it had an opportunity to do so, those opinions having been rendered prior to its decision.

The Supreme Court noted in Dayton that there was confusion, and I quote, as to the, "applicable principles to be applied and confusion as to the appropriate relief."

The Supreme Court said that where there was system-wide impact, there should be systemwide remedy. There is nothing in any of the Supreme Court decisions [30] that says the Court must make fact findings as to each and every school. That indicates that that school is solely affected in its racial composition by an act of discrimination.

There is no law that says that a Court must find that the sole cause of racial composition of a school is racial discrimination on the part of the Board of Education.

Keyes, it is still good law; it is cited and relied upon by the Court. As a matter of fact, on page 14 of the Slip Opinion, the Court says, "if there has been a systemwide

impact, then, there may be a systemwide remedy," and it cites Keyes at page 213.

Now, the Court very well could say if that were its intention, that there must be shown to have been an impact on each school in the system. [31]

As this Court noted and as other courts and the Supreme Court have noted, you cannot have a black school without a white school. There are reciprocal situations. There are reciprocal effects from constitutional violations.

The Defendants make a point about certain schools located at the edge of the district. Well, I don't see anything in Dayton, Milwaukee, or Omaha that says Swann is not good law, and if Swann, as this Court noted in its opinion, the Court said that the location of schools at the furthest edge of the district, concentration of black schools in the inner part of the district may well be a segregative tool. So the fact that we have Alpine School at the edge of the district as a part of an overall pattern of school construction which more often than not opened as black or white, it is not an indication that that school is unaffected by the racial discrimination.

At page 61 of this Court's opinion, the Court talked about, and by picking a few of these out, I don't mean to indicate these are the only references. Let's start at page 60.

The Court pointed out that the assignment of teachers and administrators in the Dayton Schools have negatively influenced the racial character of the schools. It didn't say this only happened in one year. It didn't say this happened only in the remote past. It said that it has happened. [32] It said that recent acts have lessened the sting of the practice that have not served to substantially removed the evil it helped to create. I think that demonstrates that this Court has considered the present condition in schools, the present pattern in schools, and whether or not there is a system of impact from the discrimination practice by the Board of Education.

At the end of page 61, the Court points out that the Defendants have not proved that the present racial composition of the Columbus Public Schools would have occurred even in the absence of their segregative acts of admission cited in the 1977 Supreme Court case. That is *Mount Healthy School District, Board of Education versus Doyle*.

The Defendant's argument requires this Court to assume or to require a burden of proof on its self and that the Plaintiffs — that the Plaintiffs create a time machine. The Defendants are saying, "Okay, assuming that the Court is right, that we committed all of these segregative acts and the schools are still around and that the pattern of construction continued, the pattern of assignments continued, the pattern of the faculty assignments continued." Nevertheless, the Court is required to go back and recreate the world. We must start over and assume that those things hadn't been done, and then go forward and say it would still be that way today. That is an assumption the Defendants make. We submit that logic, whether it be from tort law or any [33] other law, indicates that where the Defendants have done certain actions and they have certain demonstrable effects today and that there is a pattern to those effects within a system operated not as a series of independent republics, but a series of public schools operated by the same administrative unit, that those schools as they exist today are a product of that discrimination. If we have to go backwards in time and say that that discrimination did not exist and, therefore, we go forward and say some other forces would have made it happen this way anyhow, it seems to me that that burden is on the Defendants in any case to establish that sort of condition. They had the opportunity, as this Court pointed out, to show that these schools were the product of some other forces, that the pattern of observed racial discrimination in this system was not a product of the

discriminatory acts of the Board. They simply did not meet that burden. [34]

We agreed with the Court that the principles have not changed, that the Court has made the analysis required, and the Defendant has been given the opportunity that is set forth in *Keyes* to demonstrate that somehow or another, areas of the system were not affected by the original discrimination or the continuing pattern of discrimination.

I don't think it is unusual in school desegregation law for the defendant to come into court after each and every decision and claim that somehow or another, the new decision means that they are exculpated or should not be required to integrate their schools either completely or as much as they have already done or propose to do. I think that is a consistent phenomena. At the time that *Swann* was before the Supreme Court, many, many school districts and the number of courts said, "We will wait to see what the Supreme Court does in *Swann*." The school boards argued that *Swann* would be controlling and would decide the case.

After *Swann* came out, each and every school board said that, obviously, *Swann* did not apply to it because of some perceived difference in the facts. I think that the circumstances here are very similar. The school board is going to take — I don't fault them, I think this is a function that lawyers often engage in — but every school board will be in its respective court saying that, somehow or another, the new decision means that the Court has abandoned busing, and the Court now requires proof as [35] to every school building, that somehow or another the desegregation should not take place. I think that the Court is correct, that the fundamental principles have been reaffirmed as Mr. Justice Brennan noted in his separate concurring opinion, and that this Court has conducted the requisite inquiry.

The burden is clearly, we think, on the Defendants to demonstrate why any school should be left out of the plan as the Swann requirements dictate. Once the Plaintiffs have shown a substantial amount of segregation in the district affecting schools in the district, the burden does not shift under *Keyes*, which I think is simply reaffirmed by the court on *Dayton*, to the Defendants to meet the burden of proof as to the intentional impact, as to the remedial effects, and any other matter that would cause a school to be left out of a particular plan of desegregation.

The language of the Supreme Court with regard to incremental effect, I think, is not to be read as requiring some sort of scale to be set in the Court and to measure the number of children or each child and the effect on them. I think it is instructive to look at the Supreme Court's decision the same day in *Detroit*. There is no requirement in the *Detroit* case that the Court go back and find out if the achievement level of each black child has been affected or if the achievement level of black children in terms of their reading test scores has been affected. The Court simply notes that there was testimony that within [36] the system, was a pattern of underachievement in terms of reading test scores that should be dealt with in terms of remedial orders of the Court or that it was appropriate for the remedial order of the Court to deal with.

The logical extension of the Defendants' argument, and read in light of the kinds of relief set forth in *Detroit*, will require a finding as to each child before that child could be involved in a reading program or before it could be involved in the counseling services or before it could be affected by the in-service work with teachers or the changes in the testing program that are required by the District Court and affirmed by the Supreme Court in the *Detroit* case.

I think it is clear that the word "system" is still with us. It is clear that the word "affect" is still with us, and it

is clear also that the Supreme Court has not required either a time machine or the thought of theoretical recreation of the world that the Defendants would have this Court do.

This Court has had the advantage of the *Arlington Heights* decision, *Washington versus Davis*, and has reviewed the facts. It has found not simply three optional schools in what the Supreme Court characterizes vague language as having some segregative effect in the past. It has found not just statistical racial imbalance in the school system; it has found a whole series of detailed facts indicating a dual system in 1954. Certainly, there were a smaller number of schools at that time [37] representing the black population in the community of that period. The fact that the number of schools may have been smaller does not change the violations or the duty of the Defendants. A dual system is precisely that, a dual system. It affects all schools within that system.

The Court's findings and examples of the patterns and types of violations, the types of action and inaction on the part of the Defendants is the sort of findings that the Supreme Court has indicated should have been made one way or the other, either in favor of the Plaintiffs, in favor of the Defendants by the District Court in *Dayton*. That is not as much a criticism of that Court, but simply this Court in the way it sought to proceed in this action dealt with these matters in great detail. I think the parties submitted large volumes of proposed findings to the Court, and, hopefully, they were some assistance to the Court in coming up with its detailed comprehensive opinion.

The Defendants have suggested somehow or another that there is some great wrong being done to them because Plaintiffs haven't presented a plan, and I must confess that is one of the more novel arguments I have confronted in a school case. [38]

While we appreciate the kind words and the compliments that have been passed out by Mr. Porter with

respect to the witnesses we have had and the evidence we have presented, the Supreme Court has made it very clear to district courts that they must — not that they may — but they must in the first instance look to school boards for desegregation plans.

I have a suspicion that had we been in here with a plan and this plan had been adopted, Mr. Porter would have been the first man in the Sixth Circuit to complain that the Court had not given the school board its required first bite at the apple.

There are plans before the Court, some of which do a substantial amount of desegregation, and one of which prepared by the staff of the board of education and adopted by some of the members of the board, goes a long way to disestablishing the pattern of desegregation in Columbus.

I think that we certainly don't have the wealth that was suggested by a reporter in the hall to provide all of the services to the system in terms of a plan. If the Court deems, after making a determination of the adequacy or inadequacy of the plans, that it would like the assistance of the Plaintiffs or any of their experts as to any area of the plan or the plan as a whole, we will endeavor to be of every assistance to the Court that we can be.

However, we think Swann commands this Court to rely on the board in the first instance. The Defendants have [39] suggested supplemental findings. I have covered that, I think, in major part. What the Defendants really want is another shot at the same arguments that have been advanced at the trial.

The Court will recall that a great deal of the defense of the Defendants in this case was right in line with their argument today about Dayton, that there were no present effects, that the violations in the past had become attenuated. If the Court would simply review their proposed findings, they will see many of these arguments are articulated and articulated very well.

There were arguments that housing patterns had certainly overcome and subsumed whatever the board might or might not be doing. It was argued that they were the sole cause of what had gone on.

I think that basically, the Defendants' argument is that you must show that desegregation or discrimination was the sole cause of the racial composition of the schools today. I don't think that is a legal standard. I think all that is required is that the present condition of the segregation in the district has been affected by factors of racial discrimination in violation of the Fourteenth Amendment.

For the Court to make supplemental findings concerning its original opinion, it simply is in disguise a motion for reconsideration of that opinion. Certainly, this Court in making whatever determination it makes on the remedy will have in mind all of the applicable law, [40] all of the applicable decisions and will deal with it at that time.

To follow the procedure they suggest, we would adjourn these remedy hearings, and perhaps submit new briefs and the Court would issue supplemental findings, rearguing the original case, and thereafter, there would be the development of plans.

We suggest that is but a transparent device to delay any possibility of desegregation, not only for September, but for thereafter.

Thank you.

THE COURT: Mr. Ross?

MR. ROSS: Your Honor, the original Plaintiffs concur with the intervening Plaintiffs and do feel that this Court has complied with those standards set by the Supreme Court in the Dayton case, and that the Court has shown there to be a reciprocal effect of the violations pointed out in its findings throughout the Columbus School System.

THE COURT: Mr. Porter, you may reply.

MR. PORTER: Your Honor, I only wish to make this additional comment: I recognize it is possible to make the

argument that Mr. Lucas has made with respect to the Dayton case. I don't read it the way he does, but that may be expected. However, the Dayton case did not stand by itself. There is also the Omaha and Milwaukee cases and they specifically dealt with situations where there in the one instance by the District Court and affirmed by the Court of Appeals, and in the other, a reversal by the [41] Court of Appeals, were findings by the respective circuits that there was systemwide — there had to be a systemwide remedy, and I think in the words of the Omaha case, root and branch.

They dealt with a number of factors that were found to be violations of the Constitution and the systemwide remedies were put into effect or initiated, and in both instances, the United States Supreme Court two weeks ago pointed out that there had to be a determination made of what the system would be but for the — at the present time, but for these acts.

I don't see how, personally, those cases could be ignored and we would respectfully renew our motion or request the Court to sustain our motion in this instance.

THE COURT: Mr. Michael?

MR. MICHAEL: I would join in Mr. Porter's comments. I have nothing further, your Honor.

THE COURT: I suppose that in the time that I have occupied this bench, I have had to make some decisions which are weighty and involved some very important considerations, but of all those, the decision that these fine arguments of counsel have pointed out cause me to now make perhaps the most weighty that I have ever had to make, but nevertheless, my oath of office compels me to make this kind of decision. [42]

It has been my attitude throughout the course of this litigation that counsel for the litigants and the community should clearly understand what the Court does, what the Court does not do and the reasons therefor. So

that if the Court's judgment has been erroneous, and I might say this Court is far from infallible, that erroneousness will be clear for all to see, and it is with that spirit that I rule on this matter right now. The fact that I rule on it now without going in and reading the law books again does not mean that it is a knee jerk sort of decision, but rather, a decision made after reading and rereading, and reading and rereading the Dayton case, the Omaha case and the Milwaukee case.

I simply do not agree with the position taken by the Defendants and respect them for calling these matters to the Court's attention. That is their duty and they should not have operated otherwise, but I simply do not agree and it will not help us to have further comment from me in this regard. I act quickly so that the hearings that we expect to have the rest of this week will be with the knowledge of the Court's position concerning the Dayton case.

So therefore, the Court respectfully must say to all who are interested in this matter that it finds the defense motions urged this morning are not well taken and they are denied.

* * * * *

JOSEPH L. DAVIS

being first duly sworn,
as prescribed by law, was examined
and testified as follows:

DIRECT EXAMINATION BY MR. PORTER

[54] Q. [By Mr. Porter] Would you state, Dr. Davis, your full name and your present position with the Columbus Public School System?

A. Joseph L. Davis, Interim Superintendent of Schools.

* * * * *

[100] Q. Dr. Davis, I will hand you what has been marked as Defendant's Exhibit H and ask you if that is the amended plan that was adopted by the Columbus Board of Education on July 5th and submitted to this Court on the 8th of July?

A. Yes. It appears to be.

Q. What did the amended plan or the amendments do to the plan that we filed on July 10th? What are the differences, please?

A. The most significant difference was in the pupil [101] distribution component of the July 10th plan which sharply reduced the number of pupils who would be involved involuntarily in the pupil distribution component, I think, by the order of some 90 percent.

Then, the educational program and the support services, the staff development, all of the other components were scaled back accordingly.

Transportation, for example, instead of requiring 250 buses, an estimate of 250 for the involuntary component, that was reduced to 30.

The costs also reduced in a commensurate fashion.

Q. Directing your attention to page 12 of the amended plan, or exhibit H, I will ask you if one finds in the amended plan a statement as to the guidelines for developing the distribution plan for students, whether that is set forth?

A. Yes, it is.

Q. Would you read it please?

A. The basic guidelines followed in developing a distribution plan for students to meet the requirements of the court order was to eliminate all racially identifiable black schools cited as instances of guilt in the Court's opinion and order. If the student population of the school was greater than 47 percent black, it was considered to be racially identifiably black. The citywide ratio used in this plan was 32 percent black and 68 percent nonblack.

[102] Q. Then, in the amended plan, am I correct that there then appears under the involuntary section, there appears the schools that are so identified and the pairings and clusterings that were made?

A. Yes, I do note that I have two planning sheets Mr. Porter. It is in that very section, and they appear to be — it appears to be complete. There are just two extra blank sheets tucked in. That begins at page 15.

Q. And it continues then through page 29?

A. That is correct.

Q. And those schools were identified by the planning committee or it is your understanding that the schools were identified by the planning committee for the planning committee by counsel; is that correct?

A. That is my understanding.

* * * * *

**PLAINTIFFS'
EXHIBIT**

**No.
11**

**COLUMBUS PUBLIC SCHOOLS
Columbus, Ohio**

**HEW Civil Rights Survey
1975-76 School Year
October 8, 1975**

PUPIL ENROLLMENTS

<u>School</u>	<u>Non-Minority</u>	<u>Black</u>	<u>Span. Amer.</u>	<u>Asian</u>	<u>Amer. Indian</u>	<u>TOTAL</u>	<u>% Non-White</u>
Briggs	229	44				273	16.1
Brookhaven	1,384	206		7		1,597	13.3
Central (incl. Occup.)	855	369	1			1,225	30.2
East	13	1,312			1	1,326	99.0
Eastmoor	871	497	1	5		1,374	36.6
Independence Jr-Sr	790	108	2	2		902	12.4
Linden	151	1,292				1,443	89.5
Marion-Franklin	806	632	2			1,440	44.0
Mifflin Jr-Sr	566	949				1,515	62.6
Mohawk Jr-Sr	213	565	1			779	72.7
North	1,214	266	2	7		1,489	18.5
Northland	1,568	110		4		1,682	6.8
South	1,000	815	1	3	1	1,820	45.1
Walnut Ridge	1,919	141	4	9		2,073	7.4
West	1,558	294		3		1,855	16.0
Whetstone	1,650	44	8	15		1,717	3.9
Evening (under 21)	90	102	8	5	1	206	56.3
Adult Day (under 21)	31	74	1	4		110	71.8
	14,908	7,820	31	64	3	22,826	34.7
Barrett	896	119	1		2	1,018	12.0
Beery	226	397			1	764	70.4

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HEW Civil Rights Survey (Continued)

School	Non-Minority	Black	Span. Amer.	Asian	Amer. Indian	TOTAL	% Non-White
Buckeye	762	16	3			781	2.4
Champion	11	497				508	97.8
Clinton	1,016	83	4	6		1,109	8.4
Crestview Jr.	496	108	2	7		613	19.1
Dominion	723	77		6		806	10.3
Eastmoor Jr	309	277	5	3		594	48.0
Everett	610	218		3		831	26.6
Franklin	38	525		3		566	93.3
Hilltonia	595	224	1	1		821	27.5
Indianola Jr	398	166		6		570	30.2
Johnson Park	696	278	5	2		981	29.1
Linmoor	37	811				848	95.6
Medina	736	230	1	5		972	24.3
McGuffey Jr	401	323		2		726	44.8
Monroe	5	349				354	98.6
Ridgeview	734	27	5	10	3	779	5.8
Roosevelt	194	495		2		691	71.9
Sherwood	759	131	1	5		896	15.3
Southmoor	257	394		1		652	60.1
Starling	620	151	1	1		773	19.8
Wedgewood	662	36				698	5.2
Westmoor	822	91	1	2		916	10.3
Woodward Park	1,322	41		7		1,370	3.5
Yorktown	602	45	4	2		653	7.8
	13,927	6,249	34	74	6	20,290	31.4
Alpine	512	5		9		526	2.7
Alum Crest	28	107	1			136	79.4
Arlington Park	103	402				505	79.6
Avondale	478	5		2		485	1.4
Barnett	198	23		1		222	10.8
Beatty Park	6	339				345	98.3
Beaumont	329	38				367	10.4
Beck	293	52		1		346	15.3
Bellows	245	29				274	10.6
Berwick	135	145				280	51.8
Binns	487	4		2		493	1.2
Brentnell	16	378				394	95.9

HEW Civil Rights Survey (Continued)

School	Non-Minority	Black	Span. Amer.	Asian	Amer. Indian	TOTAL	% Non-White
Broadleigh	263	148	3	8		422	37.7
Burroughs	609	76		1		686	11.2
Calumet	250	41		9		300	16.7
Cassady	66	552				618	89.3
Cedarwood	573	11		2		586	2.2
Chicago	310	75	3			388	20.1
Clarfield	65	353				418	84.4
Clinton Elem.	552	9	2	5		568	2.8
Colerain	90		2	2		94	4.2
Como	427	26	2	1		456	6.4
Courtright	325	164	1	6		496	34.5
Cranbrook	373	28	26	40		467	20.1
Crestview Elem.	320	39		2		361	11.4
Dana	502	4				506	.8
Deshler	280	522		4		806	65.3
Devonshire	563			1		564	.2
Douglas	42	302	5			349	88.0
Duxberry Park	60	464	1			525	88.6
Eakin	339	80	1	1		421	19.5
East Columbus	194	256				450	56.9
Eastgate		345				345	100.0
Easthaven	574	59		6		639	10.2
East Linden	372	175	2			549	32.2
Eleventh	49	340				389	87.4
Fair	16	427				443	96.4
Fairmoor	425	37	3	2		467	9.0
Fairwood	25	492		1		518	95.2
Fifth	213	8		8		229	7.0
Forest Park	489	7	1	4		501	2.4
Fornof	176	7				183	3.8
Franklinton	202	69			3	274	26.3
Garfield		225				225	100.0
Georgian Hts	464	1				465	.2
Gettysburg	296					296	0
Gladstone	10	398				408	97.5
Glenmont	331	8				339	2.4
Hamilton	6	480				486	98.8
Heimandale	143	80				223	35.9

HEW Civil Rights Survey (Continued)

School	Non-Minority	Black	Span. Amer.	Asian	Amer. Indian	TOTAL	% Non-White
Heyl	503	93				596	15.6
Highland	192	386	2	3		583	67.1
Homedale	157	6		6		169	7.1
Hubbard	339	6				345	1.7
Hudson	57	276				333	82.9
Huy	559	12		1		572	2.3
Indianola Elem.	352	76	2	3		433	18.7
Indian Springs	380	6	1	1		388	2.1
Innis	391	149	3	2		545	28.3
James Rd	257	11		4		272	5.5
Kent	47	431		1		479	90.2
Kenwood	284			10		294	3.4
Kingswood	295	29	6	13		343	14.0
Koebel	105	291	1			397	73.6
Leawood	602	62		5		669	10.0
Lexington	7	219				226	96.9
Liberty	427	6		3		436	2.1
Lincoln Park	320	208	3			531	39.7
Lindbergh	310	7		2		319	2.8
Linden	550	246		5		801	31.3
Linden Park	277	150	1	2		430	35.6
Livingston	220	486	2			708	68.9
Main	26	373				399	93.5
Maize	409	11		2		422	3.1
Marburn	254	8	5	5		272	6.6
Maybury	442	6				448	1.3
McGuffey Elem.	325	148	1	2		476	31.7
Medary	492	21		4		517	4.8
Michigan	293	15	1			309	5.2
Milo	19	243				262	92.7
Moler	195	249		3		447	56.4
North Linden	367	25	1	2		395	7.1
Northridge	439	7	1	1		448	2.0
Northtowne	345	19		5		369	6.5
Oakland Park	248	4	3	3		258	3.9
Oakmont	405	27	3	2		437	7.3
Ohio	78	492		1		571	86.3
Olde Orchard	562	4		11		577	2.6

HEW Civil Rights Survey (Continued)

School	Non-Minority	Black	Span. Amer.	Asian	Amer. Indian	TOTAL	% Non-White
Parkmoor	352	24		3		379	7.1
Parsons	310	21	1			332	6.6
Pilgrim	20	272				292	93.2
Pinecrest	433	48	3	8		492	12.0
Reeb	392	60	1		4	457	14.2
Salem	512	12		2		526	2.7
Scioto Tr.	349			2		351	.6
Scottwood	288	184				472	39.0
Second	295	79	2	2		378	22.0
Shady Lane	377	23		3		403	6.5
Sharon	281	7				288	2.4
Shepard	7	168				175	96.0
Siebert	356	2				358	.6
Smith Rd	209	154		2		365	42.7
South Mifflin	83	522				605	86.3
Southwood	583	7	1		2	593	1.7
Stewart	203	131				334	39.2
Stockbridge	387		1			388	.3
Sullivant	80	275				355	77.5
Thurber	286	86	1	3		376	23.9
Trevitt		328				328	100.0
Valley Forge	421	10	2	4		437	3.7
Valleyview	225	1		2		228	1.3
Walden	431	17		8		456	5.5
Walford	273	3				276	1.1
Watkins	44	229				273	83.9
Wayne	220	22				242	9.1
Weinland Pk	318	229	2	1		550	42.2
West Broad	867	17	1			885	2.0
Westgate	457	25				482	5.2
West Mound	533	86				619	13.9
Willis Pk	316	26	2	1		345	8.4
Windsor	8	493				501	98.4
Winterset	708	4		16		728	2.7
Woodcrest	493	22				515	4.3
	35,471	16,230	106	277	9	52,093	31.9

HEW Civil Rights Survey (Continued)

School	Non-Minority	Black	Span. Amer.	Asian	Amer. Indian	TOTAL	% Non-White
Alexander							
Graham Bell	102	20				122	16.4
Clearbrook	47	29				76	38.2
Neil Ave.	161	27				188	14.4
Third St.	86	43			1	130	33.8
Bethune Center	1	73				74	98.6
	397	192	0	0	1	590	32.7
Senior High	14,908	7,820	31	64	3	22,826	34.7
Junior High	13,927	6,249	34	74	6	20,290	31.4
Elementary	35,471	16,230	106	277	9	52,093	31.9
Special Schools	397	192			1	590	32.7
	64,703	30,491	171	415	19	95,799	32.5
Miscellaneous (Home Instruction, Upham Hall, Part Time, etc.)						199	
						95,998	

Excerpt from
 Plaintiffs' Exhibit No. 62
 "The 1958-59 Study of the Public School
 Building Needs of Columbus, Ohio,"
 Bureau of Educational Research,
 Ohio State University,
 July, 1959

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* * * * *

Elementary School Recommendations

* * * * *

11. IT IS RECOMMENDED that a primary center (elementary school grades K-3) having seven classrooms and one kindergarten room be constructed on the board-owned Sixth Avenue site, and that the site be expanded.

The elementary school pupil density of the area bounded by High Street on the west, Chittenden Avenue on the north, the New York Central Railroad on the east, and Fifth Avenue on the south has increased rapidly in the last two years. Although eight classrooms were added to the Weinland Park Elementary School in 1957, more classrooms must be provided.

* * * * *

Excerpts from
 Plaintiffs' Exhibit No. 63
 "The 1967-68 Study of the Public School
 Needs of Columbus, Ohio," Educational
 Administration and Facilities Unit,
 College of Education, Ohio State
 University, March, 1969

* * * * *

BACKGROUND INFORMATION

Population Growth

1. The population of Columbus increased by 69,814 between 1940 and 1950. From 1950 to 1960 population grew from 375,901 to 471,316, an increase of 95,415. The Columbus Area Chamber of Commerce estimates that population in 1968 is 581,833; indicating that the rate of growth for Columbus is higher in the 1960's than it was in the 1950's. (See Tables 1 and 2).
2. Only three of Ohio's other large cities gained in population between 1950 and 1960. Dayton grew by only 18,000; Akron, by only 16,000; and Toledo, by only 14,000. Ohio's four other large cities actually lost population between 1950 and 1960. Cleveland lost 39,000; Canton, 3,000; Youngstown, nearly 2,000; and Cincinnati, more than 1,000.
3. Since 1870 Franklin County's population has grown faster than either the total Ohio population or that of United States. Much of this growth has been in Columbus. (See Table 3).
4. In discussing the Columbus area in the 1980's, a report entitled *The Columbus Area Economy, Structure and Growth, 1950 to 1985*, which was prepared by the Bureau of Business Research, The Ohio State University, for the Comprehensive Regional Plan, estimates that some 1,300,000 people may be residing in the Columbus area. The report also states that the population of Franklin County will be almost as large as that of Cuyahoga County today, and that Columbus will undoubtedly surpass Cleveland in population (approximately 825,000 in 1967).

5. Short-range population estimates for Columbus are extremely difficult to prepare due to rapid change in boundaries resulting from a vigorous annexation program. This explains why Chamber of Commerce projections are prepared on an annual basis.
6. Table 4 provides actual and estimated summaries of employment, population, labor, and dwelling units for 1950 through 1985. Figures 4 and 5 show the existing and proposed general locations for housing, recreation, employment areas, activity centers, and major streets, highways, expressways, and freeways for 1968 and 1985.

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Table 1

POPULATION OF COLUMBUS BY DECADES

1900 - 1960

Census Year	Population	Increase	
		Number	Percent
1900	125,560	37,410	42.4
1910	181,511	55,951	44.6
1920	237,031	55,520	30.6
1930	290,564	55,533	22.6
1940	306,087	15,523	5.3
1950	375,901	69,814	22.8
1960	471,316	95,415	25.4

Source: Census Data

Table 2

POPULATION OF COLUMBUS BY YEAR

1960 - 1968

Year	Population
1960	471,316
1961	478,472
1962	497,774
1963	512,881
1964	531,994
1965	540,961
1966	559,389
1967	573,280
1968	581,883

Source: Census Data and Columbus Area Chamber of Commerce

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Table 3

TOTAL POPULATION, COLUMBUS, FRANKLIN COUNTY, OHIO AND THE UNITED STATES

1900 - 1960

Year	Columbus	Franklin County	Ohio	United States
1900	125,560	164,460	4,157,545	75,994,575
1910	181,511	221,567	4,767,121	91,972,266
1920	237,031	283,951	5,759,394	105,710,620
1930	290,564	360,841	6,646,697	122,775,046
1940	306,087	388,712	6,907,612	131,669,275
1950	375,901	503,410	7,946,627	150,690,361
1960	471,316	682,962	9,706,397	178,464,236

Source: Census Data and Regional Plan Reports

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Births and Birth Rates

1. The birth rate for Columbus has exceeded the state-wide birth rate during each of the last thirteen years.
2. The number of annual births peaked at 13,500 in 1959 and has decreased slightly each succeeding year to a total of 10,245 births in 1967.
3. During the six-year period from 1956 through 1961, inclusive, there were 76,787 births to Columbus residents. During the six-year period from 1962 through 1967, inclusive, there were 68,708 births to Columbus residents. During the six-year period 1950 through 1955, inclusive, there were 59,127 births to Columbus residents.
4. Many demographers are predicting an upturn in future birth rates due to the large numbers of young people reaching the age for marriage.

Geographical Growth

1. From January, 1954, to January, 1968, the area of Columbus increased from 41,735 square miles to 114.056 square miles, or more than 72 square miles.
2. Table 7 includes all annexations to Columbus from January, 1964, to March, 1968, and Table 6 includes an annual summary of such annexation activity. From March, 1968, to November, 1968, eight areas involving approximately 1600 acres were annexed to the City of Columbus. The total area of the City of Columbus as of November, 1968, is 117.88 square miles.
3. Numerous petitions involving several hundred acres for possible annexation to the City of Columbus have been filed with the Franklin County Commissioner.

4. From March 16, 1963, to March 11, 1968, inclusive, 66 areas were annexed to the City of Columbus. Four of these areas were already in the Columbus City School District. Of the remaining 62 areas, 53 had not been transferred to the school district (see Table 8).

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5. During much of the past four years, the State Board of Education imposed a moratorium on school district transfers. Such a policy has increased the difficulty of planning for new buildings and other school facilities. On June 11, 1965, eleven areas that met the published transfer criteria of the State Board of Education were requested for transfer to the Columbus City School District. Nine of the proposed transfers were refused. The two areas transferred included 23 acres in Truro Township and the tax-exempt property surrounding the Columbus workhouse. Since 1965 the only areas transferred to the Columbus City School District are as follows:

a. A small area near McNaughten Road and East Main Street was approved for transfer by the voters of the Reynoldsburg Local School District and subsequently was approved for transfer by the State Board of Education.

b. In 1968, the Worthington and Columbus boards of education agreed upon the transfer of approximately 2,000 acres to the Columbus City School District. This area was approved by the State Board of Education for transfer effective in September, 1968.

6. The Columbus City School District is suffering substantial loss due to the relocation of families to areas of Columbus that have not been transferred to the Columbus City School District. If such a policy continues

the entire school district will be encircled and unable to benefit from the expected growth of the future.

* * * * *

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Table 6

SUMMARY OF ANNEXATIONS FROM 1954 - 1967

Year	Number of Annexation	Acreage	Square Miles	Accumulated Total Square Miles
1954	64-70 (7)	1,816.59	2.84	44.57
1955	71-92 (22)	6,291.45	9.83	54.40
1956	93-127(35)	7,682.94	12.26	66.66
1957	128-144(17)	11,613.12	18.26	84.92
1958	145-153(9)	1,013.35	1.58	86.50
1959	154-164(11)	1,612.12	2.52	89.02
1960	165-172(8)	1,397.35	2.18	91.20
1961	173-178(6)	982.75	1.54	92.74
1962	179-186(8)	309.11	0.48	93.23
1963	187-192(6)	705.23	1.10	94.33
1964	193-202(10)	1,361.05	2.13	96.457
1965	203-220(18)	5,285.87	3.20	104.716
1966	221-234(14)	4,243.63	7.08	111.792
1967	235-247(13)	1,462.24	2.28	114.056

Total Annexed Area 1954 to 1967, Inclusive:

67.28 Square Miles

Source: City Planning Commission, Columbus, Ohio

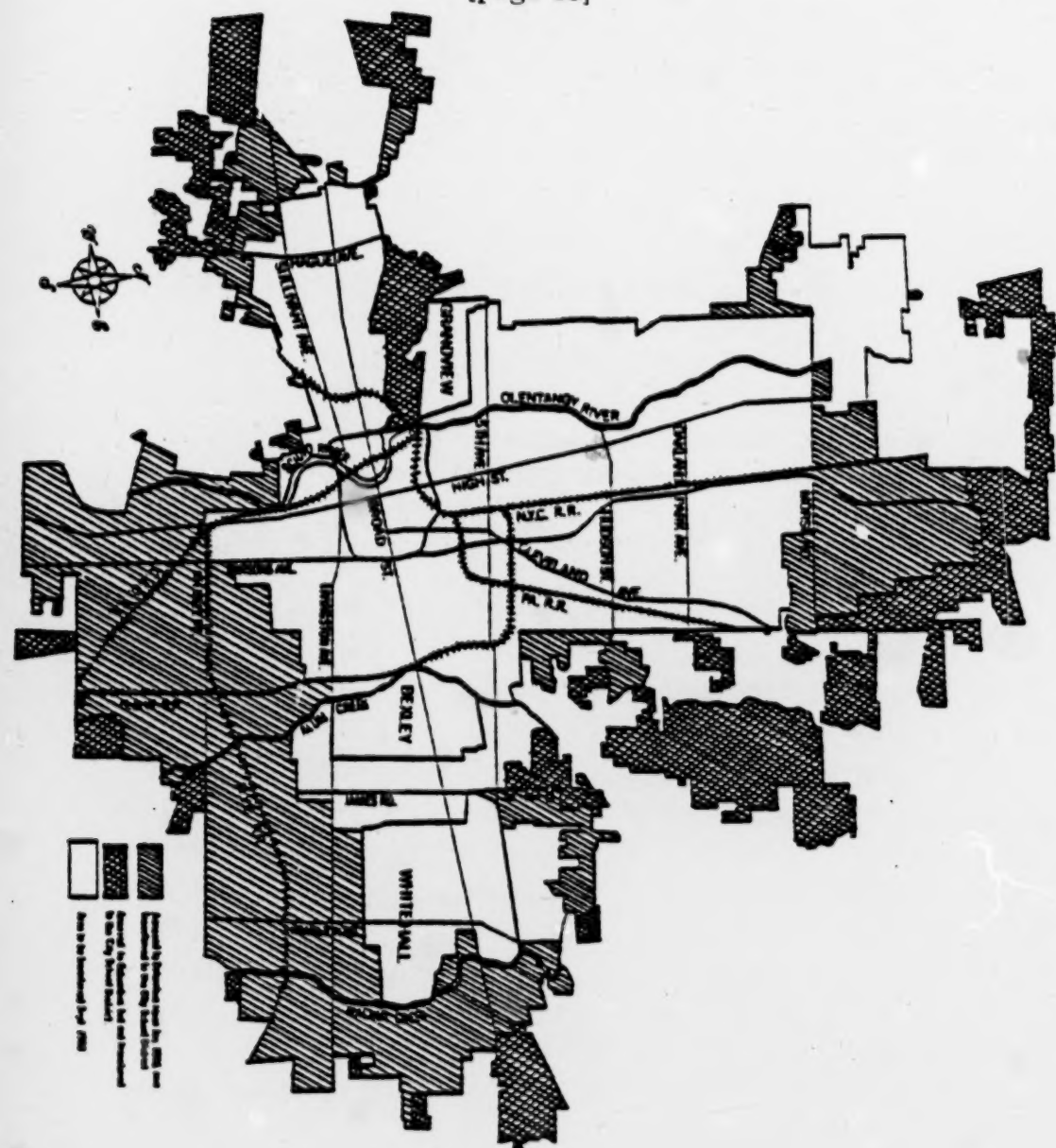


Figure 1

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Table 7

ANNEXATIONS TO COLUMBUS FROM JANUARY, 1954 TO MARCH, 1968

No.	Date	Ordinance Number	Township	Acres
64	1- 4-54	2-54	Franklin	45.11
65	9-13-54	1169-54	Sharon	38.00
66	9-13-54	1168-54	Franklin	19.24
67	11- 8-54	1481-54	Clinton	93.33
68	11-15-54	1492-54	Truro	1,250.00
69	11-22-54	1530-54	Clinton	49.70
70	11-22-54	1529-54	Clinton	321.21
71	1-10-55	38-55	Marion	44.15
72	1-31-55	121-55	Blendon, Clinton Sharon, Mifflin	518.00
73	2-14-55	241-55	Clinton	14.80
74	2-14-55	242-55	Truro	319.00
75	3-14-55	393-55	Clinton	75.00
76	5-31-55	733-55	Sharon	1,037.00
77	6-20-55	830-55	Marion	151.00
78	6-20-55	831-55	Marion	168.00
79	6-20-55	832-55	Marion	282.00
80	6-27-55	876-55	Clinton	619.00
81	6-27-55	877-55	Sharon	14.50
82	7-11-55	920-55	Mifflin	170.00
83	9-12-55	1170-55	Franklin	212.00
84	9-12-55	1171-55	Franklin	14.00
85	9-19-55	1222-55	Truro	19.00
86	9-19-55	1223-55	Truro	26.00
87	9-19-55	1224-55	Clinton	533.00
88	10-10-55	1308-55	Mifflin	694.00
89	10-10-55	1309-55	Truro	8.00
90	10-10-55	1310-55	Clinton	78.00
91	10-17-55	1340-55	Clinton	586.00
92	10-17-55	1341-55	Jefferson	710.00
93	1-23-56	83-56	Clinton	251.00
94	1-23-56	87-56	Truro	32.00
95	2-20-56	224-56	Clinton	91.00
96	2-27-56	254-56	Franklin	138.00
97	3- 5-56	281-56	Truro	168.51

No.	Date	Ordinance Number	Township	Acres
98	4-16-56	496-56	Marion	266.00
99	4-16-56	497-56	Mifflin	33.84
100	5- 7-56	617-56	Sharon	256.00
101	5-14-56	646-56	Truro	183.00
102	5-14-56	647-56	Clinton	27.25
103	5-21-56	677-56	Clinton	20.00
104	5-21-56	678-56	Clinton	120.86
105	5-21-56	679-56	Truro	1,042.00

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No.	Date	Ordinance Number	Township	Acres
106	5-28-56	726-56	Mifflin	41.20
107	5-28-56	727-56	Truro	496.00
108	6- 4-56	748-56	Sharon	241.00
109	6- 4-56	749-56	Mifflin	128.85
110	6-18-56	816-56	Marion	982.00
111	6-25-56	854-56	Clinton	10.69
112	7- 9-56	909-56	Marion	142.00
113	7-30-56	982-56	Mifflin	43.60
114	9-10-56	1117-56	Mifflin	134.00
115	9-10-56	1118-56	Truro	362.87
116	10-15-56	1272-56	Truro	243.00
117	10-15-56	1273-56	Truro	101.00
118	11-19-56	1453-56	Clinton	20.99
119	12-10-56	1552-56	Franklin	90.23
120	12-13-56	1570-56	Sharon	463.00
121	12-31-56	1650-56	Franklin	100.00
122	12-31-56	1651-56	Sharon	329.00
123	12-31-56	1652-56	Sharon	359.00
124	12-31-56	1653-56	Sharon	120.00
125	12-31-56	1654-56	Franklin	401.00
126	12-31-56	1655-56	Franklin	147.00
127	12-31-56	1656-56	Franklin	259.00
128	1- 9-57	1696-56	Mifflin	2.90
129	1- 9-57	1697-56	Sharon-Blendon	182.00
130	1- 9-57	1700-56	Clinton	56.00
131	1-27-57	42-57	Marion-Hamilton- Madison	7,100.00
132	3-11-57	336-57	Truro	3.77

No.	Date	Ordinance Number	Township	Acres
133	3-11-57	338-57	Sharon-Perry	295.58
134	4-10-57	480-57	Clinton	12.00
135	4-22-57	577-57	Mifflin	71.85
136	5- 6-57	641-57	Mifflin	21.53
137	5- 6-57	643-57	Clinton	153.00
138	6- 3-57	781-57	Jefferson	630.00
139	9-10-57	1050-57	Clinton	18.11
140	9-10-57	1164-57	Clinton	40.00
141	9-10-57	1165-57	Clinton	1.80
142	9-10-57	1166-57	Truro-Madison	2,754.00
143	12- 9-57	1519-57	Perry	7.10
144	12-16-67	1459-57	Jefferson	336.00
145	2- 3-58	165-58	Franklin	25.87
146	2- 3-58	166-58	Franklin	241.00
147	3- 3-58	314-58	Clinton-Perry	273.00
148	3- 3-58	315-58	Franklin	53.17
149	4-21-58	627-58	Franklin	16.26
150	4-28-58	651-58	Sharon	7.80
151	5-12-58	677-58	Franklin	49.26
152	10- 6-58	1364-58	Hanford (Marion)	64.00
153	11-17-58	1542-58	Truro	283.00
154	1-13-59	50-59	Clinton	132.00
155	3- 9-59	323-59	Clinton	7.80

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No.	Date	Ordinance Number	Township	Acres
156	4-27-59	567-59	Franklin	1.12
157	7-13-59	960-59	Sharon	145.00
158	7-20-59	1046-59	Mifflin	84.00
159	9-14-59	1189-59	Clinton	70.00
160	9-21-59	1335-59	Clinton-Mifflin	24.40
161	11-23-59	1574-59	Franklin	15.89
162	12- 7-59	1661-59	Franklin	910.00
163	12-28-59	1722-59	Clinton	2.91
164	12-28-59	1724-59	Truro	219.00
165	1-11-60	32-60	Clinton	3.65
166	6- 8-60	413-60	Truro	546.58

No.	Date	Ordinance Number	Township	Acres
167	5- 3-60	445-60	Clinton	9.75
168	5- 2-60	532-60	Sharon	104.00
169	6- 6-60	669-60	Franklin	44.38
170	10- 4-60	1178-60	Truro	538.00
171	10-10-60	1723-59	Mifflin	151.00
172	12- 9-60	1486A-60	Franklin	0.96
173	7-10-61	868-61	Perry-Clinton	434.00
174	7-17-61	869-61	Perry	39.39
175	7-17-61	934-61	Hamilton	251.00
176	9-11-61	1092-61	Franklin	41.55
177	11-13-61	1398-61	Franklin	48.81
178	11-20-61	1423-61	Sharon	168.00
179	1- 8-62	14-62	Mifflin	21.75
180	3- 5-62	322-62	Truro	83.92
181	4-16-62	513-62	Mifflin	14.15
182	5-14-62	663-62	Sharon	25.00
183	6- 4-62	779-62	Franklin	67.50
184	7-30-62	1037-62	Franklin	2.25
185	9-10-62	1186-62	Franklin	44.54
186	9-10-62	1187-62	Truro	50.00
187	3-13-63	159-63	Perry	118.00
188	3-13-63	160-63	Sharon	24.03
189	7- 3-63	630-63	Truro	78.00
190	7-24-63	683-63	Mifflin	413.00
191	8-13-63	1316-63	Mifflin	0.30
192	12- 2-63	1420-63	Truro	71.90
193	1-13-64	64-64	Sharon	426.00
194	1-20-64	1522-63	Truro	22.20
195	1-28-64	102-64	Franklin	29.77
196	6-24-64	736-64	Franklin	93.76
197	7- 2-64	771-64	Franklin	132.50
198	7-13-64	776-64	Perry	111.00
199	9-21-64	1066-64	Mifflin	245.82
200	9-21-64	1067-64	Mifflin	127.00
201	9-21-64	1068-64	Mifflin	150.00
202	11-16-64	1270-64	Truro	23.00
203	2-18-65	139-65	Sharon-Blendon	532.00
204	3- 1-65	268-65	Truro	46.02
205	3- 1-65	265-65	Clinton	3.26

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No.	Date	Ordinance Number	Township	Acres
206	1-19-65	1398-63	Franklin	410.29
207	4-19-65	510-65	Mifflin	7.48
208	5- 3-65	567-65	Mifflin	56.05
209	5-10-65	414-65	Clinton-Mifflin	23.00
210	4-19-65	521-65	Franklin-Jackson	257.25
211	6- 7-65	729-65	Perry	46.50
212	6- 7-65	730-65	Perry	223.70
213	7- 8-65	872-65	Franklin-Prairie	735.00
214	9-27-65	1301-65	Franklin	30.29
215	10- 4-65	1336-65	Franklin	48.55
216	10-18-65	1406-65	Sharon	84.00
217	11- 8-65	1506-65	Sharon	13.48
218	11-29-65	1577-65	Franklin	356.00
219	11-30-65	1618-65	Sharon	2,413.00
	2-14-66	254-66	Perry	
220	12- 6-65	1656-65	Sharon (incl. on 219)	
221	2-14-66	246-66	Mifflin	1,483.00
222	4- 4-66	468-66	Hamilton	16.94
223	4- 4-66	501-66	Mifflin	285.00
224	5- 9-66	743-66	Franklin-Prairie	748.50
225	5-16-66	774-66	Mifflin	445.00
226	5-23-66	811-66	Clinton	.76
227	6-20-66	942-66	Mifflin	92.50
228	7-11-66	1027-66	Franklin	98.00
229	7-11-66	1030-66	Perry	227.70
230	7-18-66	1048-66	Franklin	38.11
231	7-25-66	1100-66	Hamilton	4.83
232	9-12-66	1254-66	Sharon-Blendon	802.00
233	9-12-66	1255-66	Franklin	186.00
234	12-12-66	1722-66	Mifflin	100.00
235	1- 9-67	25-67	Clinton	.44
236	1-23-67	98-67	Sharon	135.00
237	2- 6-67	145-67	Sharon	55.90
238	5-29-67	634-67	Blendon-Sharon	367.00
239	6- 5-67	674-67	Clinton	3.88
240	7-10-67	816-67	Franklin	37.50
241	7-17-67	817-67	Madison	235.79
242	9-11-67	1052-67	Franklin	10.36

No.	Date	Ordinance Number	Township	Acres
243	9-11-67	1053-67	Perry	17.00
244	9-11-67	1054-67	Blendon	550.00
245	9-11-67	1055-67	Franklin	23.25
246	10-30-67	1336-67	Jefferson	9.55
247	12-18-67	1591-67	Franklin	16.57
248	1- 1-68	1-68	Prairie	70.86
249	1- 1-68	2-68	Blendon-Mifflin	557.00
250	1- 1-68	3-68	Mifflin	87.00
251	1- 8-68	9-68	Mifflin	31.70
252	1-28-68	102-68	Madison	65.48
253	2-19-68	214-68	Clinton-Mifflin	5.74
254	3-11-68	282-68	Prairie	417.30

Source: City of Columbus, Planning Commission

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Table 8

**AREAS ANNEXED TO COLUMBUS BUT NOT
TRANSFERRED TO THE COLUMBUS
CITY SCHOOL DISTRICT**

MAY, 1968

City Annexation Number	Township	Acres
129	Sharon-Blendon	182.00
131*	Marion-Hamilton-Madison	7,100.00
135	Mifflin	71.85
138	Jefferson	630.00
143	Perry	7.10
144	Jefferson	336.00
162	Franklin	910.00
175	Hamilton	251.00
180*	Truro	83.92
190	Mifflin	413.00
191	Mifflin	0.30
192	Truro	71.90
194	Truro	22.20

City Annexation Number	Township	Acres
195	Franklin	29.77
196	Franklin	93.76
197	Franklin	132.50
198	Perry	111.00
199	Mifflin	245.82
200	Mifflin	127.00
201	Mifflin	150.00
203*	Sharon-Blendon	532.00
204	Truro	46.02
207	Mifflin	7.48
208	Mifflin	56.05
209*	Clinton-Mifflin	23.00
210	Franklin-Jackson	257.25
211	Perry	46.50
212*	Perry	223.70
213	Franklin-Prairie	735.00
214	Franklin	30.29
215	Franklin	48.55
216	Sharon	84.00
218	Franklin	356.00
219	Sharon	2,413.00
220	Sharon	(incl. on 219)
221	Mifflin	1,483.00
222	Hamilton	16.94
223	Mifflin	285.00
224	Franklin-Prairie	748.50
225	Mifflin	445.00

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City Annexation Number	Township	Acres
227	Mifflin	92.50
228	Franklin	98.00
230	Franklin	38.11
231	Hamilton	4.83
232*	Sharon-Blendon	802.00
233	Franklin	186.00
234	Mifflin	100.00
236	Sharon	135.00

City Annexation Number	Township	Acres
237	Sharon	55.90
238	Blendon-Sharon	367.00
240	Franklin	37.50
241	Madison	235.79
242	Franklin	10.36
244	Blendon	550.00
245	Franklin	23.25
246	Jefferson	9.55
247	Franklin	16.57
248	Prairie	70.86
249	Blendon-Mifflin	557.00
250	Mifflin	87.00
251	Mifflin	31.70
252	Madison	65.48
253*	Clinton-Mifflin	5.74
254	Prairie	417.30

* part only

Excerpts from
 Plaintiffs' Exhibit No. 64
 "The 1963-64 Study of the Public School
 Needs of Columbus, Ohio," Bureau of
 Educational Research, Ohio
 State University, June, 1964

[page 65]

20. IT IS RECOMMENDED that a new elementary school having ten classrooms and one kindergarten room be constructed on a site located near Gladstone Avenue and Twenty-fourth Avenue, which site is scheduled for purchase in 1964.
21. IT IS RECOMMENDED that a site located near the intersection of Clinton Street and Jefferson Avenue be purchased and that a new elementary school hav-

ing ten classrooms and one kindergarten room be constructed thereon.

Recommendations 20 and 21 are designed to provide classroom space needed in the area bounded by Hudson Street on the north, the Pennsylvania Railroad on the east, the North Freeway on the west and Seventeenth Avenue on the south. These recommendations not only will provide space for growth but also will provide facilities for approximately ten classrooms of children that will be transported during the 1964-65 school year.

Plaintiffs' Exhibit No. 137

Table of Annexations to the
 Columbus City School District

Data is provided where available and was gathered from a review of numerous documents in the office of the Clerk-Treasurer as well as a listing of R.C. 3311.06 transfers prepared by the State Department of Education.

As can be seen from a comparison of P31-7(1) and 7(2), the following table may not be complete.

Date of Approval by State Board	Losing District	Annex'n. Nbr.	City Ord.	Acres	Nbr. of Students
6-10-57	Mifflin	136	641-57	21.5	
9-14-59	Franklin Twp.	156	567-59	1.12	0
11-09-59	Mifflin	158	1046-59	84	
11-09-59	Mifflin	128	1696-59	2.9	
8-14-61	Worthington	168	532-60	104	80
3-12-62	Upper Arlington	174	869-61	39.39	1
3-12-62	Worthington, Westerville	157	960-59	145	70
3-12-62	Worthington			200	0
6-11-62	Upper Arlington Worthington Washington	173	868-61	434	18
6-11-62	South-Western			150.58	156
4-08-63	Reynoldsburg	186	1187-62	50	

Date of Approval by State Board	Losing District	Annex'n. Nbr.	City Ord.	Acres	Nbr. of Students
4-08-63	South-Western	183	779-62	67.5	
4-08-63	South-Western	184	1037-62	2.25	
4-08-63	South-Western	185	1186-62	44.35	
6-10-63	Mifflin	179	14-62	21.75	
6-10-63	Mifflin	181	513-62	14.15	
* 8-12-63	Reynoldsburg	105	679-56	1042	
* 8-12-63	Reynoldsburg	115	1118-56	362.87	
* 8-12-63	Reynoldsburg	116	1272-56	243	
* 8-12-63	Reynoldsburg	117	1273-56	101	
* 8-12-63	Reynoldsburg	153	1542-58	283	
* 8-12-63	Reynoldsburg	164	1724-59	219	
* 8-12-63	Reynoldsburg	166	413-60	546	
* 8-12-63	Reynoldsburg	170	1178-60	538	
4-13-64	Worthington	188	160-63	24	
6-08-64	Reynoldsburg				
8-09-65	South-Western	206	1398-63	410	
11-08-65	Madison	202	1270-64	23	
4-12-71	Madison	265	156-69	802.54	0
	Reynoldsburg				
	Eastland Joint				
	Vocational				
** 4-12-71	Grandview	162	1661-59	910	7
** 4-12-71	Westerville	129	1697-56	182	400 to 600
		203	139-65	532 (part)	
		232	1254-66	802 (part)	
		233	98-67	135	
		238	643-67	367	
		259	1303-68	177	
** 4-12-71	Washington	198	776-64	111	
	Upper Arlington				
** 4-12-71	Washington	211	729-65	46.50	95
		261	1332-68	32.0	
** 4-12-71	South-Western	218	1577-65	356.00	40
		260	1331-68	898.5	

*Large maps showing the territory so transferred from Reynoldsburg are in the possession of the Clerk-Treasurer and available to plaintiffs' counsel pursuant to Rule 33(c).

The Columbus City Ordinance numbers shown for transfers listed above may provide access to maps which are in the possession of the City.

**These transfer orders have not been effected at this time because of litigation. See Case No. 75-230, Ohio Supreme Court.

3. The entire Mifflin Local School District was transferred to the Columbus City School District pursuant to R.C. 3311.231 effective July 1, 1971. At that time, Mifflin served approximately 3300 students at South Mifflin Elementary, Cassady Elementary, East Linden Elementary, and Mifflin Junior-Senior High School. The approximate racial composition of such students is available from the document marked P31-34(5), which was previously provided to plaintiff's counsel.

4. The Columbus City School District was expanded pursuant to the procedures set forth in R.C. § 3311.24 on three occasions. On March 12, 1962, the State Board of Education approved the transfer of territory from the Worthington school district to the Columbus district. On December 10, 1962, the State Board approved the transfer of territory from the Westervill school district to the Columbus district. On April 13, 1964, the State Board approved the transfer of territory from the Worthington school district to the Columbus district.

* * * * *

Plaintiffs' Exhibit No. 140
Extract from Minutes of the
State Board of Education
of Ohio, July 10, 1972

* * * * *

The Superintendent presented Item 29 of his report as follows:

29. TRANSFER OF TERRITORY UNDER SECTION 3311.24, O.R.C.

From Columbus City School District to Bexley City School District.

The Columbus City Board of Education transmitted a petition from qualified electors together with a map requesting the transfer of certain described territory from the Columbus City School District to the Bexley City

School District, pursuant to Section 3311.24, Ohio Revised Code. Pertinent information related to the transfer is outlined below.

- I. Prior to April 1, 1972, a petition complying with Section 3311.24, O.R.C., was filed by the Columbus City Board of Education with the Ohio Department of Education. The Columbus City Board of Education also filed objection to the transfer and requested further consideration.

II. Geographical consideration

1. Map of area provided.
2. Would not create an island district.
3. The area would relate more directly to the Bexley City School District.
4. Transfer would contribute to improved district organization.
5. Within the City of Columbus for municipal services.
6. Residential in nature.

III. Pupils in the area

1. Twenty-five in elementary; thirteen in high school with only one or two in public schools.

IV. Transportation

1. No transportation required.
2. Distances to school in miles
Columbus — Elementary 1.4-1.9; Junior High 1.5-2.3; High School 1.2-2.7
Bexley — Elementary .8; Junior High .8; High School .8

V. Educational planning for the area

1. Regular planning by district serving the area.

VI. Financial Considerations

	Operation		Total	Debt	Total School	Total All Purpose
	Inside	Outside				
Columbus	4.51	27.10	31.61	3.65	35.26	48.26
Bexley	5.70	33.60	39.30	5.55	44.85	62.20

1. There would be an inside millage problem which would cost the Bexley City School District 1.19 mills.
2. Valuation of area \$952,200; per pupil valuation \$25,058.
3. Total valuation of Columbus \$1,745,505,060; Bexley \$48,747,660. Per pupil valuation of Columbus \$15,843; Bexley \$18,299.
4. The per pupil value of the area is greater than the per pupil value of either district. The total value and number of pupils would not be significant.
5. The area is paying the same millage rate as Columbus and is willing to pay the higher Bexley rate.
6. The equalizing effect of the foundation program would tend to offset any gain or loss.

VII. Miscellaneous

1. No school building in the area.
2. The potential receiving district could accommodate the additional pupils.
3. Raises the question of percentage of racial mix.
4. No previous transfers.
5. Columbus states that this transfer would cause a detrimental loss of human resources.
6. The receiving district cannot be acceptable to the transfer.

VIII. General statements by proponents of the transfer

1. Area is surrounded on three sides by the City of Bexley.
2. Over 75% of the residents desire the transfer.
3. Distances to schools slightly less to Bexley.
4. Area separated from Columbus on west by recreation park, a creek, a railroad embankment with limited cross-through and another park.
5. Geographically the inhabited area is more a part of Bexley for most community affairs and should be for schools.
6. Means of travel to the west are limited by bridges and tunnels.

IX. General statements by opponents of the transfer

1. Columbus Board of Education policy states that all territory within the municipal boundaries should also be in the city school district.
2. The loss of \$925,000 valuation and the human resources of the area is of vital concern.
3. Most of the schools which the students would attend are on a regular day program — no extended day or double session except Eastmoor Senior High.

The recognition of the inside millage problem substantiated by a letter from the Franklin County Auditor's Office caused the proponents for the transfer to propose that their request for the transfer be withdrawn.

A hearing was held in accordance with Chapter 119, O.R.C., on June 6, 1972, at the Ohio Departments Building.

The hearing referee found that the proposed transfer would have the effect of eliminating a mutual school district and municipal boundary insofar as the City of Columbus is concerned. The interest of orderly planning *prima facie* consideration should be given to achieving an identity of boundaries for both school purposes and other

municipal purposes. The posture of the record at the time testimony was concluded was insufficient evidence to dictate a departure from the presumption of maintaining co-extensive municipal and school boundaries. Hence, the referee recommended that the proposed transfer be disapproved.

It was moved by Mr. Judd and seconded by Dr. Bixler that the following resolution be adopted:

WHEREAS a petition requesting the transfer of certain described territory from the Columbus City School District to the Bexley City School District was filed with the State Board of Education of Ohio by the Columbus City Board of Education in accordance with Section 3311.24, Ohio Revised Code; and

WHEREAS the Columbus City Board of Education protested the proposed transfer, a hearing was held in compliance with Chapter 119, O.R.C., on June 6, 1972, at the Ohio Departments Building, Columbus, Ohio; and

WHEREAS the hearing referee recommended that the transfer be denied, a copy of the recommendation was served upon all proper parties to the transfer request in accordance with Chapter 119, O.R.C.; and

WHEREAS the State Board of Education of Ohio has given due consideration to the petitioners' request, the referee's report and recommendation, and the possible effects of such proposed transfer upon the school districts involved, (as delineated in Item #29, pages 29-31 of the Agenda for the State Board of Education of Ohio, Regular Meeting, Monday, July 10, 1972, and recorded in the minutes of such meeting): Now, Therefore, be it

RESOLVED, That the requested transfer of territory from the Columbus City School District to the Bexley City School District under Section 3311.24, O.R.C., be DENIED.

The President called for a voice vote on the motion. Motion carried.

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Plaintiffs' Exhibit No. 383

Columbus Public Schools

Pupil enrollments by school by per cent

Black from 1964 to 1975-76

ELEMENTARY SCHOOLS PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
ALPINE	1966															
ALUM CREST	1961															
ARLINGTON																
PARK	1957															
AVONDALE	1891															
BARNETT	1964															
BEATTY																
PARK	1954															
BEAUMONT	1957															
BECK	1884															
BELLOWS	1905															
BERWICK	1956															
BETHEL-																
GODOWN																
BINNS	1957															
BRETNELL	1962															
BROADLEIGH	1952-															
1953																
BURROUGHS	1921															
CALUMET	1961															
CASSADY	1964-															
1971A																
CEDARWOOD	1965															
CHICAGO	1897															
CLARFIELD	1926															

A—Annexed school
1—Schools under construction
°—Closed schools

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ELEMENTARY SCHOOLS — Continued PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
CLEARBROOK	1957															
CLINTON	1904-															
ELEM.	1922															
COLERAIN	1957															
COMO	1954-															
1955																
COURTRIGHT	1927															
CRANBROOK	1957															
*CRESTVIEW																
ELEM.	1915															
DANA	1911															
DESHLER	1953															
DEVONSHIRE	1963															
DOUGLAS	1875-															
1900																
DUXBERRY																
PARK	1959															
EAKIN	1960															
EAST																
COLUMBUS	1920															
EASTGATE	1954															
EASTHAVEN	1968															
EAST	1911-															
LINDEN	1911A															
EASTWOOD	1905															
ELEVENTH	1906															
FAIR	1890															

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*—Combined statistics, Jr.-Elem. or
Jr.-Sr. some years

ELEMENTARY SCHOOLS — Continued PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
FAIRMOOR	1950				0.1	—	0.1	0.2	0.2	0.9	1.3	2.4	4.2	7.0	4.6	7.9
FAIRWOOD	1924				69.0	80.0	90.0	96.6	95.0	95.9	94.2	94.8	93.7	94.7	94.2	94.9
FELTON	1893				100.0	98.0	99.9	100.0	100.0	100.0	90.0	89.4	84.2	81.5	94.9	closed
FIFTH AVE. FIRST	1886 1873-				2.0	2.0	1.3	0.8	0.9	0.4	2.5	2.5	3.7	4.3	2.7	3.5
FOREST	1891				48.0	50.0	40.0	36.3	40.8	31.3	32.8	29.2	closed			
PARK	1962				—	—	—	—	—	—	—	—	—	0.3	0.8	1.4
FORNOF	1925-															
FRANK- LINTON	1927 1873- 1887				0.2	0.3	—	1.2	0.9	2.0	1.5	0.4	1.4	3.5	3.5	3.8
R.B. 1953																
FULTON	1921				35.0	40.0	22.0	17.6	27.4	20.7	22.1	21.1	27.1	27.6	25.2	25.2
GARFIELD	1953				85.0	60.0	40.0	48.0	41.8	44.6	48.8	47.7	49.4	55.2	closed	
GEORGIAN					99.0	93.0	98.7	98.7	97.2	98.3	100.0	98.8	99.5	100.0	99.3	100.0
HGTS.					—	—	—	—	—	—	—	—	—	—	—	0.2
GETTYSBURG	1969															—
GLADSTONE	1965						78.0	91.2	92.2	96.7	97.4	99.4	99.0	99.6	99.1	97.6
GLENMONT	1952				0.3	0.4	0.1	0.2	0.2	0.4	0.2	0.7	0.5	0.3	0.6	2.4
HAMILTON	1953				27.0	48.0	61.0	85.0	90.3	93.0	93.4	96.7	97.3	97.7	97.9	98.7
HEIMAN-																
DALE	1955				40.0	40.0	31.0	32.4	30.0	34.3	35.8	34.4	33.8	37.7	36.9	35.9
HEYL	1910				11.0	18.0	11.0	11.2	11.3	11.0	11.2	15.5	15.9	16.7	16.6	15.6
HIGHLAND	1894-															
HOMEDALE	1905				75.0	70.0	68.0	73.6	72.0	71.7	68.9	70.3	69.1	72.7	72.7	66.2
1923-																
HUBBARD	1968A 1894				7.0	5.0	5.0	3.5	2.5	1.8	2.1	1.5	2.5	2.2	5.1	3.6
												2.0	0.5	0.6	0.9	1.7
A—Annexed school					Non-White											

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ELEMENTARY SCHOOLS — Continued PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
HUDSON	1966							41.9	54.3	62.4	69.2	74.8	77.9	80.1	82.7	82.9
HUY	1955				—	—	—	—	0.1	0.1	0.8	0.9	1.2	2.8	3.5	2.1
INDIANOLA																
ELEN.	1904				2.0	3.0	4.5	6.6	6.1	5.9	9.8	11.3	21.3	19.5	15.7	17.6
INDIAN																
SPRINGS	1950				2.0	2.0	2.0	1.3	1.0	—	—	0.4	—	0.5	0.8	1.5
INNIS	1975				—	—	—	—	—	—	—	—	—	—	—	27.3
JAMES ROAD	1952				1.0	1.0	0.1	1.5	1.4	1.0	1.5	2.6	2.8	4.0	4.4	4.0
KENT	1960				75.0	85.0	75.0	80.1	82.5	86.1	89.7	91.8	90.0	89.5	90.7	90.0
KENWOOD	1962				—	1.0	0.1	—	—	—	—	—	0.3	—	—	—
KINGSWOOD	1952				11.0	11.0	7.0	7.1	7.4	4.8	4.7	6.3	5.1	5.1	5.5	8.5
KOEBEL	1964				—	—	—	11.3	10.7	34.5	39.2	49.5	62.5	67.2	71.3	73.3
LEAWOOD	1960				—	—	—	—	—	—	0.3	0.3	1.0	2.3	8.2	9.3
LEONARD	1904				94.0	96.0	100.0	100.0	closed	—	—	—	—	—	—	—
LEXINGTON	1966							100.0	99.7	98.8	96.7	96.1	98.0	97.8	96.8	96.9
LIBERTY	1975															1.3
(Refugee Noe-Bixby)																
LINCOLN																
PARK	1924				35.0	35.0	36.0	34.7	33.7	37.0	37.7	36.9	38.6	39.2	40.5	39.2
LINBERGH	1958				—	—	—	—	0.6	0.4	0.7	1.2	0.5	0.6	2.4	2.2
LINDEN	1905-				—	—	—	—	—	—	—	—	—	—	—	—
LINDEN PARK	1921				—	—	0.1	2.4	3.5	8.3	10.6	15.0	19.1	23.8	26.5	30.7
LIVINGSTON	1975															34.9
1901					29.0	40.0	39.0	52.9	55.2	54.0	58.7	59.6	62.5	66.9	68.7	68.6
1876-																
MAIN					77.0	75.0	87.0	90.8	91.6	92.7	93.0	95.7	92.0	91.5	91.6	93.5
1906																
					Non-White											

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ELEMENTARY SCHOOLS — Continued PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
MAIZE	1960	—	—	—	—	—	—	—	—	0.1	0.3	0.5	0.7	2.4	2.3	2.6
MARBURN	1960	—	—	—	—	—	—	—	—	—	0.3	0.3	1.1	0.4	1.6	2.9
MARYLAND	1958	98.0	99.0	100.0	98.5	98.8	98.1	77.6	82.5	closed	—	—	—	—	—	—
MAYBURY	1964	—	—	—	—	—	—	0.2	—	—	—	—	0.1	0.4	1.0	1.3
McGUFFY	1927	—	—	—	—	—	0.1	5.9	6.7	12.4	20.4*	22.2	34.4*	37.0*	31.1	31.1
ELEM.	1892	2.0	2.0	0.1	0.8	1.2	0.5	1.3	2.0	1.7	1.7	2.0	1.7	1.7	2.7	4.1
MEDARY	1904	13.0	15.0	15.0	6.7	6.4	5.5	5.4	5.5	3.3	2.1	1.7	3.3	3.1	2.7	4.9
MICHIGAN	1894	90.0	90.0	88.0	90.1	91.7	94.2	93.5	93.3	91.2	88.9	89.6	92.7	—	—	—
MILO	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
MOHAWK	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
ELEM.	1952	11.0	10.0	10.0	—	—	—	—	—	—	—	—	—	—	—	—
MOLER	1963	0.2	0.3	2.5	3.9	5.6	8.7	12.4	22.7	38.1	46.3	50.1	55.7	—	—	—
NINTH	1896	1.5	0.8	5.0	0.5	0.4	3.3	2.1	1.7	6.4	closed	—	—	—	—	—
NORTH	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
LINDEN	1950	—	0.2	—	1.0	1.0	0.7	0.5	3.7	3.9	7.7	4.5	6.3	—	—	—
NORTHBRIDGE	1956	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
NORTH-	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
TOWNE	1968	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
NORTHWOOD	1874- 1905	2.0	2.0	0.1	0.7	0.9	0.9	1.9	0.7	1.3	—	1.1	closed	—	—	—
OAKLAND	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
PARK	1952	—	—	—	1.6	0.2	—	—	0.6	1.2	1.0	1.1	1.6	—	—	—
OAKMONT	1966	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
OHIO	1893	80.0	80.0	88.0	90.3	89.7	91.6	93.1	91.3	87.8	90.2	87.2	86.2	—	—	—
OLDE	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
ORCHARD	1965	—	—	0.1	0.4	0.2	0.2	0.2	0.2	0.2	0.6	2.2	.7	—	—	—
OLENTANGY	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
(See Thurber)	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
PARKMOOR	1966	—	—	—	0.3	—	0.6	0.4	0.4	—	—	0.3	2.9	6.3	—	—
PARSONS	1960	—	—	—	0.2	0.2	—	—	0.3	0.3	1.5	1.5	6.3	—	—	—

*—Combined statistics, Jr.-Elem. or
Jr.-Sr. some years

Non-White

ELEMENTARY SCHOOLS — Continued PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
PILGRIM	1922	100.0	100.0	100.0	98.8	99.5	100.0	99.3	100.0	99.7	84.8	86.7	90.1	93.2	—	—
PINECREST	1959	—	—	—	1.0	—	—	—	—	0.2	0.9	3.3	6.2	9.8	—	—
REEB	1904	27.0	25.0	26.0	20.8	17.0	16.8	15.3	15.4	16.1	15.7	12.6	13.1	—	—	—
REFUGEE-	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
NOE-BIX	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
(See Liberty)	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
SALEM	1962	—	—	—	—	—	0.3	—	—	—	—	0.3	0.2	1.1	2.3	—
SCIOTO TRAIL	1927	—	—	—	0.6	—	0.2	—	—	—	—	—	—	—	—	—
SCOTTWOOD	1957	—	—	—	—	—	0.3	4.1	7.6	11.6	20.8	30.0	34.6	39.0	—	—
SECOND	1874- 1883	28.0	25.0	28.0	29.5	30.4	25.7	34.5	24.8	21.0	16.7	17.0	20.9	—	—	—
SHADY LANE	1956	—	—	—	0.1	0.4	0.5	0.7	0.8	2.3	2.0	2.3	5.7	—	—	—
SHARON	1947	—	—	—	—	—	—	—	—	1.0	1.3	1.0	2.4	—	—	—
SHEPARD	1906	86.0	87.0	91.0	91.4	94.6	95.5	94.1	94.7	90.6	90.4	93.3	96.0	—	—	—
SIEBERT	1888- 1902	2.0	2.0	2.0	0.2	—	—	0.4	—	—	—	0.3	—	0.6	—	—
SIXTH	1961	91.0	90.0	87.0	91.1	85.1	91.7	91.5	87.6	91.0	94.6	closed	—	—	—	—
SMITH ROAD	1915	—	—	—	—	—	—	0.4	1.3	6.4	20.3	29.5	38.4	42.2	—	—
SOUTH	1952- 1971A	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
MIFFLIN	1971A	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
SOUTHWOOD	1894	1.0	1.5	1.4	1.4	1.1	1.1	1.6	1.5	1.0	0.3	0.9	1.2	—	—	—
STEWART	1874- 1893	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—
STOCKBRIDGE	1959	—	—	—	—	0.6	0.3	—	—	—	1.3	—	2.6	39.2	—	—
SULLIVANT	1954	60.0	70.0	51.0	56.1	58.9	61.4	60.1	60.7	65.5	70.2	69.4	77.5	—	—	—
THURBER	1922	11.0	10.0	10.0	10.5	9.4	8.8	4.5	3.9	22.3	28.2	21.4	22.9	—	—	—
(OLENTANGY)	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—

Non-White

ELEMENTARY SCHOOLS — Continued PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
TREVITT VALLEY	1964					97.0	98.0	99.0	98.9	98.8	98.8	97.9	97.8	99.0	98.6	100.0
FORCE	1963															
VALLEYVIEW	1957										0.1	0.3	0.9	0.9	2.8	2.3
WALDEN	1968											1.3	1.0	1.2	.4	.4
WALFORD	1961										2.0	1.8	0.7	2.3	3.0	3.7
WATKINS	1961												0.3	0.3	2.7	1.1
WAYNE	1968			24.0	62.0	64.0	73.5			76.4	77.1	79.7	80.5	82.1	81.9	83.9
WEINLAND									11.7	10.0	11.5	10.8	11.8	12.1	9.7	9.1
PARK	1952			30.0	30.0	29.0	30.8	33.7	41.2	39.0	39.0	32.2	32.2	30.5	46.7	41.6
WEST BROAD	1910						0.1	0.6	0.5	0.7	0.5	0.8	1.1	1.3	1.0	1.9
WESTGATE	1952			3.0	3.0	4.0	4.4	3.6	4.3	4.4	4.4	5.4	4.5	4.0	4.3	5.2
WEST MOUND	1952			15.0	15.0	15.0	16.8	17.9	16.1	16.5	16.5	17.4	17.8	17.7	16.5	13.9
WILLIS PARK	1958						0.2	1.3	0.7	0.6	0.6	1.4	0.8	2.3	1.6	7.5
WINDSOR	1959			91.0	97.0	88.0	93.9	93.7	95.2	95.2	95.2	97.2	98.9	98.8	98.9	98.4
WINTerset	1968												0.2	0.7	0.3	0.6
WOODCREST	1961			0.1	0.1				0.4	0.5	0.3	0.5	0.9	1.5	3.3	4.3
Non-White																

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JUNIOR HIGH SCHOOLS PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
BARRETT	1898			12.0	13.0	26.0	13.0	13.0	7.7	8.1	8.0	7.9	8.4	8.6	10.3	11.7
BERRY	1956-															
(Marion-Franklin)	1957			22.3	20.0	35.0	39.6	54.1	61.4	66.9	67.2	68.9	68.9	68.9	69.9	70.3
BUCKEYE	1963				0.1		0.1			0.6	0.8	0.5	0.5	0.4	0.3	2.0
CHAMPION	1909			100.0	99.0	99.9	99.5	99.3	100.0	99.9	99.9	99.4	99.9	98.3	97.9	97.8
CLINTON Jr.	1955									0.5	1.3	1.3	1.6	1.7	3.4	7.5
CRESTVIEW	1915			0.2		0.1	0.7	0.3	0.5	0.5	0.8*	1.5	1.4*	4.1*	10.1	17.6
Jr.-Elem.																
DOMINION	1956								0.5	0.8	0.9	1.2	1.4	1.3	3.8	9.6
EASTMOOR Jr.	1962-															
EVERETT	1898			30.5	30.0	28.0	32.0	33.4	34.4	38.0	42.2	42.2	49.0	47.4	45.3	46.6
FRANKLIN	1898			35.0	30.0	30.0	29.9	25.3	26.4	25.6	25.6	25.6	26.5	27.8	24.9	26.2
HILLTONIA	1956			85.8	93.0	88.0	98.1	94.1	96.3	97.1	96.3	96.3	95.9	95.3	93.7	92.8
INDEPEND-				19.2	20.0	23.0	23.6	23.1	22.8	22.8	25.0	40.1	27.2	27.3	27.4	27.3
ENCE Jr.																
INDIANOLA	1975															12.0*
Jr.	1929			13.7	13.0	16.0	19.8	36.2	27.0	25.3	33.3	33.3	28.2	30.6	27.6	29.1
JOHNSON	1958-															
PARK	1959			0.3	0.6	0.6	0.2	1.8	2.9	4.9	8.1	8.1	13.5	19.3	26.7	28.3
LINMOOR	1957			60.0	70.0	75.0	84.4	88.7	89.6	92.5	95.0	95.0	97.2	96.4	96.6	95.6
MEDINA	1959-															
1960																
*McGUFFY								0.2	0.3	1.1	3.1	5.0	7.4	16.0	20.5	23.7
Jr.-Elem.	1927															
MIFFLIN	1924-							5.9	13.3*	11.9*	20.4*	32.4	34.4*	37.0*	42.9	44.5
Jr.-Sr.	1971A				7.0	4.0						43.8	48.1*	51.9*	57.5*	62.6*
*MOHAWK																
Jr.-Sr.	1952			40.0	45.0	38.0	50.0*	57.7*	61.4*	66.4*	67.5	74.9*	72.3*	72.4*	72.4*	72.5*
MONROE	1963			100.0	99.7	99.4	99.7	99.8	99.4	98.5	98.9	98.9	98.9	97.7	97.3	98.6
Non-White																

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*—Combined statistics, Jr.-Elem. or Jr.-Sr. some years

JUNIOR HIGH SCHOOLS — Continued

PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
RIDGEVIEW	1966															
ROOSEVELT	1916															
SHERWOOD	1966				39.6	43.0	45.0	—	0.3	0.1	0.4	0.7	0.2	0.4	0.9	3.5
SOUTHMOOR	1968							0.1	0.4	0.9	1.4	1.2	2.5	5.5	8.1	14.6
STARLING	1908				25.0	25.0	19.0	19.1	33.5	45.8	44.1	41.5	52.0	56.4	60.6	60.4
WEDGE-	1965-								19.0	17.6	16.6	19.3	18.4	17.1	18.1	19.5
WOOD	1966				—	0.1	1.0	—	—	—	—	1.2	1.1	1.3	2.0	5.2
WESTMOOR	1958-															
1959					3.9	5.0	4.0	6.5	9.4	9.3	9.2	9.7	9.6	9.1	9.6	9.9
WOODWARD																
PARK	1967							—	—	0.1	0.1	0.3	0.7	1.2	1.4	3.0
YORKTOWN	1967							—	0.3	0.2	0.4	0.2	1.0	2.1	2.9	6.9

Non-White

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SENIOR HIGH SCHOOLS

PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
ADULT DAY																
IBEEHCROFT																
¹ BETHEL-																
GODOWN																
BRIGGS	1975															
BROOKHAVEN	1961-															
1963																
CENTRAL	1924				27.0	28.0	26.0	31.1	0.2	1.1	1.3	1.8	2.5	3.8	7.4	12.9
EAST	1922				94.9	96.0	98.0	98.2	31.1	30.4	33.3	30.6	28.1	28.6	33.5	30.1
EASTMOOR Sr.	1955				10.6	12.0	11.0	13.7	98.9	98.9	98.1	99.6	99.7	99.5	98.9	98.9
EVENING					25.0		37.0	27.5	15.4	17.8	18.4	18.3	26.2	32.9	34.9	36.2
¹ INDEPEND-									35.5	45.7	46.1	51.2	56.8	40.9	39.8	49.5
ENCE	1975															
LINDEN-																
McKINLEY	1928				12.1	15.0	34.0	45.0	49.4	55.8	62.2	79.9	89.6	90.6	92.3	89.5
MARION-	1952-															
FRANKLIN	1953				17.6	20.0	19.0	24.9	23.4	25.2	28.8	33.1	36.9	38.5	40.3	43.9
¹ McCUTHCH-																
EON																
¹ MIFFLIN Sr.	1924-															
1971A																
¹ MOHAWK Sr.	1952															
NORTH	1924				7.2	8.0	6.0	8.4	57.7	61.4	66.4	41.2	48.1°	51.9°	57.5°	62.6°
NORTHLAND	1966							—	9.3	9.6	10.4	10.5	10.8	12.6	14.1	17.9
SOUTH	1923				9.8	10.0	23.0	29.3	—	0.3	0.3	0.2	0.3	0.6	1.6	6.5
WALNUT									31.6	33.8	35.9	34.9	40.5	43.0	44.1	44.8
RIDGE	1961				—	—	—	0.1	0.1	0.3	0.5	1.1	1.7	2.1	2.7	6.8
WEST					10.8	13.0	12.0	12.6	13.4	13.5	14.1	12.9	12.7	13.9	14.1	15.8

Non-White

°—Combined statistics, Jr.-Elem. or Jr.-Sr. some years

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SENIOR HIGH SCHOOLS — Continued

PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened 1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
WHETSTONE	1961						0.1	0.1	0.2	0.3	0.6	0.5	0.4	0.9	2.6
							Non-White								

SPECIAL SCHOOLS

PUPIL ENROLLMENT BY % BLACK

School Name	Year Opened 1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
ALEXANDER							10.6	8.9	—	12.4	13.9	29.5	17.3	13.4	16.4
GRAHAM								43.4	44.4	26.3	43.3	35.8	42.9	—	—
FAIRFAX								81.7	88.3	90.1	94.4	95.9		53.8	38.2
CLEARBROOK				85.0	77.0	80.0	87.0								
GLENWOOD				19.0	24.0	40.0	34.9								
NEIL AVE.				—	—	—	17.4	15.3	13.9	14.4	17.1	16.5	13.6	14.6	14.7
THIRD STREET				—	—	—	27.3	27.9	61.7	33.9	41.2	47.0	41.8	33.6	33.1
BETHUNE															
CENTER															98.6

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Plaintiffs' Exhibit No. 385
Columbus Public Schools
Professional staff by school by per cent
Black from 1964 to 1975-76

ELEMENTARY SCHOOLS TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
ALPINE	1966															
ALUM CREST	1961				33.3	40.0	40.0	50.0	42.9	40.0	46.2	87.5	9.5	9.5	15.8	10.0
ARLINGTON													77.8	50.0	25.0	16.7
PARK	1957															
AVONDALE	1891						12.5	16.2	15.8	23.5	17.7	21.4	20.0	20.0	21.4	22.2
BARNETT	1964						4.8	5.0	10.0	4.4	4.6	10.0	10.0	10.0	10.5	10.5
BEATTY PARK	1954				100.0	90.0	70.0	62.5	61.9	62.5	57.9	57.1	64.7	41.2	20.0	—
BEAUMONT	1957															26.3
BECK	1884															11.8
BELLOWS	1905						10.0	3.9	4.2	11.5	8.7	8.7	10.0	9.5	23.8	15.0
BERWICK	1956					14.3	12.5			6.7	8.3	9.1	8.3	16.7	16.7	20.0
¹ BETHEL												6.2	13.3	13.3	14.3	9.1
GODOWN																
BINNS	1957					4.8	5.3	8.9	4.0	3.7	8.7	5.0	5.0	10.0	9.1	10.0
BRETNELL	1962				29.4	22.2	21.1	18.6	38.1	27.3	47.6	47.4	52.6	42.1	22.2	25.0
BROADLEIGH	1952-															
	1953						5.6	4.8			4.8		4.8	18.2	15.0	20.0
BURROUGHS	1921						6.5	5.8		3.1			7.4	10.7	18.5	25.0
CALUMET	1961					9.7								6.7	7.1	9.1
CASSADY	1964-															
	1971A															
CEDARWOOD	1965						20.0	13.3	13.3	10.5	5.3	5.6	8.0	15.6	25.0	25.0
CHICAGO	1897				15.7	15.0	14.3	13.9	9.1	13.0	9.1	5.0	4.8	9.5	15.0	21.0
CLARFIELD	1926				15.0	5.9	5.9	23.4	12.0	11.5	17.4	26.1	10.0	15.0	26.3	27.8
													27.3	19.0	15.0	30.8

A — Annexed School
1 — schools under construction

White - Non-White
Data
Ex. - \$16

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ELEMENTARY SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
CLEARBROOK	1957				80.0	66.7	66.7	77.8	75.0	60.0	55.6	83.3	60.0	closed		
CLINTON	1940-															
ELEM.	1922													3.7	8.0	9.1
COLERAIN	1957														28.6	33.3
COMO	1954-															
	1955							9.5	5.3	4.6			5.0	10.0	11.1	11.1
COURTRIGHT	1927												5.6	5.6	16.7	23.5
CRANBROOK	1957												5.9	5.6	11.8	18.8
*CRESTVIEW																
ELEM.	1915							2.2*			2.2*	2.3*		6.3*	25.0	8.3
DANA	1911					9.1	9.1	13.6	9.5	4.2	4.4	5.0	4.8	13.6	23.8	19.0
DESHLER	1953					4.2	8.3		7.7	12.5	12.5	20.6	16.2	15.6	18.2	20.0
DEVONSHIRE	1963												4.3	8.7	9.1	9.5
DOUGLAS	1875-															
	1900				78.3	73.9	62.9	41.9	33.3	25.0	26.9	29.2	36.0	30.8	29.2	27.3
DUXBERRY																
PARK	1959					14.3	12.5	13.8	15.4	8.7	27.3	25.0	34.5	30.8	25.9	20.8
EAKIN	1960						9.5	4.3	8.3	7.7	4.6	5.6	5.3	11.1	15.8	11.8
EAST	1920					5.3	10.5	25.0	10.0	13.6	4.8	10.5	10.0	9.5	22.7	26.3
COLUMBUS																
EASTGATE	1954				35.7	33.3	66.7	23.5	29.4	22.2	33.3	42.9	53.8	25.0	23.1	25.0
EASTHAVEN	1968										6.7	11.8	10.0	8.0	13.0	13.1
EAST LINDEN	1911-												5.3	10.5	15.8	16.7
	1971A															
EASTWOOD	1905				64.3	64.3	57.1	57.1	53.9	60.0	50.0	40.0	60.0	33.3	closed	
ELEVENTH	1906				32.3	32.1	19.5	33.3	24.1	25.0	23.3	30.8	32.1	29.6	19.2	25.0
FAIR	1890				83.3	63.6	54.2	57.6	44.1	37.1	55.9	56.2	58.6	41.2	23.3	25.9

A — Annexed School
* — Combined data some years, Jr. - Elem.;
see Jr. High Schools

White - Non-White
Ex. - \$16
(?) Data 1966
possible error

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ELEMENTARY SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
FAIRMOOR	1950															
FAIRWOOD	1924									4.0	4.4	10.0	9.1	13.6	18.2	10.0
FELTON	1893				20.0	24.0	33.3	28.6	28.0	32.1	34.6	43.5	48.0	42.3	24.1	28.0
FIFTH AVE.	1886				100.0	72.2	44.4	41.9	37.9	32.0	34.8	28.6	27.3	27.3	23.8	closed
FIRST	1873- 1891							10.0	12.5					9.1	20.0	20.0
FOREST PARK	1962				25.0	25.0	25.0	16.7	8.3	14.3	7.7	15.4	closed			
FORNOF	1925- 1927									3.6	4.2	4.5	4.5		10.0	11.1
FRANK- LINTON	1873- 1887							6.7	7.1	10.5	12.5			10.0	20.0	12.5
R.B. 1953																
FULTON	1921				6.3	12.5	12.5	17.6	17.6	18.8	21.4	6.2	11.8	17.6	23.5	28.6
GARFIELD	1953				52.9	60.0	38.1	33.3	29.4	22.2	35.7	33.3	36.4	27.3	closed	
GEORGIAN					88.2	73.7	80.0	78.3	75.0	63.6	72.2	71.4	80.0	53.8	27.3	25.0
HGTS.	1959															
GETTYSBURG	1969													5.0	9.5	10.5
GLADSTONE	1965													9.1	8.3	9.1
GLENMONT	1952						30.0	41.7	35.3	27.3	18.2	26.3	31.6	25.0	25.0	21.0
HAMILTON	1953												7.1	7.1	7.7	6.7
HEIMANDALE	1955					5.7	5.4	8.9	18.9	9.5	13.5	8.6	25.6	27.0	22.9	25.8
HEYL	1910				40.0	37.5	47.1	53.3	46.7	46.7	35.7	36.4	27.3	25.0	27.3	25.0
HIGHLAND	1894- 1905					3.6	7.1	12.9	4.0	7.1	4.3	4.8	4.3	16.0	23.1	21.7
HOMEDALE	1923- 1968A				4.6	13.0	8.3	25.4	25.0	22.6	16.7	14.8	20.7	20.0	16.7	24.1
HUBBARD	1894					5.0	4.6	4.8	10.5	4.4			12.5	11.1	12.5	16.7
										5.3	14.3	14.3	4.8	4.5	11.1	12.5

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ELEMENTARY SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
HUDSON	1966							8.3	18.2	15.4	16.7	30.0	27.3	18.2	23.1	23.1
HUY	1955								3.7					7.1	11.1	12.5
INDIANOLA																
ELEM.	1904				4.8	5.3	4.8		4.3		5.6	6.7	6.7	17.6	17.6	12.5
INDIAN																
SPRINGS	1950													6.3	18.8	13.3
INNIS	1975															22.2
JAMES ROAD	1952									5.9	7.1		8.3	15.4	18.2	20.0
KENT	1960				63.2	62.5	36.4	28.0	24.1	25.9	26.9	26.9	28.6	25.9	23.1	20.0
KENWOOD	1962									6.7				9.1	9.1	10.0
KINGSWOOD	1952				4.8	5.0	4.8							4.5	10.5	11.8
KOEBEL	1964					8.3	7.7	10.8	17.7	15.0	15.0	16.7	16.7	25.0	20.0	12.5
LEAWOOD	1960					4.0	4.0	3.8	4.0	6.9			4.3	9.5	16.7	18.2
LEONARD	1904				13.3	71.4	57.1	66.7	closed							
LEXINGTON	1966							42.9	38.5	38.5	35.7	45.5	45.5	27.3	27.3	20.0
LIBERTY	1975															25.0
(Refugee Noe-Bixby)																
LINCOLN																
PARK	1924				7.7	15.4	23.3	25.5	34.5	22.9	15.2	22.2	27.6	23.3	24.2	22.6
LINBERGH	1958							7.1	18.8	5.3				7.1	20.0	21.4
LINDEN	1905- 1921															
LINDEN PARK	1975					3.4			3.1	5.6		2.7	12.5	12.8	14.6	20.0
LIVINGSTON	1901					8.7	17.2	20.5	19.1	19.6	17.6	17.5	14.3	14.6	20.0	18.8
MAIN	1876- 1906				14.3	16.0	19.5	31.6	36.4	29.7	31.3	28.1	38.2	40.0	24.1	24.0

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ELEMENTARY SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
MAIZE	1960															
MARBURN	1960															
MARYLAND PARK	1958															
MAYBURY	1964				88.9	75.0	62.5	70.6	60.0	54.5	55.6	55.6	closed			
*McGUFFY ELEM.	1927							4.6			4.0	3.7	3.8	7.1	12.5	12.5
MEDARY	1982						3.7	6.8*	3.7	3.1	8.6*	15.3*	16.7*	16.7*	18.5	25.0
MICHIGAN	1904							4.3	4.0					5.6	11.8	10.0
MOHAWK ELEM.	1952						5.6	5.0	4.8	4.8	5.6	6.3	5.9	11.1	25.0	25.0
MILO	1894						80.0									
MOLER	1963				32.1	34.5	33.3	46.7	39.3	34.5	32.1	52.2	63.6	47.6	27.8	23.5
NINTH	1963							6.1	6.7	10.5	5.9	6.2	11.8	16.7	11.8	30.8*
NORTH	1896						11.1							closed		
LINDEN	1950															
NORTHBRIDGE	1956															
NORTHTOWNE	1968							5.1	5.6	4.6				15.9	18.8	18.8
NORTHWOOD	1879- 1905													6.3	6.7	13.3
													7.1	7.7	18.8	7.1
OAKLAND PARK	1952							6.7		5.3				10.0	11.1	
OAKMONT	1966							12.5	6.3			9.1		8.3	25.0	16.7
OHIO	1893									7.1	7.1	7.1	6.7	11.8	12.5	17.6
OLDE ORCHARD	1965				44.0	48.0	37.9	45.0	54.5	38.3	40.5	48.8	55.3	38.9	22.2	20.6
OLENTANGY (See Thurber)	1966															
PARKMOOR	1966												9.1	13.6	17.4	18.2
PARSONS	1960															
*Combined data, Jr. - Elem. some schools; see Jr. High Schools								5.6				7.1		6.3	14.3	14.3

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ELEMENTARY SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
PILGRIM	1922															
PINECREST	1959				100.0	86.7	75.0	94.1	87.5	73.7	76.5	80.0	72.2	52.9	27.8	28.6
REEB	1904						4.0	4.1	4.4	3.7	4.4	5.0	4.8	4.3	14.3	11.1
REFUGEE NOE-BIX. (See Liberty)	1904				13.1		12.9	14.3	9.7	14.7	10.3	3.7	7.4	12.5	16.0	17.4
SALEM	1962															
SCIOTO TRAIL	1927															
SCOTTWOOD	1957															
SECOND	1874- 1883															
SHADY LANE	1956				10.0	10.0	15.4	13.3	11.1	21.4		18.2	19.2	13.0	22.7	23.8
SHARON	1947															
SHEPARD	1906															
SIEBERT	1888- 1902				8.3	7.7	7.7	42.9	38.5	6.7	8.3	10.0	40.0	20.0	22.2	25.0
SIXTH AVE.	1961					5.3	10.0	5.0		9.5	5.3	5.9	5.9	6.7	7.1	14.3
SMITH ROAD	1915				33.3	33.3	22.2	18.2	36.4	41.7	50.0	70.0	57.1	30.0	closed	
SOUTH	1952-								6.7	10.5	5.9		12.5	25.0	26.7	21.4
MIFFLIN	1971A															
SOUTHWOOD	1894						4.0	4.3	4.2	4.0		8.3	21.9	21.2	24.3	24.1
STEWART	1874- 1893													4.8	18.2	22.7
STOCKBRIDGE	1959															
SULLIVANT	1954							10.5	5.3	5.6	7.1			10.0	18.2	7.1
THURBER	1922				11.1	27.8	35.0	40.0	57.1	44.0	41.7	41.7	39.1	33.3	26.1	23.8
(OLENTANGY)													18.2	19.0	20.0	22.2

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ELEMENTARY SCHOOLS - Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
TREVITT VALLEY	1964				50.0	45.5	40.0	37.5	26.7	25.0	46.7	36.4	30.4	21.7	21.1	
FORCE	1963						4.2									
VALLEYVIEW	1957							7.7						4.8	9.5	10.0
WALDEN	1968								7.7					9.1	11.1	12.5
WALFORD	1961					7.7	7.7	7.7						6.3	18.8	6.7
WATKINS	1961					10.0	14.3	20.0	22.2					15.4	16.7	10.0
WAYNE	1968	20.0	10.0	10.0	20.0	22.2	18.2	22.2	31.3	35.7	10.0	9.1	11.1	33.3	21.4	25.0
WEINLAND PARK	1952															
WEST BROAD	1910	3.8	3.7	3.6	7.1	7.1	11.8	8.8	10.3	17.2	14.3	19.4	25.8			
WESTGATE	1952				3.5		3.0		3.4	3.2	6.3	12.1	16.1			
WEST MOUND	1952						4.4	4.8	5.6	5.6	10.5	15.8	16.7			
WILLIS PARK	1958				4.5	3.9	4.3	7.7	4.3	5.0	9.1	17.4	18.2			
WINDSOR	1959						5.0	4.6	5.0	6.2	13.3	12.5	13.3			
WINTERSET	1968	40.0	35.5	27.8	26.3	38.1	39.0	47.4	45.5	52.8	37.1	26.5	25.0			
WOODCREST	1961													10.0	8.7	8.7
														10.0	10.0	10.5

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SPECIAL SCHOOLS TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
ALEXANDER																
GRAHAM								5.9	5.6	3.3	10.7	4.0	15.0	4.8		4.8
FAIRFAX								30.8	9.1	27.3	20.0	20.0	9.1			
CLEARBROOK					80.0	66.7	66.7	77.8	75.0	60.0	55.6	83.3	60.0	7.7	15.4	14.3
CLENWOOD					22.2	33.3	20.0	38.5								
NEIL AVE.					21.4	21.4	20.0	5.7	5.3	4.5	4.5	4.5	13.0	8.0	8.0	12.0
THIRD STREET							22.2	17.4	30.0	18.2	9.1	8.3		16.7	8.3	22.2
BETHUNE CENTER																

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JUNIOR HIGH SCHOOLS TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
BARRETT	1898				2.2	4.3	4.0	9.8	10.0	5.7	3.8	4.0	5.5	9.4	13.5	18.9
BERRY	1956-															
(Marion-Franklin)	1957						3.1	7.5	10.8	7.5	20.9	19.5	27.3	27.3	23.9	23.3
BUCKEYE	1963					4.2	3.7	2.9	2.7	2.5	4.8	5.1	5.1	8.1	11.1	8.1
CHAMPION	1909				97.3	90.6	80.0	75.0	73.7	72.5	76.2	63.9	71.8	56.4	35.0	24.3
CLINTON Jr.	1955						2.0	2.1	2.1	2.0	4.0	4.1	6.9	7.5	8.5	14.6
CRESTVIEW Jr.	1915						2.4	2.2	—	3.0	2.2*	2.3*	—	6.3*	9.4	15.6
DOMINION	1956						2.9	2.7	2.4	2.4	2.4	2.6	2.4	5.0	10.3	11.4
EASTMOOR Jr.	1962-															
1963						6.3	5.9	5.3	8.1	9.8	7.7	9.1	8.6	11.8	15.2	15.6
EVERETT	1898				7.1	7.0	5.0	7.1	6.4	3.9	3.7	4.3	8.0	12.5	15.2	17.8
FRANKLIN	1898				32.6	28.9	31.7	43.8	42.5	34.6	78.2	78.7	70.4	54.9	45.8	23.9
HILLTONIA	1956					7.5	7.7	7.6	9.8	6.8	4.4	6.8	9.3	18.2	16.7	21.6
INDEPEND- ENCE	1975															
INDIANOLA Jr.	1929					5.6	2.7	7.7	7.3	8.5	6.4	6.8	11.4	14.6	23.8	21.0
JOHNSON	1958-															
PARK	1959						2.4	4.5	4.4	2.0	2.0	2.1	8.9	12.5	12.7	20.4
LINMOOR	1957					8.3	15.9	24.3	26.8	25.8	27.4	34.5	32.2	28.3	21.7	23.7
MEDINA	1959-															
1960							2.2	4.4	2.2	2.1	2.1	2.1	2.0	4.4	12.5	12.8
MCCUFFY Jr.	1927						3.6	6.8	15.2	7.9	8.6*	15.3*	16.7*	18.1*	18.6	26.5
*MIFFLIN Jr.	1924-															
1971A					11.8	5.6	8.3	18.0*	18.8*	13.8*	17.5*	29.0*	34.8*	35.4*	21.7*	23.2*
*MOHAWK Jr.	-----				39.4	41.2	41.7	38.9	47.4	48.6	58.8	51.4	40.5	23.5	23.5	25.0
MONROE	1963															

*—Combined statistics, Jr.-Elem. or
Jr.-Sr. some years
A — Annexed School

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JUNIOR HIGH SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
RIDGEVIEW	1966							7.8	6.3	8.3	5.6	3.0	2.6	5.4	5.4	5.6
ROOSEVELT	1916				5.1	8.8	8.6	9.5	12.5	15.2	19.1	23.3	34.7	27.7	3.9	22.7
SHERWOOD	1966							2.9	2.9	—	—	—	5.0	5.4	12.8	14.3
SOUTHMOOR	1968							11.1	8.8	8.8	8.8	20.6	23.1	20.1	21.1	17.1
STARLING	1908				2.5	4.8	5.0	4.4	8.5	6.1	4.2	6.2	6.4	8.9	11.9	16.7
WEDGEWOOD	1965-															
1966							5.9	3.7	3.7	6.5	3.2	3.3	5.9	8.8	8.3	13.5
WESTMOOR	1958-															
1959							2.5	2.6	2.6	2.3	2.3	2.3	6.7	8.7	13.0	17.8
WOODWARD																
PARK	1967							8.3	6.5	5.4	1.8	1.7	3.0	6.3	9.1	11.1
YORKTOWN	1967							7.4	6.5	5.7	5.0	4.8	3.8	11.3	14.5	13.5

P 31-524
Non-white

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SENIOR HIGH SCHOOLS TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
ADULT DAY																
¹ BEECHCROFT												12.5	30.0	10.0	10.0	12.5
¹ BETHEL-																
GODOWN																
BRIGGS	1975															
BROOKHAVEN	1961-															
	1963															22.2
CENTRAL	1924					1.5	1.5	3.1	3.1	2.8	2.7	3.0	5.3	5.1	7.1	8.2
EAST	1922					3.6	3.7	4.5	9.4	9.4	10.5	10.8	12.8	15.0	17.6	23.7
EASTMOOR	1955					12.7	15.0	21.3	24.8	28.9	35.2	37.3	41.5	36.3	31.3	23.7
EVENING							1.8	1.9	1.6	1.5	4.0	10.6	8.8	13.3	15.2	16.2
INDEPEND-						7.0	4.3	5.0	9.8	11.9	16.4	14.5	14.8		50.0	
ENCE	1975															
LINDEN-																
McKINLEY	1928					—	1.4	2.8	6.1	7.9	15.4	27.3	44.4	37.9	30.5	22.9
MARION-	1952-															
FRANKLIN	1953					2.1	7.4	6.7	9.1	6.8	10.5	11.1	15.4	15.9	17.3	19.7
¹ McCUTCH-																
EON																
•MIFFLIN	1928-															
Jr.-Sr.	1971A															
•MOHAWK																
Jr.-Sr.	1952											12.8	11.9*	17.3*	22.7*	21.3*
NORTH	1924															
NORTHLAND	1966					—	1.6	1.7	1.6	18.0*	17.5*	29.0*	34.8*	35.4*	21.7*	23.2*
SOUTH	1923															
SOUTHEAST						1.5	1.3	2.7	3.9	1.8	1.4	3.1	2.6	6.3	9.8	10.7
•WALNUT																
RIDGE	1961															
WEST	1929					—	1.6	3.1	1.8	—	2.5	2.3	2.2	6.1	9.0	9.2
•—Combined Jr.-Sr. data some years.						—	2.4	1.3	3.2	2.2	4.3	5.7	5.2	9.1	12.7	13.3
1—Schools under construction																

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SENIOR HIGH SCHOOLS — Continued TEACHERS BY % BLACK

School Name	Year Opened	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975- 1976
WHETSTONE	1961					—	1.9	2.0	1.6	1.6	1.4	1.4	2.6	7.4	11.1	10.0

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Plaintiffs' Exhibit No. 505
 Table of Pupil Segregation
 Indices Prepared by Plaintiffs'
 Expert Witness, Dr. Karl Taeuber

COLUMBUS

Pupil Seg — Minority vs. Non-Minority

		<u>Elem.</u>	<u>Jr.</u>	<u>Sr.</u>
Fall	1975	70	56	54
	74	73	62	56
	73	76	64	57
	72	76	66	58
	71	77	67	57
	70	80	66	55
	69	81	67	56
	68	81	68	53
	67	79	69(25)	50
May(65)	66	80	61(20)	53
Feb.(64)	65	79	63	54
Feb.(63)	64	76	63	55

Supreme Court, U. S.

FILED

NOV 11 1978

MICHAEL R. DAK, JR., CLERK

In The
Supreme Court of the United States

October Term 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al,
Petitioners,

vs.

GARY L. PENICK, et al,
Respondents.

**BRIEF OF RESPONDENTS, THE OHIO STATE
BOARD OF EDUCATION AND
SUPERINTENDENT OF PUBLIC INSTRUCTION**

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i.

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**BRIEF OF RESPONDENTS, THE OHIO STATE
BOARD OF EDUCATION AND
SUPERINTENDENT OF PUBLIC INSTRUCTION**

These respondents support the petition and respectfully pray that a writ of certiorari be issued to the Court of Appeals for the Sixth Circuit.

INTRODUCTORY STATEMENT

These respondents, the Ohio State Board of Education and Franklin B. Walter, Superintendent of Public Instruction, support the petition of the Columbus School Board and its superintendent, and urge the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

We adopt the petitioners' statements concerning the opinions below, jurisdiction, the questions presented, and the applicable constitutional and statutory provisions.

STATEMENT OF THE CASE

These respondents adopt the petitioners' statement of the case. We add this supplementary note concerning the Court of Appeals' treatment of the liability of the State Board of Education and Superintendent of Public Instruction. The District Court made no finding of independent segregative intent on the part of the state defendants. It found them guilty of a Fourteenth Amendment violation on the basis of its conclusion that they should have done more to end the racial imbalances which existed in the Columbus City School District. It held that the State Board's failure to take "firm action" against the local district provided a basis for an inference "that they intended to accept the Columbus defendants' acts, and thus shared in their intent to segregate in violation of a constitutional duty to do otherwise." [A. 67.]

The Court of Appeals appeared to regard this as sufficient support for a violation finding against the state defendants, but it still entertained enough doubt about the legal sufficiency of the District Court's conclusion to warrant the remand of the case to the District Court for further consideration of the State Board's liability. [A. 204-207.]

REASONS FOR GRANTING THE WRIT

There are four reasons why the petition for certiorari should be granted: (1) to correct the Sixth Circuit's misconstruction of *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); (2) to require the District Court to make the findings of fact concerning incremental segregative effect which *Dayton* has mandated; (3) to clarify the liability presumptions described in *Keyes*¹ in relation to the remedial fact finding required by *Dayton*; and (4) to insure that the inference of segregative intent which might be drawn from a school board's failure to take all possible integrative action does not become a springboard by which courts vault into administrative control of school districts.

The District Court firmly declined to make the findings of fact concerning incremental segregative effect which *Dayton* absolutely requires. The Court of Appeals not only failed to correct this error. It compounded it by misconstruing *Dayton*.

Both lower courts also made improper use of inferences and presumptions to justify their racial balance remedy. Both courts held that a school board intends to perpetuate racially disproportionate school populations if it fails to pursue racially integrative options. Both courts considered that Columbus' failure to correct its racial imbalances was unconstitutional. [A. 50-51, 58-61, 165.] By equating a toleration of racial imbalances with unconstitutional segregation, both courts laid the foundation for their employment of the *Keyes* inference of duality. *Keyes*, 413 U.S. 189, 201-202, 203 (1973). Presuming thereby that a "dual" school system existed in 1954, the Court of

¹ *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

Appeals held that Columbus was thereafter under a continuing constitutional duty to desegregate. [A. 165.] Columbus' subsequent construction of new school facilities in neighborhoods where the children were, with the knowledge that they would be racially imbalanced, was regarded by both lower courts as unconstitutional. [A. 48-49, 50-51, 58, 173, 198.] The District Court found eight incidents of discrete segregation subsequent to 1954. [A. 21-24, 26-42.] The Court of Appeals acknowledged that "these instances can properly be classified as isolated in the sense that they do not form any systemwide pattern." [A. 175.] However, it found that the policies of the Columbus Board as to neighborhood school siting and pupil assignment did have systemwide impact [A. 198] and that these warranted a systemwide remedy calling for racially balanced student populations in all schools of the district.

If this use of inferences and presumptions may be indulged in school desegregation cases, racial imbalances will be tantamount to constitutional violations, and judicial reconstruction of school districts can be expected as a matter of course. Neither that result nor the process by which it was reached below is authorized by this Court's decisions in *Swann*, *Dayton*, *Austin*, *Pasadena*, *Arlington Heights*, or *Washington v. Davis*.²

² *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Austin Independent School District v. United States*, 429 U.S. 990 (1976); *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

I. THE DECISIONS BELOW ARE IN CONFLICT WITH AND MISAPPLY DECISIONS OF THIS COURT, IN THAT THEY IMPOSE A SYSTEM-WIDE RACIAL BALANCE REMEDY WITHOUT FIRST DETERMINING THE INCREMENTAL SEGREGATIVE EFFECT OF THE CONSTITUTIONAL VIOLATIONS.

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), established something new in the law of school desegregation: a precise definition of the area over which remedial control may be exercised by the courts. It holds:

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the School Board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. * * * If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton School population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy.

433 U.S. at 420.

Demonstrating that the *Dayton* rule was not peculiar to the Dayton factual context, this Court remanded both the Omaha and Milwaukee cases for the same findings mandated in *Dayton*.³ The requirement of a specific finding

³ *Brennan v. Armstrong*, 433 U.S. 672 (1977); *School District of Omaha v. U.S.*, 433 U.S. 667 (1977).

on incremental segregative effect cannot be attributed to *Dayton's* particular facts. *Dayton* lays down a rule which is applicable to all school desegregation cases.

Dayton orders district courts to establish the difference between two patterns of population distribution. It requires a comparison of the racial dispersal of pupils in school at the present time with the dispersal which probably would have existed if no constitutional violations by school officials had distorted the probable distribution. No other conclusion can be drawn from this Court's language:

... the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the ... school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.
Ibid.

The District Court in the present case failed to make that determination. Its reason seems to be that *Keyes*⁴ authorizes a finding of system-wide violation once plaintiffs show that pupil segregation in a meaningful portion of the system is attributable to segregative intent by school officials. Under *Keyes*, such a showing creates a rebuttable presumption that other segregated schools in the system are also the products of discriminatory intent. Whatever may be the inferences which *Keyes* allows to make a prima facie case of violation, *Dayton* requires district courts to carry the factual inquiry further before issuing remedial orders concerning pupil reassignment and transportation. It requires district courts to determine the extent to which the present distribution of pupils differs from the one which would have existed if the constitutional violations of school officials had not occurred.

⁴ *Keyes v. School District No. 1, Denver Colorado*, 414 U.S. 189 (1973).

Subsequent to *Dayton*, it is not enough for a district court to say that there have been some violations, therefore by presumption all racial imbalances are due to segregative intent, therefore there must be a system-wide redistribution of all the pupils in the school district. Since the District Court failed to make *any* determination of incremental segregative effect, its remedial order is not in compliance with *Dayton*, and the Court of Appeals' affirmation was clearly erroneous.

Since *Swann* was decided in 1971 there has been a gradual refinement of this Court's definition of the remedial action which lower courts might take in desegregation cases. *Dayton* provides new requirements which regulate lower court actions both as to fact finding and remedial decrees. It caps a period of several years of increasingly refined thinking about the functions which the district courts are to play in school desegregation cases and lays down important limits of their discretionary power.

Brown I established that state laws which compelled children to attend different schools solely because of their race were in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown II*, 349 U.S. 294 (1955), held that in those states school officials carried the burden of devising plans for desegregation under the guidance of federal district courts.

For at least a decade after 1955 federal courts held that *Brown I* and *II* did not require affirmative action to undo racial imbalance.⁵ During these years many "freedom of choice" plans were proposed by southern school administrators which permitted children to attend the schools of their choice. The practical effect of the freedom of choice plans was to maintain the segregated conditions which had been required or permitted by state law prior

⁵ See for example *Bell v. School City of Gary, Indiana*, 324 F. 2d 209 (7th Cir. 1963); *Downs v. Board of Education*, 336 F.2d 988 (10th Cir. 1964); *Deal v. Board of Education*, 369 F. 2d 55 (6th Cir. 1966).

to 1954. Little practical integration occurred in southern systems.

In 1968 *Green v. County School Board*, 391 U.S. 430, held that the freedom of choice response to *Brown* was constitutionally insufficient. *Green* involved a rural school district in Virginia in which there were only two schools. Prior to 1954 one had been for black children and the other had been for whites. The freedom of choice plan ostensibly gave black children the right to attend the white school, but as a practical matter none did. The Supreme Court held that school officials in districts which had statutory dual systems prior to 1954 were henceforth obligated to devise programs for integration which would be practical, which would work now, and which would eliminate all remnants of segregation "root and branch."

Under the *Green* doctrine of affirmative action, state neutrality with respect to segregated schools was no longer permissible in those states which permitted or required dual school systems in 1954, and southern school districts were required to take effective desegregative measures. Many of these districts were rural and had always relied upon school buses to transport children to school.

The question of whether the *Green* mandate applied to metropolitan systems arose in *Swann*, which involved the schools of Charlotte and Mecklenburg in North Carolina. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Chief Justice observed that the problems encountered by lower federal courts in the years since *Brown I* suggested that the Court should now provide some guidelines for the assistance of all concerned. The Court observed that the "central issue in this case is that of student assignment."

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of

the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. * * *

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.

402 U.S. at 22-23.

The Court approved the district court's use of modified attendance zones, pairing and clustering, noncontiguous pairing, and the transportation of students under a plan in which they would be picked up at schools nearest their homes and transported to the schools to which they were assigned.

The Court noted that there were limits, however hard to define, on the remedial powers of federal courts. A remedial plan should be workable, effective and realistic. It concluded:

However, in seeking to define the scope of remedial power or the limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity.

Id., 31.

Broad authority, unfettered by specific limitations, was thus conferred on lower courts. The Supreme Court was content in 1971 to invoke the spirit of equity and trust to

the wisdom of lower courts as they addressed the problems of formulating equitable desegregation decrees.

Two years later, in 1973, *Keyes* reached the Supreme Court. *Keyes v. School District No. 1*, 413 U.S. 189. It is not a remedy case. It deals instead with the inference of segregative intent which may be drawn from certain evidence. It held that where school officials are shown to have followed a policy of segregating black and white children in a meaningful portion of the school system, a rebuttable presumption arises that other segregated schools in the system were also the result of their segregative intent.

The plaintiffs had proven intentional segregation of the schools in the Park Hill area of Denver. The district court had ordered those schools desegregated. The plaintiffs also pointed to segregated schools in the core of the city and asked that they too be desegregated. The Supreme Court held that the showing of segregative intent with respect to Park Hill also raised a presumption of segregative intent with respect to the schools in the core. It affirmed the district court's order desegregating the Park Hill area and remanded for further proceedings with respect to the core schools:

If respondent board fails to rebut petitioners' prima facie case, the district court must, as in the case of Park Hill, decree all-out desegregation of the core city schools.

Id., 214.

Keyes is principally significant for its treatment of the presumption issue and its differentiation between *de facto* and *de jure* segregation. However, the Supreme Court's remand order, ending on the note that "all-out desegregation of the core city schools" must be decreed if the school officials could not rebut the presumption of their segregative intent with respect to such schools, suggested that system-wide desegregation of big city schools could be ordered if the plaintiffs could show that school officials

played some role in the maintenance of segregated schools in a meaningful portion of the city.

Mr. Justice Powell, concurring in the judgment, observed that lower courts might henceforth be in some doubt as to the scope of their authority to issue remedial orders in such situations. His separate opinion in *Keyes* outlines problems which he then discerned on the horizon—problems which would not be squarely addressed and decided until *Dayton*. Commenting on *Swann*, which had been decided only two years before, he observed:

In imposing on metropolitan southern school districts an affirmative duty, entailing large scale transportation of pupils, to eliminate segregation in the schools, the Court required these districts to alleviate conditions which in large part did *not* result from historic, state-imposed *de jure* segregation. Rather, the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular state had or did not have segregatory school laws.

413 U.S. at 222-223.

* * * In decreeing remedial requirements for the Charlotte-Mecklenburg school district, *Swann* dealt with a metropolitan, urbanized area in which the basic causes for segregation were generally similar to those in all sections of the country, and also largely irrelevant to the existence of historic, state-imposed segregation at the time of the *Brown* decision. Further, the extension of the affirmative duty concept to include compulsory student transportation went well beyond the mere remedy of that portion of school segregation for which former state segregation laws were ever responsible.

Id., 224-225.

Mr. Justice Powell thus expressed the recognition that the remedy approved in *Swann*—and the remedy which the district court was impliedly invited to order for Denver's core schools—addressed a quantum of racial concentration in the schools which had not actually been caused by school officials.

It is true, of course, that segregated schools—wherever located—are not solely the product of the action or inaction of public school authorities. Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs.

Id., 236.

The controlling case is *Swann, supra*, and the question which will confront and confound the District Court and Denver School Board is what indeed does *Swann* require. *Swann* purported to enunciate no new principles, relying heavily on *Brown I* and *II* and on *Green*. Yet it affirmed a district court order which had relied heavily on 'racial ratios' and sanctioned transportation of elementary as well as secondary pupils. Lower federal courts have often read *Swann* as requiring far-reaching transportation decrees [footnote omitted] 'to achieve the greatest possible degree of actual desegregation.' 402 U.S. at 26. In the context of a large urban area, with heavy residential concentrations of white and black citizens in different—and widely separated—sections of the school district, extensive dispersal and transportation of pupils is inevitable if *Swann* is read as expansively as many courts have been reading it to date.

Id., 237-238.

Mr. Justice Powell then cautioned:

To the extent that *Swann* may be thought to require large scale or long distance transportation of students

in our metropolitan school districts, I record my profound misgivings. Nothing in our Constitution commands or encourages any such court-compelled disruption of public education. It may be more accurate to view *Swann* as having laid down a broad rule of reason under which desegregation remedies must remain flexible and other values and interests be considered.

Id., 238.

Mr. Justice Powell was the first member of the Supreme Court to record an awareness that remedial orders requiring large-scale pupil transportation in urban centers might be attempting to correct more than just the segregation caused by school officials. As subsequent cases were decided, other members of the Court came to share the same view.

The implications of *Swann* were ultimately re-examined by the full Court, but it was to take several years before its evolving grasp of the problem would lead to *Dayton's* clear rule.

The extent to which lower courts were construing *Swann* as authority for system-wide transportation orders was made plain in the year after *Keyes*, when the Detroit case reached the Supreme Court. *Milliken v. Bradley*, 418 U.S. 717 (1974). In reversing the Sixth Circuit's approval of a multi-county remedial program for the schools of Detroit, *Milliken* marked the first effort by the Supreme Court after *Swann* to define the scope of remedial orders which lower courts might make. *Milliken* emphasized that the remedy may not go further than the constitutional violation—that its office is to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, 746. That important theme would recur with increasing emphasis in the decisions to come.

The next case to reach the Court was *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

Pasadena school officials had been found responsible for segregated schools in that city. The district court ordered a remedial plan having attendance patterns which would ensure that no school would be more than 50 percent black. The plan was put into effect, and the remedial order was satisfied in all its terms. Four years later the school board asked the district court to terminate its jurisdiction and dissolve the order. The district court refused on the ground that 5 of the system's 32 schools had developed black pupil concentrations exceeding 50 percent. The Ninth Circuit affirmed, finding no abuse of discretion. The Supreme Court held that both lower courts were wrong. Mr. Justice Rehnquist wrote the opinion for the six-member majority.

The majority found the District Court's order to be inconsistent with *Swann*. Its order that no school be more than 50 percent black was apparently considered by it "as an inflexible requirement . . . to be applied anew each year. . . ." 427 U.S. at 434. It apparently believed "it had authority to impose this requirement even though subsequent changes to racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." *Ibid*.

There was also no showing in this case that those post-1971 changes in the racial mix of some Pasadena schools . . . were in any manner caused by segregative actions chargeable to the defendants. * * * The fact that black student enrollment at five out of 32 of the regular Pasadena schools came to exceed 50 percent during the four-year period from 1970 to 1974 apparently resulted from people randomly moving into, out of, and around the [school district] area. This quite normal pattern of human migration resulted in some changes in the demographics of Pasadena's residential patterns, with resultant shifts in the racial makeup of some of the schools. But as these shifts were not attrib-

uted to any segregative actions on the part of the defendants, we think this case comes squarely within the sort of situation foreseen in *Swann*: 'It does not follow that communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year by year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.'

427 U.S. at 435-436.

In conclusion, the Court held that the district court was not empowered to require the school board to rearrange attendance zones each year to ensure that a racial mix desired by the court was maintained in perpetuity.

The teaching of *Pasadena* is that racial concentrations in the schools which do not result from discriminatory action by school officials are not matters which are subject to judicial control. Remedial orders may reach segregation caused by the unlawful action of school officials. But racial concentrations caused by the random movement of people into and out of a school district are something else, and courts do not have authority to order school officials to readjust pupil assignments to correct such developments.

During the next seven months the Court rendered two decisions which left no doubt about its view on a related subject — the indispensability of discriminatory intent in any equal protection claim under the Fourteenth Amendment. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 50 L. Ed. 2d 450 (1977). The relevance for "remedy" cases which arises out of *Washington* and *Arlington Heights* is that racial imbalances in schools are Fourteenth Amendment violations only if they have been caused by school officials

who have acted with discriminatory intent. Racial imbalances due to other causes are not remediable.

Consistent with this reasoning, and reinforcing it, was the Supreme Court's handling of the *Austin* case.⁶ The Fifth Circuit had nullified a plan for the desegregation of the schools in Austin, Texas. The school board had proposed what was essentially a neighborhood school system for a city that was racially and ethnically segregated. The Fifth Circuit held broadly that the maintenance of a neighborhood school system in any city which had racial and ethnic concentrations like Austin's was sufficient evidence of segregative intent to support a finding of Fourteenth Amendment liability. The Supreme Court vacated the judgment and remanded for reconsideration in light of *Washington v. Davis*. Three of the justices then took the unusual step of expressing sharp reservations about the Fifth Circuit's view on remedy, a matter which was not before the Court for decision. Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, stated that the Fifth Circuit's order involved such "a misapplication of a core principle of desegregation cases" that discussion of the remedy issue ought to be made in the remand order. His opinion foreshadowed the rationale of *Dayton*, which was to be decided in a few months. He wrote:

... the task is to correct by a balancing of the individual and collective interests 'the condition that offends the Constitution.'

A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, 'as with any equity case, the nature of the violation determines the scope of the remedy.'

50 L. Ed. 2d 603.

⁶ *Austin Independent School District v. United States*, 420 U.S. 990, 50 L. Ed. 2d 603 (1976).

He stated that the Fifth Circuit "seems to have erred in ordering a desegregation plan far exceeding any identifiable violations of constitutional rights." *Id.*, 604.

As is true in most of our larger cities with substantial minority populations, Austin has residential areas in which certain racial and ethnic groups predominate in the population. Residential segregation creates significant problems for school officials who seek to achieve a nonsegregated school district. In Austin those problems are perhaps accentuated by the geography of the city.

• • •

The Court of Appeals . . . concluded that nothing short of extensive crosstown transportation would suffice. Designed to achieve a degree of racial balance in every school in Austin, the desegregation plan endorsed by the Court of Appeals is remarkably sweeping.

Ibid.

The remedial plan was described as involving the transportation of 32 percent to 42 percent of the entire school population, some 18,000 to 25,000 pupils.

Whether the Austin school authorities intentionally discriminated against minorities or simply failed to fulfill affirmative obligations to eliminate segregation . . . the remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find . . . that absent those constitutional violations the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court.

The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control

of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.

I do not suggest that transportation of pupils is never a permissible means of implementing desegregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, *large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past.* Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary age children. A remedy simply is not equitable if it is disproportionate to the wrong.

50 L. Ed. 2d at 605 (Underscoring supplied).

To what extent the views of Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, were shared by other members of the Court was then unclear. Only Justices Brennan and Marshall voted to affirm the Fifth Circuit's decision. Seven members of the Court clearly disapproved of it for various reasons.

By the time of the *Austin* decision, the Court was clearly emphasizing, at least through three of its members, that not all of the racial concentrations in the schools were due to the segregative intent of school officials, and that remedial orders had to be confined to the conditions which their violations caused.

Dayton was decided six months later. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). It represents the culmination of six years of experience in the Supreme Court's shaping of remedial guidelines since *Swann*. That experience might be summarized as a period of

expansionist involvement by lower federal courts in the reorganization of local public school systems, coupled with increasing concern by the Supreme Court about the scope and wisdom of their remedial efforts. The Supreme Court became explicit.

Dayton defines the specific condition which a remedy order may address: racial segregation caused by the discriminatory intent of school officials. Racial concentrations which are caused by factors *other* than such misconduct are not remediable in a school desegregation case. Like *Swann*, which said that "one vehicle can carry only a limited amount of baggage,"⁷ *Dayton* recognizes that school officials are not responsible for all the concentrations of racial groups in metropolitan schools. It reiterates that the victims of segregative policies are to be restored to the positions they would have occupied if unlawful action by school officials had not occurred. Remedial orders are not to carry any farther.

Writing for a unanimous court (Mr. Justice Marshall having taken no part in the consideration of the case), Mr. Justice Rehnquist stated:

• • •

We realize, of course, that the task of fact-finding in a case such as this is a good deal more difficult than is typically the case in a more orthodox lawsuit. Findings as to the motivations of multi-membered public bodies are of necessity difficult, cf. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 USLW 4073 (January 11, 1973), and the question of whether demographic changes resulting in racial concentrations occurred from purely neutral public actions or were instead the intended result of actions which appeared neutral on their face but were in fact invidiously discriminatory is not an easy one to resolve.

433 U.S. at 414.

⁷ 402 U.S. at 22.

* * *

Viewing the findings of the District Court as to the three-part 'cumulative violation' in the strongest light for the respondents, the Court of Appeals simply had no warrant in our cases for imposing the systemwide remedy which it apparently did. * * * It is clear from the findings of the district court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution. *Spencer v. Kugler*, 404 U.S. 1027 (1972); *Swann, supra*, at 24. The Court of Appeals seemed to have viewed the present structure of the Dayton school system as a sort of 'fruit of the poisonous tree,' since some of the racial imbalance that presently obtains may have resulted in some part from the three instances of segregative action found by the District Court. But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope.

Id., 417-418.

* * *

In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the district court taking those findings of violations in the light most favorable to respondents.

Id., 418.

* * *

The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary." It 'may be exercised only on the basis of a constitutional violation.' [Citations omitted]. Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' [Citations omitted].

Id., 419-420.

* * *

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra*.

* * *

If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra*, at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

Id., 420.

If there was any question in anyone's mind as to whether the *Dayton* rule would apply to other factual situations, all doubt should have been extinguished two days later when the Supreme Court remanded the Omaha case to the Eighth Circuit for reconsideration in light of *Village of Arlington Heights* and *Dayton. School District of Omaha v. United States*, 433 U.S. 667 (1977). And on

the same day the Court made it plain that *Dayton* applies to liability findings as well as to remedial orders. After the Seventh Circuit had affirmed liability findings in Milwaukee on an interlocutory appeal, the Supreme Court vacated the judgment of the Court of Appeals and remanded for reconsideration so that the inquiry required by *Dayton* could be undertaken. *Brennan v. Armstrong*, 433 U.S. 672 (1977).

It has now been established as firm constitutional doctrine that no remedy may be ordered concerning pupil reassignments without prior findings by the district court comparing the present racial distribution of pupils with what it would have been had school officials not been guilty of unlawful discrimination. There is no constitutional warrant for ordering a quantum of desegregation which would exceed that probable norm.

The District Court failed to make the findings which *Dayton* required. Its remedial order does not rest on a constitutional foundation. The Court of Appeals' judgment of affirmance is equally contrary to law.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

GARY L. PENICK, *et al.*,
Respondents.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

GARY L. PENICK, *et al.*,
Respondents.

PLAINTIFFS' BRIEF IN OPPOSITION TO CERTIORARI

INTRODUCTION

The Columbus Board bases its petition for certiorari on assumptions that the trial court, as affirmed by the Court of Appeals, misapprehended the legal standards for segregative intent (Pet. 26-34) and causation (Pet. 16-24) in approving a system-wide remedy to overcome the current system-wide impact of the system-wide violations found. Respondents are in the unusual position, however, of answering such a typical claim of error by a party that has lost in the courts below in the added light of the stay opinion entered by Mr. Justice Rehnquist indicating that at least that Justice believes the issues concerning intent and causation should be reviewed by this Court. 47 U.S.L.W. 3089 (Aug. 11, 1978), Pet. App. 213-214. In this brief, we therefore detail the proceedings and rulings below to demonstrate that there has been *no* error

on this score and that Justice Rehnquist's concern arises from a fundamental misconception of the proceedings and rulings below. As a result, there is no call for this Court to exercise its discretionary review power to supervise the lower courts on the issues in this case (*see* Supreme Court Rule 19(b)); instead, the writ should be denied, and the stay entered by Mr. Justice Rehnquist vacated forthwith so that the vindication of plaintiffs' constitutional rights will be delayed no longer.

In passing, the petitioners also spout the worn rhetoric of "extensive cross-town transportation" (Pet. 13) and "statistical racial balance" (Pet. 25). But busing is not in issue: there has been no claim nor showing that the time or distance of transportation risk the health, safety or education of the children; to the contrary, the transportation is provided to students assigned to schools beyond walking distance so that access to schooling will be convenient for all students. Similarly, the phrase "statistical racial balance" is merely a poorly veiled attempt to substitute semantics for substance; for whatever petitioners intend by use of the term, they apparently concede that if the current "racial imbalance" in Columbus Public Schools is in fact caused by their intentionally segregative conduct, the appropriate remedy would obviously reduce or eliminate that "racial imbalance." Petitioners, nevertheless, then go on to argue that *any* plan to eliminate *de jure*, one-race schools that initially provides for a broad and flexible racial range constitutes a proscribed fixed racial balance. Pet. App. 25-26. Apparently, petitioners would be content only if the range is expanded from 30% to 100%, i.e., to permit complete racial separation between all-black and all-white schools. Such rhetorical broadsides aside, the decision in this case turns on the issues actually decided by the courts below:

QUESTIONS PRESENTED

1. Did the lower courts err in inquiring whether the Columbus school authorities acted with segregative intent and to what extent such intentionally segregative conduct caused the existing segregation of the Columbus Public Schools?

2. Upon finding that the Columbus Board's intentionally segregative policies and practices proximately caused the current segregation throughout the entire school district, did the lower courts err in ordering a system-wide plan to remedy this system-wide violation?

STATEMENT

A. Summary

Unlike the situation in some other school cases (*e.g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977)), the parties and the district court at the trial on the merits basically agreed on the critical issues to be determined pursuant to this Court's rulings: whether school officials acted with segregative intent and the extent to which such intentional action caused the current segregation of the Columbus Public Schools. *See* Pet. App. 46, 49-50. As a result, the district court conducted the trial on the merits with the understanding that judicial intervention was permitted, and required, only to the extent necessary to overcome the current effects of any intentionally segregative conduct. *E.g.*, Pet. App. 73-75, 95.

The parties, however, disagreed about the *facts* of the case, Pet. App. 46. "Over 70 witnesses . . . , over 600 exhibits . . . [and] a trial transcript . . . in excess of 6,600 pages" (Pet. App. 6) were presented to contest these two critical factual issues of segregative intent and causation. Based on a sensitive inquiry into this extensive and

focused record, the district court reached its judgment approving a system-wide remedy in detailed opinions on the intentional and system-wide nature of the violations and the pervasive extent of their current segregative impact (Pet. App. 1-86), the application of this Court's ruling in *Dayton* to such findings (Pet. App. 90-96), and the adequacy of proposed remedy plans to overcome the continuing system-wide effect of the violations (Pet. App. 97-124, 125-137). The courts below found that the Columbus school district has been and is currently a "northern" dual system, where a variety of intentionally segregative system-wide policies and practices (rather than a single state segregation law) have substantially contributed to and proximately caused the current condition of segregation throughout the district. *E.g.*, Pet. App. 60-61, 73, 94-95, 197-199. The courts below therefore ordered system-wide relief to do no more, and no less, than remedy the violation. *E.g.*, Pet. App. 73-74, 95, 99-107, 127, 207.

B. Liability

Through a carefully, even meticulously reasoned exposition of the evidence and application of the controlling legal standards established by this Court in *Dayton*, *Washington v. Davis*, *Arlington Heights*, and *Keyes* to the record, the district court ruled as follows:

1. "From the evidence adduced at trial," District Judge Duncan found that the "Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954" (Pet. App. 61), with an "enclave of separate, black schools" (Pet. App. 11) intentionally created and maintained to keep most white and black children in racially separate schools. After an early flirtation with nondiscrimination following Ohio's prohibition against racially dual schooling in 1887-1888, the Columbus Board created the all-black Champion elementary school in 1909 and maintained it as such

through 1938. At that time, Champion's all-black faculty were reassigned over the summer to the former Pilgram junior high school; the Board then simultaneously converted Pilgram junior high school into an all-black elementary (by gerrymandering all-white students and assigning all-white staff out to other schools) and Champion into an all-black junior high. Subsequently, the Board made similar overnight and total racial conversions to assign all-black student bodies, administrators and teachers to the Mt. Vernon, Garfield and Felton schools separate from white children and staff in the system. These blatantly segregative actions involved a substantial portion of the black student population, directly affected many white schools on a reciprocal basis and implemented a system-wide policy of racial discrimination in hiring and assigning faculty, administrators, and students. Pet. App. 7-11. Defendants did not even "assert that these results were an accommodation of the neighborhood school concept." Pet. App. 11. In sum, "the Columbus Public Schools were officially segregated by race in 1954 when the Supreme Court decided *Brown*." Pet. App. 94.

The trial court undertook "this look to the past" not for the "purpose of dragging out skeletons" nor with the sometimes false benefit of "hindsight," but simply in order to "discover" whether the Columbus Board's policy of intentional segregation at the time of *Brown* is "responsible for the admitted current" racial segregation of the Columbus schools (Pet. App. 7).¹ Recognizing the significant growth that characterized the Columbus schools since 1954 and the substantial residential segregation (Pet. App. 11-12, 56-58), the trial court carefully reviewed the entire record evidence (Pet. App. 18-60) and determined that the Columbus Board "never" even tried to (and, not surprisingly, did not) dismantle the "dual

¹ See *Keyes*, 413 U.S. at 210-211; cf. also 413 U.S. at 203.

system" which it inherited at the time of *Brown*. Pet. App. 94; also Pet. App. 60-61.

2. The trial court also carefully examined all aspects of the administration of the Columbus Public Schools following *Brown* and detailed in its findings "a variety of post-1954 Board decisions and practices, such as creating and maintaining optional attendance zones and discontinuous attendance areas and choosing sites for new schools which had the natural, foreseeable and anticipated effect of enhancing rather than mitigating the racially separate schools which were purposefully established by the Board prior to 1954." Pet. App. 94; also Pet. App. 12-42. Among the classic segregation devices utilized by the Columbus Board after *Brown*, the following were prominent:

- the longstanding and system-wide assignment of faculty and staff on a racially segregated basis through 1974. (when the Columbus Board finally entered into a conciliation agreement with the Ohio Civil Rights Commission) and thereafter the continued, system-wide assignment of administrators on a racially segregated basis. Pet. App. 14-15, 18, 61, 152-154, 173-174, 198.

- a general pattern, with full knowledge of the racial consequences (and in tandem with the then-existing system-wide policies of staff and faculty segregation), of segregative site selection and school construction and a series of specific school construction projects in racially mixed "fringe" and "racial pocket" areas that systematically maximized school segregation in the face of the known, available, non-discriminatory and nonsegregative alternatives. *E.g.*, Pet. App. 20-25, 35-42, 61, 94, 166-173, 198.

- persistent deviation from and systematic manipulation of any arguable "neighborhood school concept" in such racially mixed "fringe" and "racial pocket" areas in order to segregate black and white students

in separate schools through the use of dual overlapping (or optional) zones, discontinuous attendance areas, gerrymandering, and alteration of grade structures in circumstances where the racially neutral implementation of any "walk-in" school concept would have resulted in racially mixed schools. *E.g.*, Pet. App. 26-42, 61, 94, 174-195, 198.

Expressly applying the intent requirements of *Keyes*, 413 U.S. 189, 198 (1973), *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. MHDC*, 429 U.S. 252, 265-268 (1976) (*see* Pet. App. 42-46), the trial court conducted the requisite sensitive inquiry into, for example, the persistent history of invidious discrimination, substantive departures based on race from normal practice, contemporaneous notice to school officials about the discriminatory effects of their actions, contemporaneous statements evidencing segregative intent, and the non-segregative alternatives to school board actions which were available. Pet. App. 11-60. Based on this examination, the district court found that the Board's acts and omissions following *Brown* through the time of trial were, in fact, also motivated by "segregative intent." Pet. App. 61.² Far from acting either to dismantle the continuing

² Thus, the Board's strained attempt (Pet. 26-33) to suggest that the trial court's inquiry into all the relevant circumstances concerning intent is in conflict with the decisions of this Court or any Circuit is unsupportable. For example, it is hardly for the Columbus Board to claim any error in the trial court's finding that the school board here chose to implement a supposedly neutral "neighborhood school concept" with the systemwide intent to segregate students, particularly in view of the circumstances here: an underlying dual structure of system-wide intentional segregation that the Board intentionally perpetuated rather than dismantled following *Brown*; the Board's long-standing and system-wide racial assignment of staff and segregated siting of schools; and racially motivated deviation from or manipulation of any arguable "neighborhood school concept" whenever it ordinarily might be expected to lead to racially mixed schools. Pet. App. 7-11, 14-15, 26-42, 60-63; *aff'd* Pet. App. 155-160, 165-166, 173-175. *See, e.g.*, *Swann*, 402 U.S. at 28; *Keyes*, 413 U.S. at 206-208, 211-213; *Arlington Heights*, 429 U.S. at 265-

dual system or even in a neutral fashion, the "school board . . . since 1954 has by its official acts intentionally aggravated" the original system of intentional segregation inherited by the Board. Pet. App. 94.

3. Consistent with the admonitions in *Swann*, 402 U.S. 1, 26 (1971); *Keyes*, 413 U.S. at 210-214; and *Dayton*, 433 U.S. at 420, concerning the required inquiry into causation in general, and any alternative or supervening causes for the existing condition of segregation in particular, the trial court also carefully evaluated the evidence to rule on the Board's claim that, regardless of any intentionally segregative Board practices, "the racial imbalance which admittedly exists in the Columbus Public Schools is the sole result of housing segregation and other factors which are beyond the control of school officials." Pet. App. 50. First, the trial judge found that the Board's intentional racial identification of schools and neighborhoods in Columbus, with the Board's full foreknowledge

268; *Dayton*, 433 U.S. at 414. Moreover, as noted by both the district court and the Court of Appeals, the finding of segregative intent infecting the Board's entire operation is also supported by direct evidence (e.g., Pet. App. 7-11, 28-29, 34, 36-42, 50-54, 170-175), as well as the drawing of reasonable inferences by the trier of fact from his sensitive inquiry into all the relevant circumstances (e.g., Pet. App. 61, 94). Unlike the situation at the time of Supreme Court review in *Brennan v. Armstrong*, 433 U.S. 672 (1977), therefore, there is here no "unexplained hiatus between specific findings of fact and conclusory findings of segregative intent;" and unlike the original Court of Appeals decision in *School District of Omaha v. United States*, 433 U.S. 667-668 (1977), therefore, the trial court here found segregative intent based not on a *per se* rule or un rebuttable "presumption" but on wide-ranging findings which regarded the foreseeable and anticipated effect of Board practices as one factor. In sum, the trial judge's determination of segregative intent was expressly guided by, and is therefore entirely consistent with, *Washington v. Davis*, 426 U.S. at 242, and *Arlington Heights*, 429 U.S. at 265-268. See also, *Milliken v. Bradley*, 418 U.S. at 725-726 and 738 n.18; *NAACP v. Lansing Board of Education*, 559 F.2d 104, 1046-1047 (6th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); and *United States v. School Dist. of Omaha*, 565 F.2d 127, 128 (8th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978).

(and intentional promotion) of the consequences for housing, also contributed substantially to residential segregation by race and "had a significant impact upon the housing patterns" in Columbus; the Court further found that the interaction of intentionally discriminatory housing and schooling operated to promote further segregation in each. Pet. App. 58.³

Second, the trial judge found that the evidence fell "far short" (Pet. App. 95) of showing that the present racial segregation in the Columbus Public Schools "is the result of social dynamics or of the acts of others for which defendants owe no responsibility" (Pet. App. 60-61); rather, the Columbus school authorities, "despite ample opportunity at trial" (Pet. App. 95), failed to prove that anything like the current level of almost complete pupil segregation in the Columbus schools "would have occurred even in the absence of their segregative acts and omissions, see *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286-287 (1977)." Pet. App. 61; also Pet. App. 95.⁴

Recognizing the broad impact of the Board's intentionally segregative actions directly affecting particular schools and the system-wide scope and impact of other Board policies of intentional segregation, the trial court therefore ultimately found "system-wide liability" (Pet. App. 95):

The finding of liability in this case concerns the Columbus school district as a whole. Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter. . . . [quoting *Keyes*,

³ This evidentiary finding is far from novel and forms a causal link for a finding of intentional school segregation that this Court has expressly held warrants complete relief. See, e.g., *Keyes*, 413 U.S. at 202-203; *Swann*, 402 U.S. at 7, 20-21, 28.

⁴ See also, e.g., *Keyes*, 413 U.S. at 210-214; *Swann*, 402 U.S. at 26.

supra]. The evidence in this case and the factual determinations made earlier in this opinion support the finding that [all] those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards.

Pet. App. 73; *also* Pet. App. 94-95.⁵

C. Remedy

1. In considering remedy, the trial court embraced no stringent, perpetual racial balance requirement but directed the defendants to consider the racial composition of the school district as a whole only as a "useful starting point." Pet. App. 73-74 (citing *Swann*, 402 U.S. at 24-25). Although, as noted above, the district court had found that all of the predominantly black schools in

⁵ As a result, the district court conducted the very inquiry into intent and causation subsequently described by this Court in *Dayton Board of Education v. Brinkman*, 433 U.S. at 419-420. The controlling principles for first conducting the inquiry into the nature and extent of violation and then tailoring the scope of remedy to fit the current impact of the violation were directly addressed by the evidence introduced at the trial on the merits, were already established by the decisions of this Court, and these rules were expressly applied by the district judge. *See, e.g., Swann*, 402 U.S. at 16; *Keyes*, 413 U.S. at 201-204, 210-214; *Milliken I*, 418 U.S. 717, 738, 744 (1974); *Arlington Heights*, 429 U.S. at 265; *Mt. Healthy*, 429 U.S. at 286-287. The legal propriety of the district court's determination turns on the substance of its inquiry and decision on causation *not* on the semantical presence or absence of the phrase "incremental segregative effect." *Contrast* Pet. 16-22. The trial judge's examination and findings concerning causation, therefore, stand in stark contrast to the situations in *Omaha*, 433 U.S. at 668, and *Brennan*, 433 U.S. at 672, where the lower courts at the time of Supreme Court review had *never* addressed the inquiry into causation at all, and *Dayton*, where the Court of Appeals ruling at the time of Supreme Court review inexplicably jumped from violation findings "only with respect to high school districting," 433 U.S. at 413, to a "system-wide remedy," 433 U.S. at 417.

Columbus "have been substantially and directly affected by the intentional acts and omissions" of the Board and that such conduct had "the reciprocal effect of making white schools whiter" (Pet. App. 73), the district judge cautioned against any remedy greater than necessary to redress the impact of the violation. The court expressly advised the defendant school authorities (quoting *Swann*, 402 U.S. at 26) of the remedial standard by which their plan to remedy their system-wide liability would be judged insofar as it might "contemplate the continued existence of some schools that are all or predominantly of one race":

The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the Court that their racial composition is not the result of present or past discriminatory action on their part.

Pet. App. 74. By order, the responsible school authorities were therefore required to submit plans to remedy the system-wide violation, with full implementation scheduled for no later than September 1977. Pet. App. 76-77.⁶

⁶ Subsequent to the district court's March 8, 1977 liability ruling, this Court issued its opinion in *Dayton* and the trial court determined its impact on the prior ruling. Pet. App. 90-96. In view of the district court's previous understanding and steadfast application of the rule that equitable relief was permitted and required only to the extent necessary to remedy any existing school segregation caused by defendants' intentionally segregative conduct, the trial judge held that he had already expressly utilized and applied the standards articulated in *Dayton* (Pet. App. 93); and based on *Dayton*, the trial court reiterated the system-wide scope of defendants' liability (Pet. App. 94-95). *See also* Note 5, *supra*. The district court concluded its application of *Dayton* by cautioning as follows:

[T]he Court has no real interest in any remedy plan which is more sweeping than necessary to correct the constitutional wrongs plaintiffs have suffered. Nor will the Court order implementation of a plan which fails to take into account the system-wide nature of the liability of the defendants.

Pet. App. 95.

2. Although the staff of the Columbus Public Schools recommended a system-wide desegregation plan, the Columbus Board first submitted a plan preserving 22 all-white schools and then filed an amended plan leaving the majority of Columbus schools one race. Despite every opportunity, and the express obligation if they had any proof, defendants offered *no* evidence in support of either Board plan to show that *any* of the proposed one-race schools were genuinely nondiscriminatory and not the result of the system-wide violation. In the face of this default, the district court found that the two Board alternatives failed to overcome the current segregative impact of the system-wide violation. Pet. App. 102, 105.

The trial court also found that the original Columbus staff plan of system-wide scope, as well as a system-wide plan submitted by the State Board, fit the pervasive impact of the system-wide violation (Pet. App. 106-107). But the court permitted the Columbus Board yet another opportunity to submit an effective plan of the Board's own making rather than approve either of the available system-wide alternative plans or develop a Court plan. The district court also granted the Board a delay in implementation to January and September 1978 for elementary and secondary schools respectively. Pet. App. 108-114.

3. Upon the Columbus Board's submission of a system-wide plan, there being no objection from any party as to its effectiveness, the district court approved its implementation but granted a second delay in implementation, at the Board's request, to September 1978. Pet. App. 126-127, 131-134.⁷

⁷ The court of appeals denied defendants' application for further delay in implementation (Pet. App. 210); but Mr. Justice Rehnquist granted a stay to the Columbus Board pending certiorari. Pet. App. 217.

D. Appeal

Mindful of the nature of appellate review under Rule 52(a), F.R.Civ.P., as detailed for school cases in this Court's opinion in *Dayton*, 433 U.S. at 409-410, 417-418, the court of appeals reviewed the evidence, fact-findings, and law applied by the trial court in support of its judgment. The court of appeals carefully reviewed the record and found that substantial evidence supported each of the trial court's subsidiary violation findings. Pet. App. 154-196. The court of appeals also examined the legal standards employed by the trial court in making its determination of system-wide liability requiring a remedy of comparable scope and found no misapprehension in the law applied by the trial judge to the substantial evidence and detailed findings with respect to intent, causation, and the standards for equitable relief. Pet. App. 196-200.

In particular, the court of appeals affirmed the trial court's system-wide violation findings: a systematic program of intentional segregation making the Columbus Public Schools a "northern" dual school system at the time of *Brown* (Pet. App. 160) that had never been dismantled and was not attenuated by the time of trial following the 1975-76 school year (Pet. App. 165-166, 198); other system-wide policies of intentional segregation in the siting and construction of new schools and additions (Pet. App. 173, 198) and the assignment of faculty and administrators (Pet. App. 174, 198); and a facially neutral but racially motivated geographic zoning policy that was manipulated in practice (by gerrymandering, optional zones, and discontinuous attendance areas and the like, Pet. App. 175-195) that also contributed to "the large majority of racially identifiable schools" at the time of trial (Pet. App. 198).⁸

⁸ While each of the manipulations of the geographic zoning policy had its own wide-ranging segregative impact as described above, the court of appeals also noted that the variety of deviant tech-

The Court of Appeals undertook this careful review of the subsidiary findings and evidence below "to determine whether the segregation in the Columbus schools [at the time of trial] was intentionally and, hence, unconstitutionally created [as found by the district court] or whether, as claimed by the Columbus Board of Education, it resulted from neighborhood housing segregation which the Columbus Board of Education could not control, and the [allegedly] racially 'neutral' Columbus Board policy of neighborhood schools." Pet. App. 166. That review convinced the court of appeals that the Columbus Board's system-wide policies and practices of intentional segregation had a continuing system-wide causative impact that "thoroughly justified the District Judge in ordering a system-wide remedy" (Pet. App. 199) under *Dayton* and *Keyes*. Pet. App. 197-200, 207.⁹

niques were so varied that they could "properly be classified as isolated in the sense that they do not form any system-wide pattern." Pet. App. 175. As we develop more fully in the discussion, *infra*, pp. 17-20, the significance of such patent racial aberrations from any arguably neutral geographic zoning principles for the court of appeals (as stated in its very next sentence) was as additional evidence that the Board's claim of administering a neutral neighborhood school policy was nothing but a sham and a pretext for a policy of intentional segregation: "They are significant, however, in indicating that the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." Pet. App. 175; (also Pet. App. 94-95, 61, 34, and 29). See, e.g., *Arlington Heights*, 429 U.S. at 267 and n.17 and *Keyes*, 413 U.S. at 201-202, 207-208, 212. It is therefore simply incorrect to say "that the Court of Appeals employed legal presumptions of intent to extrapolate system-wide violations from what was described in the Columbus case as 'isolated' instances." 47 U.S.L.W. at 3090 (Rehnquist, J.).

⁹ As a result, this Court's two-court rule counsels acceptance of the factual determinations of the trial court as to the nature and extent of the Board's intentionally segregative conduct and the scope of its impact. *Amer. Const. Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *United States v. Johnston*, 268 U.S.

REASONS FOR DENYING THE WRIT

I.

The Judgment of the Courts Below Turns on the Evidence and Fact-Findings Not on Any Conflict With Decisions of This Court.

In view of the proceedings and rulings in the trial court, as affirmed by the court of appeals, this is obviously not a case where limited proof of violation or findings of isolated violations were misused by a trial judge (or appellate court) to order system-wide relief. Compare Statement, *supra*, pp. 8-10, 13-14 with Pet. App. 23-24. To the contrary, on the issues of whether the school board acted with segregative intent and whether such intentionally segregative conduct is a proximate cause of the existing segregation throughout the Columbus Public Schools, the trial judge found in favor of the plaintiffs based not just on the preponderance, but rather on the overwhelming weight of the evidence. In carefully reviewing and analysing the "volume of evidence presented in this case" in order to make its factual determinations on the critical issues of intent and causation, the trial court stated:

I am firmly convinced that the evidence clearly and convincingly weighs in favor of the plaintiffs.

Pet. App. 2. And the trial court's opinions represent not only detailed fact findings supporting the ultimate determination of system-wide liability, but also the results of a sensitive inquiry into the intent and causation issues. The court's judgment embodies no more and no less than the restrained exercise of equitable discretion, finally approving a system-wide remedy drawn by the local school

220, 222 (1925); *Comstock v. Group of Institutional Investors*, 335 U.S. 211, 214 (1948); *Graver Manufacturing Co. v. Linde*, 336 U.S. 271, 275 (1949); *Milliken v. Bradley* 418 U.S. 717, 738 n.18 (1974).

authorities only as proven necessary by their own default, in the first instance, in failing to come forward either with a plan to overcome the demonstrated impact of the system-wide violation or with evidence to show in what respects the system-wide impact of the violations found was not pervasive. See *Swann*, 402 U.S. at 7-9, 15-16, 24-25 and n.8, 26, 28, and *Keyes*, 413 U.S. at 213-14.

Petitioners have no claim of error to make in this Court. This is simply a case where the lower courts have applied the controlling legal standards to the record evidence, properly concluding that the Columbus Board, in its operation of its school district, has been motivated by segregative purpose and has acted to implement a variety of intentionally segregative policies and practices that have proximately caused the existing segregation in the Columbus Public Schools. To overcome the system-wide impact of this system-wide violation, a system-wide remedy has therefore been approved by the courts below (after giving the petitioners every additional opportunity to show in what respects, if any, a more limited plan would overcome the effects of the violation demonstrated at the liability hearing). *Swann*, 402 U.S. at 26; *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971); *Keyes*, 413 U.S. at 213-14; and *Dayton*, 433 U.S. at 410-11, 419-20. Hence, no legal issue meriting this Court's review is presented by this case; the lower courts have held only that the Columbus Board must effectively dismantle its own system-wide, intentional segregation.

II.

The Decision Below is Not Based on the Use of Legal Presumptions to Jump From Isolated Violations to Sweeping Relief; As a Result, the Issue for Supreme Court Review Suggested by Mr. Justice Rehnquist's Stay Opinion is Not Presented.

The Columbus Board primarily argues that the lower courts jumped from isolated incidents of segregation

and/or limited violation findings, to a determination of system-wide liability (and requirement of system-wide relief), and seeks support for its assertion in Mr. Justice Rehnquist's August 11, 1978 stay opinion, Pet. App. 217 (*e.g.*, Pet. 20-21). The crux of the stay opinion is its suggestion that "the Court of Appeals employed legal presumptions of intent to extrapolate system-wide violations from what was described in the Columbus case as 'isolated' instances." Pet. App. 213. The stay opinion quotes one word from a section of the court of appeals' affirmance discussing (Pet. App. 174-89) some of the examples of the Columbus Board's most blatant, selective manipulation of geographic zoning practices through gerrymandering, optional attendance zones, and discontinuous assignment areas.¹⁰ The court of appeals agreed with the district court that these practices revealed that the Columbus Board chose to adhere to or depart from the so-called "neighborhood school" concept of administration to achieve the underlying purpose of system-wide racial segregation throughout the Columbus Public Schools. See Statement, *supra*, p. 13, n.8.¹¹ Compare, *e.g.*, Pet. App. 175-95, 94-95,

¹⁰ The stay opinion is narrowly focused only upon that portion of the district court and court of appeals opinions discussing attendance zones, gerrymandering, discontinuous zoning and optional areas after 1954. It ignores the findings detailed elsewhere in those opinions of system-wide segregative practices, and the trial judge's conclusion that petitioners failed to show that the current segregation in the school system would have occurred in the absence of those violations. (See Statement *supra* pp. 8-12) Affirmance of the district judge's order requiring a system-wide remedy thus was not based upon inference and presumption; rather, it was grounded explicitly on findings of non-isolated, system-wide policies of segregation and discrimination. Only by disregarding these findings could the Court approach the issue described, in the stay opinion, as ripe for decision.

¹¹ Thus, even "isolated instances" of blatant manipulation in "pocket" or "fringe" areas demonstrate the motivation of the Columbus Board; and they were correctly regarded by the courts below as one—but only one—aspect of the substantial evidence which

61, 34, and 29 with, e.g., *Arlington Heights*, 429 U.S. at 267 and n.17; *Milliken v. Bradley*, 418 U.S. at 725-26 and 738 n.18, *aff'g in pertinent part* 484 F.2d 215, 221-34 (6th Cir. 1972); *Keyes*, 413 U.S. at 201-02, 207-08, 212; *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41 (1960); *Morgan v. Kerrigan*, 509 F.2d 580, 588-90 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042, 1049-52, 1055-56 (6th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *Oliver v. Michigan State Bd. of Educ.*, 408 F.2d 178, 183-85 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Davis v. School Dist. of Pontiac*, 443 F.2d 573, 576 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1972); *Kelly v. Guinn*, 456 F.2d 100, 106-08 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973).¹²

It is therefore wrong to assert that the lower courts in this case "evinced an unduly grudging application of *Dayton*" on the grounds that they "employed legal pre-

supports the finding that the Columbus Board's claimed devotion to a "neighborhood school" concept has been and is but a pretext for a policy of official racial discrimination and intentional segregation system-wide. See Statement, *supra*, pp. 6-8.

¹² In addition, as summarized in the Statement, *supra*, pp. 4-6, substantial evidence concerning other system-wide aspects and direct evidence of the Columbus Board's racially discriminatory administration of its public schools also supports the ultimate finding of intentional system-wide segregation. The direct evidence and other intentionally segregative, system-wide practices include: the longstanding and intentionally racial assignment of faculty and staff that identified schools as for "blacks" or "whites" primarily (Pet. App. 14-15, 173-174, 176, 198); the intentional perpetuation of the *de jure*, dual school system inherited in 1954 right through the time of trial (Pet. App. 7-11, 60-61, 94, 155-159, 165-166, 198); the intentionally segregative construction and siting of new schools and additions throughout the school district from 1954 through the time of trial keep most blacks and whites in separate schools (Pet. App. 20-25, 94, 166-173, 198); and the segregative responses of the Columbus Board to notice of its segregative policies and practices in view of the available non-segregative alternatives (Pet. App. 10, 29, 35-42, 50-54).

sumptions" either "to extrapolate system-wide violations from . . . 'isolated instances'" or "to justify a system-wide remedy" in the absence of system-wide impact. *Contrast* Pet. App. 213-214. The legal issue posed by the stay opinion is simply not raised by this case.

Justice Rehnquist's stay opinion is apparently also read by petitioners as a limiting interpretation of the Court's ruling in *Dayton*. We refer to the suggestion that *Dayton* "mandated . . . specific findings . . . on the impact discrete segregative acts [even system-wide segregative acts] had on the racial composition of individual schools within the system." Pet. App. 212. Such a "school-by-school" approach was specifically presented by the defendants to, and rejected by, the full Court in *Keyes*, 413 U.S. at 200; *Swann*, 402 U.S. at 20-21, 26-28; and *Davis v. Board of School Comm'rs*, 402 U.S. at 37. We do not perceive how *Dayton* can be read to reverse the express holdings of these three cases, particularly when *Dayton* so explicitly relies on *Swann* and *Keyes* for its own reasoning and holding.

Petitioners seek by this oft-rejected argument to halt school desegregation relief at the level of current residential segregation in Columbus, regardless of the Board's prior system-wide segregative intent, its historic contribution to residential segregation, its "loading of the game board" (*Swann*, 402 U.S. at 28) and nurturing an "environment for the growth of further segregation" (*Keyes*, 413 U.S. at 211). At a time when most of the nation has demonstrated its willingness to provide constitutional, non-segregated public schooling under the prior rulings of this Court, as faithfully carried out by most of the lower courts, such a result would require express reversal of *Swann*, 402 U.S. at 20-21, 28-29 and *Keyes*, 413 U.S. at 202-03, 211-14. Indeed, it would invite the reopening of settled cases in all regions of the country. At base, the petition of the Columbus Board asks this Court to deter-

mine that the rights declared in *Brown* are to be so limited that there is, in reality, no remedy at all.¹³ This Court should decline the invitation.

¹³ In any event, even the implications that petitioners apparently read into the stay opinion do not support review of the judgment below. The system-wide policies and practices of intentional segregation in this case were found by the lower courts, based on the record evidence, to have affected *all* schools throughout the entire Columbus public school system. See Statement *supra*, pp. 9-12, 14. This evidence also showed that the Board's intentional school segregation identified residential areas as being for blacks or for whites, thereby causing residential segregation by families who choose or avoid particular homes based on the racial identification of nearby schools (which in turn causes further segregation, and so on). Pet. App. 58. This is precisely the "environment for the growth of further segregation" and "loaded game board" caused by the official policy and practice of system-wide intentional segregation of Columbus school authorities that has been the object of this Court's repeated commands to dismantle similar dual systems from *Brown II* through *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 28; *Scotland Neck*, 407 U.S. at 490, 491-92; and *Keyes*, 413 U.S. at 211. Even as a matter of evidentiary burdens of proof (not irrebuttable legal presumptions), school cases are no different from other constitutional or federal equity cases. The perpetrator of the wrong, not the victim, bears the burden of demonstrating in what respects the current effects of his long-standing violation are more limited than the probable or intended consequences. See, e.g., *Village of Arlington Heights v. MHDC*, 429 U.S. at 270-71 and n.21; *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. at 286-87; *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 771-73 (1976); *Keyes*, 413 U.S. at 210-14; *Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972); *Swann*, 402 U.S. at 26; *Zenith v. Hazeltine*, 395 U.S. 100, 123-24 (1969). The petitioners made no attempt to meet this burden with any convincing evidence following the plaintiffs' proof of longstanding and continuing system-wide violations substantially contributing to, and proximately causing, the current condition of segregation throughout the Columbus Public Schools.

CONCLUSION

The Columbus Board's Petition for a Writ of Certiorari should be denied and the stay vacated forthwith so that any further delay in implementation of the constitutional remedy for the system of racially dual schooling that continues at this time to fester in Columbus, as it has since at least 1954, will finally end "now." *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

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In The
Supreme Court of the United States

October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I.

Although the Respondents' Brief disputes that the courts below violated the mandate of *Dayton* by employing legal presumptions to extrapolate a systemwide violation and remedy from isolated instances, it fails to support its argument with any analysis of the opinions below. An examination of those opinions will disclose, as Justice Rehnquist has already noted, that the lower courts' employment of legal presumptions violates the mandate of *Dayton*.

As was the case in *Dayton*, there is a hiatus in this case between the limited liability findings of the trial court, and its remedial requirement that every school be racially balanced. There was no attempt by either the trial court or the appellate court to connect isolated instances, some of which occurred more than 50 years ago, with the present racial composition and distribution of the Columbus school population. Unlike *Dayton*, however, this hiatus is not unexplained, since both courts acknowledged the employment of legal presumptions to reach a conclusion of systemwide effect which otherwise could not be supported in fact.

Of course, the district court's liability decision preceded the decisions of this Court in *Dayton*, *Brennan* and *Omaha*, all of which required a detailed factual inquiry into the current impact on the racial composition of schools from past instances of unconstitutional conduct. This current impact was required to be demonstrated in fact and not to be merely presumed. However, although the district court's liability opinion stated that the court was constrained to adhere to the Sixth Circuit's approach in *Brinkman v. Gilligan* (*Dayton III*), 539 F.2d 1084 (1976), of extrapolating systemwide liability and remedy from isolated violations, the district court later failed to see any significance in this Court's subsequent disapproval of that approach when it vacated and remanded the Sixth Circuit's decision, stating that *Dayton* did not provide "new and clear instructions." [A. 93.] Instead, when presented with the opportunity to make the required inquiry into incremental segregative effect, the trial court explicitly refused to do so.

Nonetheless, despite the fact that *Dayton* was decided after the trial court rendered its liability decision, and despite the trial court's explicit refusal to conduct the mandatory *Dayton* inquiry, the Respondents argue that the district court's liability opinion indicates that the court

anticipated the *Dayton* decision and conducted the mandatory inquiry without the improper employment of legal presumptions. Respondents' Brief, p. 10.

This strained argument is belied by the trial court's own findings that: (1) school construction policies conformed to "objective" criteria [A. 13-14]; (2) only in "some instances" could school site selection have had an impact on racial composition [A. 21-25]; (3) segregated housing patterns, the primary cause of racially imbalanced schools, were caused by discriminatory acts of others [A. 57]; (4) even in the absence of any unconstitutional acts by school officials, all schools would not be racially balanced [A. 74.]; and (5) there was no requirement that the impact of segregative acts by school officials be separately determined from the impact of other causes of racial imbalance in schools [A. 58.]. These findings, standing alone, would compel the conclusion that the incremental segregative effect of specific unconstitutional actions by school officials could not have extended to every school in the system, and that schools would not have been racially balanced in the absence of these actions. Furthermore, the fact that a significant number of schools on the periphery of the Columbus system, recently annexed into the district, were not a part of the system at the time of these alleged violations, compels the conclusion that the violations had no effect in these schools.

Without the use of legal presumptions, it would have been impossible for the district court to make these factual findings the foundation for a judgment of systemwide liability and a remedy requiring *all* schools to be racially balanced. To assert that this result indicates an application of the principles of *Dayton* is simply incredible.

The Sixth Circuit recognized that the only way in which the limited violations found in this case could be found to have "caused" systemwide racial imbalance is through the employment of a legal presumption of system-

wide impact. [A. 198.] As Mr. Justice Rehnquist recognized, the use of such presumptions is inconsistent with *Dayton*, *Brennan* and *Omaha*.

II.

The Respondents have also urged that the lack of support for the lower courts' finding of a cause and effect relationship is excusable, since the relationship can be presumed unless the defendants can prove to the contrary. Respondents' Brief, pp. 9, 20, n. 13. However, even if the defendants in this case had been afforded the opportunity to make such a showing to the trial court, the court's conclusion that it would be "impossible" to separate the effect of school board discriminations from those of others would have made the opportunity meaningless. Moreover, the attempt to explain away the absence of an inquiry into the incremental segregative effect of school board discriminations by allocating the burden of proof to the defendants is inconsistent with the clear mandate of *Dayton* that the trial court conduct a "detailed factual inquiry" into this issue.

Even if the district court had conducted the inquiry, however, it would have been improper to allocate the burden to the defendants. If any burden of proof is to be allocated, it should be allocated to the plaintiffs, since the existence of a causal relationship is an element of the plaintiff's constitutional claim.

The case authority cited by the Respondents fails to lead to a contrary conclusion. For example, in *Village of Arlington Heights v. MHDC*, 429 U.S. 252 (1977) this Court did not place upon the defendant "the burden of demonstrating in what respects the current effects of his long-standing violation are more limited than the probable or intended consequences." Respondents' Brief, p. 20, n. 13. The cited language refers to the burden of

proof of discriminatory *intent*, and not to the proof of effect:

Proof that the decision by the Village was motivated in part by a *racially discriminatory purpose* would not necessarily have required the invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted *even had the impermissible purpose not been considered*. If this were established the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of discriminatory purpose.

Arlington Heights, 429 U.S. at 271, n. 21. (emphasis added).

Thus, the burden of proof of *purpose* may shift to the defendants once the plaintiffs have made a threshold showing. The burden shift is justified because of the difficulty of conclusively proving that a discriminatory state of mind motivated a public official in his actions. But as the Court recognized in *Dayton*, the *effect* of intentionally discriminatory action is more easily susceptible to proof. Shifting the burden of proof to the defendants on this issue is therefore not justified.

III.

Although the Respondents' Brief asserts that the Petition in this case presents merely factual issues for resolution by the Court, there is actually little dispute concerning the subsidiary fact findings made by the district court. It is in the inferences drawn from those facts, and in the application of legal presumptions to those facts, as well as in the legal conclusions adopted by the courts below, where the error in their decisions lies and the question for review is presented to this Court.

In cases of such legal error, this Court's review of ultimate fact findings, inferences, and mixed findings of fact and law are not governed by the "clearly erroneous" rule, nor the "two court rule." *Keyes v. School District No. 1*, 413 U.S. 189, 198, n. 9 (1973). The Court's power to review the issues presented in the Petition is therefore plenary.

In attempting to characterize this case as involving only factual issues, the Respondents' Brief has also embellished upon and expanded the trial court's factual findings. For example, the district court did not find that the existence of five predominantly black schools in 1954 resulted in "keep[ing] most white and black children in racially separate schools." Respondents' Brief, p. 4. On the contrary, the district court's actual findings concerning pre-1954 violations were confined to only five schools, and the court found that "substantial racial mixing of both students and faculty" existed in other schools in the system. [A. 10.]

The Respondents have also engaged in a *post hoc* attempt to supplement the trial court's findings. The liability judgment rests solely upon specific findings concerning the existence in 1954 of what the district court characterized as an "enclave" of five black schools, and upon a small number of post-1954 actions which the court of appeals characterized as "isolated". The Respondents' characterization as these findings as mere "examples" of "systemwide" conditions ignores the total absence of findings of other instances of allegedly unconstitutional conduct in the opinions below. In the absence of such findings, this Court can only assume that there were no other violations.

Similar attempts to embellish, expand, characterize, or supplement the actual findings of the trial court appear throughout the Respondents' Brief. Rather than addressing each distortion, we would simply urge the Court to

examine these assertions critically, comparing them to the actual findings appearing in the opinions of the courts below.

CONCLUSION

A critical examination of the Petition, briefs, and the decisions of the courts below will establish that this case does not present a mere factual dispute to the Court, but concerns the appropriate legal standards to be applied in the determination of liability and remedy in school desegregation cases. Instead of conducting the mandatory *Dayton* inquiry, both courts "employed legal presumptions of intent to extrapolate systemwide violations" from isolated instances. [A. 213.] The adoption of this legal standard below clearly conflicts with this Court's decisions in *Dayton*, *Brennan*, and *Omaha*.

Furthermore, the adoption of a legal standard of "foreseeable effect" in the determination of discriminatory intent is contrary to the decisions of this Court in *Washington v. Davis* and *Arlington Heights*, and conflicts with decisions in other circuits.

Justice Rehnquist's decision granting a stay of the lower courts' judgments in this case noted that the Sixth Circuit's most recent decision in the *Dayton* litigation, *Brinkman v. Gilligan*, No. 78-3060 (6th Cir. July 27, 1978) [A. 219.], also violated the mandate of this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). [A. 212-214.] A petition for a writ of certiorari to review the Sixth Circuit's decision in that case was filed in this Court on October 13, 1978. *Dayton Board of Education v. Brinkman*, Case No. 78-627.

The review of both the Columbus and Dayton cases would provide a vehicle for the development of more specific rules to guide the district courts in the determination of liability and remedy in school desegregation cases. Specific guidance from this Court is necessary to

correct the varying and inconsistent adjudications which have characterized school desegregation litigation. The impact in Ohio alone would be significant, where cases involving the Cleveland, Cincinnati, Youngstown, and Akron school districts are currently pending in the lower courts.

Consequently, this Court should issue a writ of certiorari to review the judgments below.

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In The
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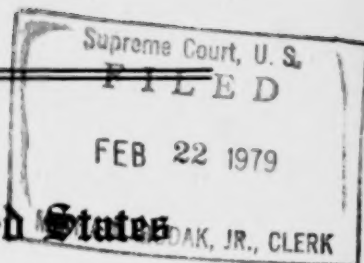


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In The
Supreme Court of the United States
October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The July 14, 1978 opinion of the United States Court of Appeals for the Sixth Circuit [Pet. App. 140-207] is reported at 583 F.2d 787. The March 8, 1977 liability opinion of the United States District Court for the Southern District of Ohio [Pet. App. 1-86] is reported at 429 F. Supp. 229. The District Court's October 4, 1977 memorandum and order [Pet. App. 125-137], imposing a systemwide desegregation plan, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1978. The petition for a writ of certiorari was timely filed on October 11, 1978, and was granted on January 8, 1979. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- A. Fourteenth Amendment to the United States Constitution, Section 1.

"... nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the laws."

- B. Ohio Revised Code, Chapter 33:

§ 3313.48 Free Education to be Provided;
Minimum School Year

"The board of education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof. . . ."

QUESTIONS PRESENTED

1. In a school desegregation case, where mandatory segregation by law has long since ceased, does the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceed the equitable jurisdiction of a federal court where the court has failed to determine how much incremental segregative effect discrete and isolated segregative acts had on the racial composition of the individual schools within the system at the time of trial, as

compared to what the racial composition would have been in the absence of such acts?

2. May a federal court employ legal presumptions, in combination with evidence of discrete and isolated constitutional violations, to justify a systemwide statistical racial balance remedy, where (i) there is no evidence of a causal connection between those unconstitutional actions and the existence of other racially imbalanced schools, (ii) there is a high degree of residential segregation, and (iii) the systemwide remedy would not be warranted by the incremental segregative effect of the identified violations?

3. May a federal court infer segregative intent from the mere assignment of students to schools nearest their homes pursuant to a longstanding, statutorily required and educationally sound neighborhood school policy, where the foreseeable effect of such assignment, because of segregated housing patterns in the urban school district, is to cause some schools to be racially imbalanced?

4. Where there was no direct proof that segregation of students was a factor which motivated the decisions of school officials, may a federal court infer segregative intent solely from evidence that a collateral foreseeable effect of the decisions made would be to continue or increase statistical racial imbalance within schools when the same decisions would have been made for educational and administrative reasons?

STATEMENT OF THE CASE

A. Prior Proceedings

This is a school desegregation case involving the public school system of Columbus, Ohio. The original complaint was filed on June 21, 1973, seeking declaratory and injunctive relief concerning an \$89.5 million school con-

struction and improvement program. [A. 5-12.]¹ The plaintiffs, 14 black and white students and their parents, alleged that the Columbus Board of Education, its individual members, and its Superintendent (hereinafter collectively referred to as the "Columbus Board") had, by virtue of the United States Constitution and certain Board resolutions, a legal obligation of affirmative integrative action in the expenditure of the construction funds. Federal jurisdiction was invoked under 28 U.S.C. §§ 1331(a) and 1343(3) and (4). After the plaintiffs had withdrawn their motion for a preliminary injunction and filed one amended complaint, a second amended complaint was filed on October 22, 1974. [A. 15-30.] The second amended complaint was styled a class action, and it alleged that the Columbus Board had intentionally segregated the public schools by creating and maintaining a neighborhood school policy notwithstanding a segregated housing pattern in the city, by using optional attendance areas, by segregating teachers and principals, and by failing to desegregate. The second amended complaint also named the Ohio State Board of Education and its Superintendent of Public Instruction as defendants and alleged that they were liable for failing to bring about the desegregation of the Columbus public schools.

A motion to intervene was filed by NAACP lawyers on February 5, 1975, on behalf of 11 other black and white students and their parents. [A. 32-43.] The complaint in intervention contained essentially the same allegations as the second amended complaint and sought the systemwide

¹"A." references are to the two volume appendix. "Pet. App." references are to the appendix filed with the petition for certiorari. References to parts of the record not included in the appendix will be designated "R." for citations to the liability trial transcript. Exhibits will be designated "Px" for plaintiffs' exhibits, and "Dx" for defendants' exhibits.

desegregation of the Columbus public schools. The district court granted the motion to intervene, certified the case as a class action, and designated one of the NAACP lawyers as lead counsel for the entire plaintiff class. [A. 43-46, 50.]

The district court ordered that the trial be bifurcated into separate liability and remedy proceedings. 429 F. Supp. at 264. [Pet. App. 68.] The issue of liability was tried in 36 trial days from April 19 to June 17, 1976. On March 8, 1977, the district court issued its liability opinion and order, including findings of fact and conclusions of law, concluding that the Columbus public schools were unconstitutionally segregated. *Penick v. Columbus Board of Education*, 429 F. Supp. 229 (S.D. Ohio 1977). [Pet. App. 1-86.] The court enjoined the Columbus Board and the State Board from discriminating on the basis of race in the operation of the Columbus system, and ordered both defendants to formulate and submit proposed systemwide desegregation plans. The court, on its own motion, certified its findings of liability for an immediate appeal under 28 U.S.C. § 1292(b). The judgment was entered on March 9. [Pet. App. 87.]

In accordance with the district court's order, the Columbus Board of Education formulated and submitted a systemwide desegregation plan on June 10, 1977, reserving all rights to appeal. The State Board filed a plan on June 14, 1977. Shortly thereafter, this Court announced its decisions in three major urban school desegregation cases: *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (June 27, 1977); *Brennan v. Armstrong*, 433 U.S. 672 (June 29, 1977); and *School District of Omaha v. United States*, 433 U.S. 667 (June 29, 1977). In all three cases, lower court decisions mandating systemwide remedies were vacated and remanded with the direction that the courts below determine the incremental segregative effect of any unconstitutional school board actions and that they formulate remedies limited to the correction of that effect.

Prompted by these decisions, the Columbus Board, on July 8, 1977, filed an amended desegregation plan designed to racially balance the specific schools identified in the Court's liability decision as being involved in the constitutional violations found.² Hearings on all of the plans submitted by the defendants began on July 11, 1977. At the start of the remedy hearings, both the Columbus and State Boards moved the district court to make the determination of incremental segregative effect required by this Court's decisions in *Dayton*, *Brennan* and *Omaha*, before it proceeded to fashion a remedy. [A. 53-63, 715-30.] The Court denied these motions [A. 740-41.]

On July 29, 1977, the district court issued its order rejecting the desegregation plans formulated by the Columbus and State Boards and ordered development of a new systemwide racial balance remedy plan. [Pet. App. 97.] As it did with its liability decision, the district court certified its July 29 order for interlocutory review.

On August 31, 1977, the Columbus Board, as directed, filed a desegregation plan which conformed to the requirements of the district court's July 29 order that every school in the Columbus system be racially balanced. On October 4, 1977, the district court entered an order approving the plan and ordering that it be implemented in September, 1978. [Pet. App. 125.] A judgment to that effect was entered on October 7. [Pet. App. 138.]

The Columbus Board of Education took interlocutory appeals under 28 U.S.C. § 1292(b) from the liability order and judgment and from the July 29, 1977 interim remedy

²The district court entered a Memorandum and Order on July 7, 1977, granting leave to file the amended plan. [Pet. App. 90.] Although it permitted the plan to be filed, the district court stated its opinion that this Court's decisions in *Dayton*, *Brennan* and *Omaha* had no effect on this litigation, and that "systemwide liability is the law of this case pending review by the appellate courts." [Pet. App. 95.]

order. The Sixth Circuit granted the Board's petitions for permission to appeal. [A. 51-53, 176.] The Board also appealed the final October 4 remedy order and judgment. [A. 177.] The three appeals were consolidated in the court of appeals and argued on February 15, 1978.

On July 14, 1978, the court of appeals entered an opinion and judgment affirming the district court's orders and judgments with respect to the Columbus Board, but remanded the case for additional and more detailed findings pertaining to the motivation for the State Board's failure to cause desegregation of the Columbus public schools, and the effect of any such failure "as suggested in *Dayton*." [Pet. App. 140, 200-207.]

On August 11, 1978, Mr. Justice Rehnquist stayed the Sixth Circuit's mandate and the execution and enforcement of the judgments, pending the timely filing of a petition for a writ of certiorari. --- U.S. ---, 58 L.Ed. 2d 55. [Pet. App. 217.] The petition was timely filed on October 11, 1978, and was granted on January 8, 1979. Under the terms of Mr. Justice Rehnquist's order, the stay remains in effect pending the issuance of the mandate of this Court.

B. The Columbus City School District

In 1976, the year in which this case was tried, the Columbus City School District's enrollment was 95,998 students, making it the second largest school district in Ohio in student enrollment. The system was organized into 123 elementary schools (grades K-6), 26 junior high schools (grades 7-9), three junior-senior high schools (grades 7-12), 13 senior high schools (grades 10-12), and five special schools. Except for the special schools and five alternative or magnet elementary schools, all schools served neighborhood attendance areas.

The racial composition of the total student enrollment in 1975-76 was 67.5% white and 32.5% non-white. Almost

all of the non-white students in the Columbus system are black students. Since Columbus schools were constructed and are operated under the neighborhood school concept, the racial compositions of the schools reflected the residential patterns of Columbus. The Columbus Board of Education has, however, implemented various voluntary educational programs and student transfer plans to improve racial balance and to provide every student with an opportunity for integrated educational experiences.

The racial compositions of the student enrollments varied greatly among the 170 schools operated by the Columbus public schools in 1975-76, as is shown in the 1975-76 HEW Civil Rights Survey. [A. 745-50 (Px 11).] For example, the racial compositions of the three junior-senior and thirteen senior high schools as shown in the survey were:

School	% Black Enrollment
Briggs	16.1
Brookhaven	13.3
Central	30.2
East	99.0
Eastmoor	36.6
Independence Jr-Sr	12.4
Linden	89.5
Marion-Franklin	44.0
Mifflin Jr-Sr	62.6
Mohawk Jr-Sr	72.7
North	18.5
Northland	6.8
South	45.1
Walnut Ridge	7.4
West	16.0
Whetstone	3.9

Although most schools in the Columbus system have racially mixed student bodies, the lower courts applied a strict statistical definition in characterizing schools as "white schools" or "black schools." The district court's formulation of the definition was as follows:

"The concept of racial identifiability or unidentifiability is used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the actual (or estimated) system-wide percentage of black pupils. Schools which have a percentage of black pupils within this range are racially unidentifiable, or balanced. Schools which have a black population in excess of this range are racially identifiable, or imbalanced, black schools. Schools having a black population less than the range are racially identifiable, or imbalanced, white schools."

429 F. Supp. at 268-69. [Pet. App. 78.]

The "statistical variance" or "range" adopted by the district court was $\pm 5\%$ for the period 1950-57, $\pm 10\%$ for 1957-64, and $\pm 15\%$ for 1964-75. The court of appeals concurred with the use of the statistical measure. 583 F.2d at 799-800. [Pet. App. 160-162.] Under this analysis, any school with a black student population outside of a range of 17.5% to 47.5% was "racially identifiable." Schools with racial compositions greater than 82.5% white were characterized as "identifiably white" or "white schools." Schools with racial compositions greater than 47.5% black were characterized as "identifiably black" or "black schools." As will be demonstrated later, the lower courts predicated their judgments of systemwide liability, and the imposition of a systemwide statistical remedy, on the Columbus Board's failure to balance all "racially identifiable" schools.

To put the organization and racial composition of the Columbus public schools at the time this case was tried in 1976 into a proper perspective, it is helpful to review the dynamic growth of the school system in enrollment and geographic area, the racial characteristics of residential patterns in the City of Columbus, the school system's long-standing adherence to a neighborhood school policy, and the Columbus Board's efforts to encourage integration and better racial balance in the schools through voluntary programs consistent with the neighborhood school concept. With such a perspective, this brief will then discuss the evidence of school board actions which the plaintiffs claimed had been motivated by discriminatory intent, and the district court's findings of isolated instances of discriminatory action.

1. *Growth in Enrollment and Geographic Area*

As the district court recognized, 429 F. Supp. at 236-37 [Pet. App. 11], it would be impossible to evaluate the record in this case without an appreciation of the tremendous growth of the City of Columbus and its school system within the past 25 years, and the impact of this growth upon the decisions of those officials responsible for providing a quality education to students within the system.

The City of Columbus increased markedly in geographic size and population during the period 1950-1975. As a result of an aggressive annexation policy, the area of the city grew from 40 square miles in 1950 to over 173 square miles in 1975. 429 F. Supp. at 237. [Pet. App. 12; A. 752-766 (Px 63); A. 238-39.] The extensive and continuous expansion by annexation during this period was unique among eastern and midwestern cities. [A. 238-41, 296-98.] Dr. Karl Taeuber, an urban sociologist called as an expert witness by the plaintiffs, characterized this growth as "unusual," and acknowledged that, with the sole

exception of Dallas, Texas, no other city experienced greater growth by annexation during this period. [A. 297-98; 307-8.]

As a result of annexations, increased birth rates, and in-migration, the population of the City of Columbus grew dramatically during the same period. This growth is illustrated by the following table:

COLUMBUS, OHIO Population 1940 - 1970			
Census Year	Total Population	Increase Since Prior Census	Increase Since Prior Census
1940	303,087	15,523	5.3%
1950	375,901	69,814	22.8%
1960	471,316	95,414	25.4%
1970	539,677	68,361	14.5%

429 F. Supp. at 237. [Pet. App. 12; Px 253, 254, 255, 256.]

This population growth was also unique, since most large midwestern and eastern cities lost population during the same period.

Because of the high birth rate [A. 755 (Px 63); A. 238-39.], Columbus school enrollments grew even faster than the general population during this period. Enrollments increased from 46,352 in 1950-51 to 83,631 in 1960-61, and to 110,725 in 1971-72. 429 F. Supp. at 237. [Pet. App. 12; Px 63, p. 44, Px 4-10; A. 745-50 (Px 11).]³ Enrollments then gradually declined to 95,998 at the time of trial. 429 F. Supp. 237. [Pet. App. 12; A. 745-50 (Px 11).]

³The average rate of growth was 3,700 students per year in the 1950s, and 2,700 per year in the 1960s. This rapid rate of growth required the addition of an average of 100 classrooms per year for the period 1950-1970.

As a result of the Columbus Board's policy of making school district boundaries coterminous with the city boundaries, the school district's annexations kept pace with those of the city and contributed to the growth in size and population of the school system. While most of these annexations involved new residential areas, or undeveloped land ready for new housing, the school district also acquired developed areas which had school facilities already in place. In 1956, the Scioto Trail and Sharon elementary schools were acquired in separate annexations. [Dx C-72, p. 40.] In January, 1957, the entire overcrowded Marion-Franklin Local School District, located immediately south of the Columbus district, was merged into the system. As a result, the system acquired the Clarfield, Fornof, Heimandale, and Smith Road elementary schools, Beery Junior High School, and Marion-Franklin High School. [Dx C-72, p. 40; Px 62, p. 48.] On December 30, 1957, following a municipal annexation, the school system acquired the Courtright elementary school from the Whitehall school district. [Dx C-72, p. 40.] In 1968, Columbus acquired the Homedale elementary school from the Worthington school district. [A. 363-64.] By 1968, only a few of the areas annexed to the city had not been incorporated into the school district. [A. 764-66 (Px 63, p. 18-19).]

Effective July 1, 1971, the entire Mifflin Local School District was transferred to the Columbus District. At that time Mifflin served some 3,300 students at South Mifflin, Cassady and East Linden elementary schools and at Mifflin Junior-Senior High School. [A. 363.] Prior to the transfer, the Mifflin school system was extremely overcrowded, was financially unable to provide a quality education, and had lost its accreditation from the North Central Association of Schools. [A. 237-38, 690-92; R. 5587; Px 360, pp. 6-7.] Also in 1971, the State Board approved the transfer of 14 parcels of land to the Columbus school district from seven sur-

rounding school districts. [A. 688-89, 690-92.] Although some were delayed by litigation, all of the transfers were effective as of July 1, 1976, following a decision of the Ohio Supreme Court. [A. 363-64.] *In re Proposed Annexation by the Columbus City School District*, 45 Ohio St. 2d 117, 341 N.E. 2d 589 (1976). The area transferred from the Westerville school district alone included over 2,600 students in 1976. [A. 690-91.]

The phenomenal growth in the school district's area and population prompted the district court's conclusion that rapid growth "[o]bviously . . . demanded new school facilities and placed pressures upon the school officials seeking to provide quality school facilities for expanding enrollments in a continually enlarging geographic area." 429 F. Supp. at 237. [Pet. App. 12.]

2. Residential Patterns

While an understanding of the tremendous growth of the city and school system is critical to an evaluation of this case, it is also necessary to consider the characteristics of that growth and the residential mosaic into which it developed.

Although the overall population of Columbus grew at a rapid rate from 1940, the black population increased at an even greater rate. In 1940, 11.7% of the population was black. During the next 30 years, total black population nearly tripled, and in 1970 was 18.5% of the total Columbus population. 429 F. Supp. at 237. [Pet. App. 12; Px 253-256.] The black student composition of the Columbus schools, always well in excess of the percentage of blacks in the general population, grew at a steady rate to 29% of total enrollment in 1970, and to 32.5% in 1975. *Id.*

As in most large cities in the United States, the black residential population of Columbus is concentrated within

a geographically contiguous area.⁴ In 1970, 71% of the black population resided within 23 contiguous census tracts located in the east central area of Columbus. 429 F. Supp. at 237. [Pet. App. 13; A. 249; Px 349.] The degree of residential racial imbalance in Columbus was statistically demonstrated by Dr. Taeuber's computation of a "segregation index" to measure and illustrate the relative degree of separation or non-dispersal of black and white residents. 429 F. Supp. at 258. [Pet. App. 56-57; A. 282-83.]

Dr. Taeuber computed the following residential segregation indices for Columbus:

1940	87.1
1950	88.3
1960	85.3
1970	84.1

429 F. Supp. at 258. [Pet. App. 57; A. 283.]

⁴According to the plaintiffs' expert, Dr. Taeuber, all cities in the United States are residentially segregated. Dr. Taeuber was quoted as follows by Mr. Justice Powell in his separate opinion in *Keyes v. School District No. 1*, 413 U.S. 189, 223 n. 9 (1973) (Powell, J., concurring and dissenting):

"As Dr. Karl Taeuber states in his article, Residential Segregation, 213 Scientific American 12, 14 (Aug. 1965):

'No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand, and in cities that are progressive in their employment practices and civil rights policies as well as those that are not.'

In his book, *Negroes in Cities* (1965), Dr. Taeuber stated that residential segregation exists 'regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation and discrimination.' *Id.*, at 36."

An index of "0" would mean that every city block had the same proportion of black and white residents, while an index of "100" would indicate that each city block had either all white or all black residents. The index, of course, measures only statistical dissimilarity, and is incapable of indicating the cause of residential racial separation. [A. 229.]

Dr. Taeuber testified that the development of segregated housing patterns depends upon a "myriad" of facts and circumstances, and that patterns will vary among localities. [A. 306, 307.] However, Dr. Taeuber testified that the causes of segregated residential patterns could be grouped into three categories: choice, economics, and discrimination. [A. 300.] The choice factor relates to common cultural, religious, and language traditions, and patterns of life. Consequently, the large in-migration of blacks to the cities after World War II was characterized by the movement of new black residents to established black residential areas, not unlike the pattern seen for European immigrants to this country's cities in the late 19th and early 20th centuries. [Tr. 285-86, 304, 1749.]

Dr. Taeuber recognized economics as a major cause of residential segregation, but noted that there is a high degree of residential segregation even among blacks and whites of comparable income.⁵ [A. 289-94.]

Within the third general category, discrimination, Dr. Taeuber acknowledged a recent article in which he listed

⁵Dr. Taeuber has estimated that economic constraints account for from 20 to 25 percent of housing segregation. TAEUBER, PATTERNS OF NEGRO-WHITE RESIDENTIAL SEGREGATION 18 (Rand Corp. paper #4288, 1970). Others have estimated the economic factor to account for between 40 and 50 percent of residential segregation. PASCAL, ECONOMICS OF HOUSING SEGREGATION 177-78 (Rand Corp. research memo #5510, 1967). See, Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, 73 n. 29 (1978).

all of the discriminatory practices he considered responsible for residential segregation.⁶ Noticeably absent from Dr. Taeuber's list was any reference to school construction or assignment policies.

The plaintiffs introduced a large volume of evidence concerning a number of the discriminatory housing practices as they occurred in Columbus. However, there was no evidence that Columbus school officials participated in these practices, or even had any knowledge of them, and the district court made no findings which implicated school officials in connection with any of these actions.

Nonetheless, the plaintiffs attempted to shift the responsibility for residential segregation onto school officials through the testimony of Martin Sloane, who offered his opinion that there was a "reciprocal effect" between racially imbalanced schools and the racial character of the neighborhood. [A. 339-41.] Mr. Sloane, a lawyer, was unqualified by education or experience to offer such an opinion, and offered no empirical evidence to support his general observation. Specifically, he made no study of

⁶The nine practices listed were: (1) racially motivated site selection and assignment policies of public housing authorities; (2) racially motivated site selection, financing, sale and rental policies of FHA and VA; (3) racially motivated site selection, relocation and redevelopment policies of urban renewal programs; (4) zoning and annexation policies; (5) restrictive covenants; (6) policies of financial institutions that discourage prospective developers of racially integrated private housing; (7) policies of financial institutions that allocate mortgage funds and rehabilitation loans to blacks only if they live in black areas; (8) practices of the real estate industry such as limiting the access of black brokers to realty associations and multiple-listing services, refusal by white realtors to co-broker on transactions that would foster racial integration, block-busting and panic selling, racially identifying vacancies overtly or by nominal codes, steering, and penalizing brokers who attempt to facilitate racial integration; and (9) racially discriminatory practices by individual homeowners and landlords. [A. 300-302.]

conditions in Columbus, and admitted he had no previous contact with the city. [A. 326.]

3. *Neighborhood School Policy*

The Columbus Board of Education, as required by Ohio law, has consistently adhered to a neighborhood school policy since before 1900.⁷ In Columbus, the essence of the neighborhood school policy has been to assign students to schools within a reasonable distance of the students' residences, so that the vast majority can walk to school. [A. 227-28, 576-77, 625-29.] The success of this policy is illustrated by the fact that less than 10 percent of students in the Columbus system were required to be transported for safety and distance reasons in 1975-76. [A. 233-34.]

In pursuit of this policy, school attendance area boundaries are designed so that students are within walking distance of their schools. [A. 227-28, 625-28.] Boundaries are therefore defined on a geographical basis, and take into account natural barriers such as rivers, super-highways, and major thoroughfares. [A. 227.] At the elementary level, boundaries are based upon a walking distance of three quarters of a mile. Junior high boundaries are based upon a one and one-half mile walking radius, and senior high areas are based upon a two mile radius. 429 F. Supp. at 238. [Pet. App. 14.]

The neighborhood school policy, as pursued in Columbus, has many benefits. It provides for schools convenient

⁷Section 3313.48, OHIO REVISED CODE, requires Ohio school boards to provide free education to students residing within their districts "at such places as will be most convenient for the attendance of the largest number thereof." The Sixth Circuit has interpreted this statute to require Ohio boards of education to adhere to a neighborhood school policy. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

to the home and parents so that a good relationship can be established between school and home, and parent-teacher communications can be improved. By reducing time and distance of travel to a minimum, it also reduces the cost of transportation.⁸ [A. 228.]

4. *Voluntary Efforts to Improve Racial Integration*

Employment of a neighborhood school policy in a residentially segregated setting necessarily results in some schools which are racially imbalanced. However, in the past 10 years, the Board has sought to increase racial balance in the schools without departing from the basic neighborhood school policy. Since 1967, the Board has taken racial balance into account when redrawing attendance boundaries, and has pursued an open enrollment plan. 429 F. Supp. at 239. [Pet. App. 16; Px 197; R. 1007-08, 5179.] In April, 1973, the Board adopted the "Columbus Plan." Under the Plan, students may transfer to other schools in the district to improve racial balance or to take advantage of unique educational programs. 429 F. Supp. at 239. [Pet. App. 17-18; Px 82; R. 717-723.] Since 1975, transportation has been provided for full-day racial balance transfers. *Id.* Magnet schools and city-wide career centers have been established, all of which had integrated enrollments when this case was tried. 429 F. Supp. at 239-40. [Pet. App. 18; A. 745-50 (Px 11).] As a result of these programs and policies, the Columbus Public Schools are substantially more balanced racially than the general population. The dissimilarity indices computed by Dr. Taeuber for the schools demonstrated that the school population is substantially more integrated than the residential population of Columbus. [A. 802 (Px 505).]

⁸OHIO REVISED CODE § 3327.01 requires school boards to provide transportation to students in grades K-9 who live more than two miles from school.

C. School Board Actions Alleged to be Unconstitutional

As has already been demonstrated, the period 1950-1975 was one of phenomenal growth for the Columbus school system. This rapid growth in area and population put extreme pressures on school officials to continue to provide quality facilities and education for Columbus students.

The great majority of the thousands of administrative actions challenged as intentionally discriminatory by the plaintiffs were undertaken in direct response to the pressures imposed by the rapid growth of the school system. Expanding enrollments during this period required the construction, on average, of over 100 new classrooms each year, while educational improvements such as reduced class sizes, larger libraries, expanded vocational programs, and programs for the handicapped simultaneously reduced existing capacities or required new classrooms. School officials were also required to use various temporary measures to provide adequate facilities until permanent capacity was constructed, including boundary adjustments, rental facilities, transportation, and extended sessions. Yet, even while employing an erroneous standard for proof of discriminatory intent, the district court found only a few isolated actions during this period to be intentionally discriminatory.

1. *School Construction*

In the period 1950-1975 the Columbus Board constructed 103 new school buildings and over 145 additions to buildings to meet growing enrollments within an expanding geographic area. Before constructing new school facilities, the Columbus Board sought the expert assistance and recommendations of the Bureau of Educational Research, a unit of the College of Education of Ohio State University. The Bureau prepared detailed studies of school plant needs in 1950, 1953, 1955, 1958, 1963 and 1968. [Px

59, 60, 61, 62, 63, 64.] As noted by the district court, the Bureau studied and reported on community growth characteristics, educational programs, enrollment projections, the system's plan of organization, the existing plant, and the financial ability of the community to pay for new school facilities. 429 F. Supp. 237-38. [Pet. App. 13-14.] The Bureau then made specific recommendations for the size and location of new schools and additions to existing schools. *Id.* The district court found these studies to be "comprehensive, scientific and objective." 429 F. Supp. at 237. [Pet. App. 13.]

The Ohio State University building studies did not make racial compositions of schools or neighborhoods a factor in the process of identifying building needs and making recommendations. [A. 577.] Data concerning racial compositions of schools and neighborhoods were not even collected. [A. 598-99.] The plaintiffs' expert, Dr. Gordon Foster, agreed that race was not a factor in the studies and recommendations of the Bureau. [A. 541.]

The evidence showed that the Bureau's recommendations were followed by the Columbus Board in the construction of new schools and additions, and in the location of new sites, with the exception of the recommendations contained in the 1968 study, which could not then be implemented because the 1968 school building bond issue was rejected by the voters. The district court found that "[s]chool construction of new facilities and additions to existing structures were accomplished in substantial conformity with the Bureau's periodic studies and recommendations." 429 F. Supp. at 238. [Pet. App. 14.]

In 1972, a building study was undertaken for the Board by a large-scale community task force known as Project UNITE. 429 F. Supp. at 239. [Pet. App. 16.] The Project UNITE building report recommended a specific construction program similar to that recommended in Ohio State's 1968 Report. [Px 219.] The recommendations were adopted by the Board, and implemented with funds

generated from an \$89.5 million bond issue passed in November, 1972. [A. 661-62, 674-82.]

A table listing each school in the system at the time of trial, its construction date, and the reference to the specific recommendation for construction of the school by the Bureau of Educational Research or by Project UNITE, has been compiled from the various building studies and is included at the conclusion of the brief.

As the district court recognized, the selection of sites for new schools involved weighing numerous complicated factors. 429 F. Supp. at 241. [Pet. App. 20.] In selecting school sites, the Columbus Board considered the following factors:

1. Location of existing buildings;
2. Land use pattern, including the actual and proposed development of the community;
3. Availability of satisfactory land, including size, shape, contour and related characteristics;
4. Availability of basic services such as gas, water, street, storm sewer and sanitary sewer;
5. Traffic patterns, natural boundaries and related factors and the future development of appropriate attendance areas;
6. Desirable size of schools, including the type of outdoor facilities desirable for the school and community;
7. Short-range, intermediate-range and long-range site and construction plans for the district;
8. Economic factors, including initial cost and development costs.

[A. 684-85.]

As has already been noted, since 1967 the Board has made it a policy to also evaluate, as an additional factor, the degree to which the site enhances the probability of providing a racially balanced school population. Even so, as the district court recognized, opportunities to enhance

racial balance through site selection were limited, noting that such opportunities existed only "in those areas of the city where the population shifts from one race to another." 429 F. Supp. at 243. [Pet. App. 25.]

Although the district court stated that in "some instances" new schools could have been sited with an integrative, rather than a segregative effect, the court could find fault with the site selection and boundaries of only two new schools, out of a total of 103 constructed during the period 1950-1975. Although the plaintiffs also challenged a great number of school building additions as segregative, the district court made no finding that any of the 145 additions were racially motivated. Thus, out of 248 separate construction projects completed during a 25 year period, almost all of which were done exactly as recommended by the Ohio State University consultants, the district court made adverse findings with respect to only two new school projects.

The first of these was Sixth Avenue, an elementary school primary center (grades K-3) constructed in 1961. The construction and site of this primary school, as well as its grade organization and size, were recommended in the 1959 Ohio State University building study. The site was located in a highly developed area of the city, where pupil density had increased rapidly since 1957. [A. 751 (Px 62, p. 58).] The nearby Weinland Park and Second Avenue schools were already severely overcrowded. Although eight rooms had been added to Weinland Park in 1957, its 1960-61 enrollment was 174 students over capacity. [Px 1; Px 22; Px 35; Px 62, p. 50.] Although four rooms had been added to Second Avenue in 1957, its 1960-61 enrollment was 108 over capacity. [Px 1, Px 22; Px 35; Px 62, p. 50.]

When the Sixth Avenue School opened in 1961-62, it drew students in grades K-3 from a portion of the former Weinland Park attendance area and a small section of the Second Avenue attendance area. The school was located

in the center of its attendance area, thus making it accessible to students without the necessity of transportation. [Px 258D.] Students in the Sixth Avenue attendance area in grades 4-6 continued to attend Weinland Park. [A. 320.]

Even with the opening of Sixth Avenue, the student population in the Sixth Avenue-Weinland Park-Second Avenue area continued to exceed capacity. In the 1961-62 school year, when Sixth Avenue opened, all three schools had enrollments that significantly exceeded their capacities. [Px 1.] The opening enrollment of Sixth Avenue was 40 students over capacity. [Px 1; Px 64.]

During the time that Sixth Avenue was operated, it had a predominantly black student enrollment. However, Sixth Avenue was closed in 1973, and its students were reassigned to Weinland Park and Second Avenue, with the result that both schools had racially balanced enrollments at the time the case was tried. 429 F. Supp. at 242. [Pet. App. 23-24; A. 745-50 (Px 11).] The Sixth Avenue building has since been used as a teacher resources center.

The second school construction project faulted by the district court was Gladstone Elementary. The construction of Gladstone was specifically recommended in the 1963-64 building study by Ohio State, to be located near Gladstone Avenue and 24th Avenue to provide classroom space for rapid enrollment increases in the area. [A. 766-67 (Px 64, p. 65).] Nearby Duxberry Park Elementary was severely overcrowded, being 350 students over capacity in 1964-65. [Px 1; A. 766-67 (Px 64, p. 65).]

When Gladstone opened in 1965-66, its attendance area was the western portion of the former Duxberry Park attendance area. The Gladstone area was bounded on the east by the Pennsylvania Railroad, on the south by 17th Avenue, on the west by Cleveland Avenue, and on the north by Maynard Avenue. [Px 258G.] The railroad divided the Gladstone area from the Duxberry Park attendance

zo., so that children west of the railroad no longer had to be transported to Duxberry or to cross the railroad.

The district court speculated that if Gladstone had been constructed north of the site recommended by Ohio State University, and if attendance boundaries had been redrawn for several surrounding schools, the result might have been an integrative effect on Hamilton, Duxberry, and Gladstone. Even if this were so, however, the expanding black population in this northeast area, acknowledged by the district court, 429 F. Supp. at 241 [Pet. App. 21-22], would have made this effect only temporary. As indicated in the 1975-76 HEW enrollment survey, by October, 1975, the enrollments of Hamilton, Duxberry, and Gladstone had each become predominantly black. [A. 745-50 (Px 11).] Nearby Linden Elementary, which the district court noted to have been 100% white in the early 1960s, 429 F. Supp. at 242 [Pet. App. 22], had become racially balanced (31.3% non-white) by the 1975-76 school year. [A. 745-50 (Px 11).]

The only other school construction project mentioned in the district court's opinion was Innis Road Elementary, which opened in 1975. Neither the construction nor the site selection of this school was criticized by the district court. Rather, the court drew an inference of segregative intent from the Board's decision not to pair Innis with Cassady Elementary.⁹

The 1972 Project UNITE Building Report recommended the construction of a new elementary school near Cleveland Avenue and Innis Road. [Px 219, Summary of

⁹"Pairing" is the combination of two schools' attendance areas with contrasting racial compositions. Students in the combined area attend one or the other school depending upon the grade level of the student. The result is that both schools have student bodies with substantially similar racial compositions. See, e.g., *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 409 n. 3 (1977).

Building and Site Needs, p. 23.] This area was in the former Mifflin Local School District which had been transferred to the Columbus district in 1971. 429 F. Supp. at 248. [Pet. App. 35.] Cassady Elementary School, which had come into the Columbus system as a part of this transfer, was extremely crowded [A. 237-38], and Innis was constructed to relieve this overcrowding. As recommended in the Project UNITE Building Report, Innis was built to the north and west of Cassady near Cleveland Avenue and Innis Road. The school opened in 1975. 429 F. Supp. at 248. [Pet. App. 36.]

In establishing the attendance area for the new Innis school, the Board was presented with two alternatives. The first alternative was to pair Innis and Cassady, making Innis a grades K-3 primary center and Cassady a grades 4-6 intermediate center, with the two schools serving the combined two-school attendance area. Under this proposal, black enrollments in each of the two schools were projected to be between 50 and 60 percent.¹⁰ [Px 468.] However, the pairing of the schools would have required additional transportation because of the large size of the combined attendance area.

The second alternative was to assign to each school a separate neighborhood attendance area consistent with the

¹⁰In fact, had the pairing proposal been adopted, and the reassignment of students had occurred in 1975-76, *both* Innis and Cassady would have been "black schools" under the standard of racial identifiability employed by the district court. 429 F. Supp. 268-69. [Pet. App. 78-79.]

An examination of the enrollment and racial composition of the two schools in 1975-76 indicates that, if the two attendance areas were combined, there would have been a total of 1158 black and white students in the combined attendance area. [A. 745-50, (Px 11).] Of these students, 701, or 60.5% would have been black. If black students were evenly dispersed into both schools, each would have had a black student composition of 60.5% — both "black schools" under the district court's definition.

Board's neighborhood school organization. Under this alternative, both schools would retain the grades K-6 elementary organization. The Board chose not to pair the schools.

There was ample justification for the Board's choice. The pairing alternative would have required additional transportation, and would have required a departure from the K-6 organization which then prevailed in every elementary school in the system, with the exception of Colerain school which is a crippled children center for grades K-3.

2. Pupil Assignment

a. Optional zones

During the period of enormous enrollment growth in the system, the Columbus Board employed a number of optional attendance zones.¹¹ Dr. Fawcett, Columbus superintendent from 1949-1956, and President of Ohio State University from then until 1972, testified that because of rapid enrollment growth, the school system tried to keep some flexibility in adjacent school boundaries to alleviate overcrowding. Optional zones were used for this purpose, as well as for safety or distance reasons. Optional zones were also used to phase in new secondary schools, one grade each year. [A. 633-36.] Dr. Fawcett testified that optional zones, which were always between adjacent districts, had no racial significance. [A. 576.] Only four optional zones remained in 1975-76, and these were scheduled to be discontinued with the opening of four new high schools in September 1976. [R. 694-95.]

Of the 41 optional zones which were in existence for various lengths of time during the period 1955-1975, the

¹¹An optional zone is an area in which students may opt to attend a specific school other than the one which otherwise serves that area. The student has a choice as to which of two or more schools to attend. 429 F.Supp. at 269 [Pet. App. 80.] See also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 412 n. 8 (1977).

plaintiffs' expert, Dr. Gordon Foster, found only 11 which he believed had "racial implications," (i.e., had a possible impact upon the statistical racial composition of schools) based entirely upon his analysis of census data.¹² The dis-

¹²In 1955-56, there were 26 optional zones in existence, 19 at the elementary level, three at the junior high level, and four at the senior high level. [Px 61, figs. 2, 3, 4.] Dr. Foster's analysis of census data indicated only a few of these to have had possible "racial implications."

The Franklin-Roosevelt option, established in 1955-56 and discontinued in 1960-61, was a one block area along the south side of the primarily commercial Main Street for about 18 blocks. [A. 461-62.] The area was not heavily populated. The non-white composition of many of the blocks was not reported in the census data because of so few units. [Px 255.] Blacks and whites resided in the zone in 1950 and 1960. [Px 250; Px 251; Px 254; Px 255.] The census data, however, only give the number of housing units occupied by non-whites. They do not give any information about the actual number of non-white persons or, more importantly, the number of non-white or white school age children in the block. [Px 254; Px 255.]

The downtown optional zone encompassed the central business district of Columbus. [Px 61, fig. 2; A. 478-79.] The zone had been a neutral or optional zone for a long time. [A. 483.] It continued until 1975 in one form or another with students in the area having the choice of attending any of from four to seven schools. Some of the schools were predominantly white, some were predominantly black, and some were about equal. [A. 480-83.] The census data show a mixed population in the area in 1940, 1950, 1960 and 1970. [Px 253-256; A. 479-80.] Dr. Foster believed this zone had racial implications because "ordinarily" whites choose to go to predominantly white schools. But there is no evidence that occurred. Moreover, there is no evidence that the Columbus Board intended to segregate by means of this option. The black students in the area could also choose to attend any of the predominantly white schools involved, which choices would have had an integrative effect. [A. 535-37.]

There was no reliable evidence that any of the other options discussed by Dr. Foster (Highland-West Mound; Highland-West

(Footnote 12 continued on page 28)

trict court, however, found only a few of these to be intentionally discriminatory.

The district court first discussed the "near-Bexley" optional zone which was in effect from 1959-1975 on the east side of Columbus. The option permitted students in this predominantly white area to attend elementary, junior and senior high schools which were "whiter" than those

(Footnote 12 continued)

Broad; Pilgrim-Fair) were purposely designed to segregate students. However, the district court drew an inference of segregative intent from the creation of the two Highland optional zones. These zones are discussed further in the text at pp. 29-31, *infra*.

A total of 15 optional zones were established in the period 1957-75. Of these, Dr. Foster again found only a few to have had a possible racial effect.

The option between Central and North high schools, created in 1960-61, was not racially motivated. [Px 258C; Px 305.] Central has never been a majority black school. In 1964, Central was 27 percent black and North was 7 percent black. [Px 12.] This optional area is about equidistant from these two schools. In 1975-76, Central was 30.5 percent black and North was 18.5 percent black. [A. 745-50 (Px 11).] The option did not have any racial effect.

The option established in 1962 between East and Linden-McKinley was not racially motivated. [Px 258E; Px 307.] The area had a low density population and included a railroad yard. [R. 3696-97.] The optional area was formerly in the East High School attendance area. [Px 306; 307.] The optional area was predominantly black in the 1960 census. [Px 255, 251, 306, 307.] In order to attend East High, students in the area had to cross a railroad yard. [A. 466-67.] Thus, the option allowed students to avoid a hazard. If black students in the area opted to attend Linden, this optional area had integrative effects. [Px 12.] There was no evidence of racial intent or effect in this option. [Px 258E; Px 306; Px 307; R. 3696-3699.]

Dr. Foster also found a racial effect from the creation of an optional zone which the district court named the "near-Bexley option." The evidence concerning this option is discussed in the text at pp. 28-29, *infra*.

they would otherwise have attended.¹³ 429 F. Supp. at 244-45. [Pet. App. 28.]

Although there was no direct evidence of segregative motivation in the establishment of this option, the district court found that it was not created for racially neutral reasons. Even if this were conceded, however, the evidence established the absence of any current segregative effect. The record indicates that only one or two students in the area were enrolled in the Columbus Public Schools. [A. 770 (Px 140).] Furthermore, with the exception of Fairmoor Elementary, all schools at the receiving end of the option were racially balanced.¹⁴ This optional zone was terminated at the end of the 1974-75 school year. [A. 450.]

The district court also found that the creation of two optional zones on the west side of Columbus "had a substantial and continuing segregative impact" on four elementary schools. 429 F. Supp. at 245-47. [Pet. App. 29-33.]

The first optional zone discussed by the court was established in 1955, and was terminated in 1957. It permitted students in a portion of the Highland Elementary attendance area to attend either Highland or West Broad. Although no enrollment data by race was available for these schools during the time the option was in existence, the court concluded that West Broad was predominantly black on the basis of Dr. Foster's interpolations from census data and the 1964 racial composition of both

¹³Students in the option area would normally have attended Fair Avenue Elementary (96.7% black in 1974-75), Franklin Junior High (93.7% black) or East Senior High (98.9% black). The option permitted attendance at Fairmoor Elementary (4.6% black), Eastmoor Junior High or Johnson Park Junior High (45.3% black and 26.7% black, respectively) and Eastmoor Senior High (34.9% black). [A. 776-86 (Px 383).]

¹⁴See n. 13, *supra*.

schools.¹⁵ Census data indicated that the option area was predominantly white in residential population. 429 F. Supp. at 245. [Pet. App. 30-31.] The optional zone was eliminated in 1957, and the area was permanently re-assigned to West Broad. 429 F. Supp. at 246. [Pet. App. 30.]

Another optional zone involving Highland was created in 1955, and was terminated in 1961. 429 F. Supp. at 246. [Pet. App. 31-32.] This option permitted students residing in a portion of the Highland attendance zone to attend West Mound Elementary. Relying on census data, the court concluded that the optional zone was predominantly white, and that it permitted students to attend the "whiter" West Mound.

The Court acknowledged that Highland was overcapacity during this period [A. 472], that West Mound was undercapacity, and that the option eased the capacity problem. 429 F. Supp. at 246. [Pet. App. 31-32.] Nonetheless, the court speculated that the capacity problem might have been alleviated by choosing a "blacker" optional zone, or by completely redrawing attendance boundaries for Highland, West Broad, West Mound, and Burroughs.

¹⁵A large portion of the statistical evidence relied upon by Dr. Foster was derived from the interpolation of census data. It is simply not possible to interpolate census data between the ten year census periods without risking sizeable error. This is particularly true in a city like Columbus where there were rapid changes in area, population, and racial composition in the periods between censuses. See *Castenada v. Partida*, 430 U.S. 482, 506-7 (1977) (Burger, C.J., dissenting). Statements in the record concerning the probable racial compositions of neighborhoods served by various schools must therefore be read with a great deal of caution.

Statements concerning the probable racial composition of various schools prior to 1964 must also be discounted, since enrollment data was not recorded by race prior to that time, when HEW first required such data to be recorded and reported.

Although the Court found that the use of these optional zones "had a substantial and continuing segregative impact upon these four west side schools," 429 F. Supp. at 247 [Pet. App. 33], this conclusion is not borne out in the enrollment statistics. In 1975-76, both Burroughs (11.2% black) and West Mound (13.9% black) had substantial black student enrollments. [A. 745-50 (Px 11).] West Broad's black enrollment increased from no black students in 1964, to 17 black students in 1975-76. 429 F. Supp. at 247. [Pet. App. 32; A. 745-50 (Px 11).] Highland's non-white enrollment *decreased* from 75% in 1964 to 67.1% in 1975-76. *Id.*

b. *Discontiguous attendance areas*

During the period 1957-70, the Columbus Board created 11 discontiguous attendance areas.¹⁶ Most of these had been discontinued by the time the case was tried.

Generally, these zones were small, geographically isolated areas, where enrollments were too small to justify a separate school. Students residing in these areas were therefore transported to a nearby school with available space. [A. 621-23.]

Of the eleven discontiguous areas, the district court found racial effects from only two.¹⁷ The first of these was

¹⁶Under the definition employed by the district court, a discontiguous attendance area is an attendance zone from which the student resident must cross another attendance area to reach his assigned school. 429 F. Supp. at 269. [Pet. App. 80.]

¹⁷The record clearly indicates the absence of discriminatory intent or effect in the creation and operation of the other nine zones. The Barnett Elementary discontiguous zone was extremely isolated and students residing there will always have to be transported. Students were transported to Barnett, the only nearby school which was accessible and had available capacity. [R. 5383-87.] The Binns zone was not actually discontiguous, and the students residing there could walk to Binns. Binns had capacity for these students, and their assignment had no racial effect. [R. 5387-

(Footnote 17 continued on page 32)

the Moler discontinuous zone, established in the 1963-64 school year. 429 F. Supp. at 247. [Pet. App. 33-34.] The zone consists of five streets in an isolated area, from which it will always be necessary to transport students. [A. 624-25.]

This isolated area was annexed from the Marion-Franklin district in 1957, and until 1963 the students were transported to the Smith Road school. [Px 247; Px 248; Dx C-72.] Smith Road was overcrowded during that period, and when Moler opened in 1963 the students in the area were assigned and transported to the Moler school because it had space. In 1963, all other nearby schools were overcrowded. Alum Crest was overcrowded, Watkins was overcrowded, Clarfield was overcrowded, and Koebel

(Footnote 17 continued)

5388.] The assignment of students from a discontinuous zone to Medina Junior High was justified by capacity problems, and had an integrative effect. [A. 623-24; 745-50 (Px 11).] The discontinuous area assigned to Oakmont elementary was geographically isolated, so that students residing there will always have to be transported. There was no racial effect since all nearby schools were predominantly white. [A. 745-50 (Px 11).]

Students in the Sharon discontinuous area were transported to that school for safety reasons. [R. 5392-93.] There was no racial effect since all schools in the area were predominantly white. [A. 745-50 (Px 11).] The Berwick discontinuous area existed only during the period 1959-1961, and was assigned to Berwick because of capacity problems at other nearby schools. [Px 258; Px 62; Px 64; Px 22; Px 258E.] The North Linden school served two discontinuous areas in 1961-62. [Px 258D.] Students were reassigned to Forest Park Elementary upon its completion in 1962. [Px 258E.] Two small discontinuous areas were assigned to Linden Elementary, one in 1957, and one in 1959. [Px 258, 258B.] Both areas were permanently reassigned to Duxberry when it opened in 1959, and were contiguous to the Duxberry attendance area. [Px 258B, Px 258C.] Two small discontinuous zones were assigned to Northridge Elementary, one in 1957-59 and the other in 1959-60. [Px 258, 258A, 258B.] Both areas were subsequently reassigned to other schools with contiguous attendance zones. [Px 258B, 258C.]

had not been built. Moler was the closest school with space to house these students. [Px 2; Px 64, pp. 55-57.]

The district court relied on the testimony of Mr. Leon Mitchell, principal at Alum Crest in 1966-67 and 1967-68, in reaching the conclusion that Alum Crest had space for these students in those two years. Mr. Mitchell testified that it was his recollection that in those years his school had 11 teachers and only 210 students, and that he thought Alum Crest had space to house the transported students whom he identified as predominantly white. Mr. Mitchell's recollection concerning enrollments at Alum Crest in 1966 and 1967 was not accurate. In 1966-67, Alum Crest's enrollment was 251. [Px. 1.] In 1967-68, the enrollment was 279. *Id.* The capacity was 261. [Px 63, p. 68.] Moreover, Mr. Mitchell pointed out that enrollments changed rapidly at Alum Crest because of high mobility. [R. 6247.]

Even if the assignment of students in this discontinuous zone to Moler had an incidental racial effect from 1963 to 1968, the evidence is clear that there was no segregative effect at the time the case was tried. The discontinuous area has had a substantial black population since 1970, and its assignment to Moler since that time has had an *integrative* effect. [A. 745-50 (Px 11).] If these students had been assigned to Alum Crest at the time of trial, it would have compounded the racial imbalance at that school. [A. 745-50 (Px 11); Px 252; Px 255; Px 256.]

The other discontinuous zone which was found to have had a racial effect was the Heimandale discontinuous attendance zone. 429 F. Supp. at 247-48. [Pet. App. 34-35.] The zone was already in existence when this area was annexed from the Marion-Franklin district in 1957, and was terminated in 1963. This zone encompassed a three street area within the Heimandale attendance area, from which students were assigned to Fornof Elementary, the next adjacent attendance area. [R. 289-293.]

During the school years 1957-58 through 1962-63, Heimandale and Fornof were at or over capacity. [Px 62,

p. 26; Px 64, p. 32.] In 1963, a six room addition was completed at Heimandale and the discontinuous zone was terminated with the reassignment of students to Heimandale. [Px 22; Px 35; Px 258F; Px 266.] The fact that the establishment of this zone had no segregative effect at the time this case was tried is apparent from Heimandale's racially balanced enrollments since 1964.¹⁸

c. Other pupil assignment practices

The district court's discussion of the Board's post-1954 pupil assignment practices was confined to those specific instances discussed above. Although the plaintiffs challenged thousands of other board decisions, the district court either made no findings, or explicitly found the plaintiffs' evidence to be unconvincing.

Rental Facilities. The plaintiffs claimed that instances where rental facilities were temporarily used to relieve overcrowding were motivated by a segregative purpose. The Board offered evidence that demonstrated a complete absence of any segregative purpose. [A. 607-12, R. 5294-5322.] The rental facilities were needed at various times during the period 1957-1971 because of overcrowding or because a new school had not been completed on schedule. In all instances, the rented space was as close as possible to the school involved and was usually at a church because of strict building safety codes and school requirements. [R. 5294-96; Px 358.] The district court made no findings that any of the rentals were motivated by segregative intent.

¹⁸ The racial composition of Heimandale was 40 percent black in 1964 and 1965, and 30 percent black in 1966. [Px 12.] At the time of trial, Heimandale was racially balanced under the court's definition, with a black student composition of 35.9 percent. [A. 747 (Px 11).]

Boundary Changes. Because of the severe overcrowding at schools and the construction of 103 new schools and 145 school building additions, the school system was required to make many school boundary changes each year. The construction of a new school building, depending on its location, could require changes to the boundaries of one, two, three or more existing schools. For example, in 1966, 57 separate school attendance areas were affected by boundary adjustments. [Px 258; Px 258I; R. 5407-08.]

Although the plaintiffs originally claimed that nearly all boundary changes were motivated by segregative intent, Dr. Foster did not analyze boundary changes. [R. 3681.] The Columbus Board nevertheless offered evidence describing in detail the process involved in establishing and changing school attendance areas. This evidence established that school boundary changes were based upon rational school administrative concerns. Boundary changes were designed to conform to the neighborhood school policy and took many relevant factors into account, including walking distances, density of student population, size of schools, geographical and man-made barriers, student safety, and, since 1967, racial balance. [A. 625-32.]

With the exception of boundary changes associated with the specific actions discussed in its liability opinion, the district court made no finding of discriminatory intent or effect with respect to boundary changes.

Transportation For Overcrowding. The plaintiffs also challenged the temporary transportation of classes from an overcrowded school to the nearest school with available space to relieve severe overcrowding. The Board submitted overwhelming evidence that justified this practice as educationally and administratively sound and non-discriminatory. [A. 612-21.] The district court found no discriminatory intent or effect with respect to this practice.

Extended Sessions. The plaintiffs also challenged the use of extended school days and double sessions to relieve overcrowding in the early 1970s. The evidence demonstrated that these measures were educationally and administratively sound practices to cope with extreme overcrowding and were not racially motivated. [R. 5312-18.] Again, the district court made no finding that this practice was discriminatorily motivated or had a discriminatory effect.

Student Transfers and Assignment. The district court found that the plaintiffs' challenge of student transfers for medical, babysitter, disciplinary and other reasons did not "bear sufficient impact to be helpful in the resolution of the issues." 429 F. Supp. at 240 n.2. [Pet. App. 20 n.2.] The defendants' evidence established that these practices were administered in a racially neutral manner. [R. 4587-4600.]

3. Professional Staff

The plaintiffs also attempted to show that the Columbus Board had intentionally discriminated against blacks in its employment practices. However, the district court placed only limited reliance on this evidence in drawing an inference that certain board actions in the past had been discriminatorily motivated. The evidence established that the Board's employment practices at the time this case was tried were nondiscriminatory.

a. Hiring and assignment of teachers

Although the Board had always employed black teachers, it began, with the superintendency of Dr. Fawcett in 1949, to increase the number of black teachers through active recruiting. [A. 574-75, R. 4729-38, 4745, 4897, 5690, Dx C-63.] The Board has been successful in its efforts, despite the keen competition for a decreasing number of

black teacher graduates [R. 4735-36], and the shortage of black graduates with special skill certification. [R. 4750-54, Dx C-100.] The percentage of black teachers in the system was increased from 9.7% in 1964 to 17.5% in 1975 through an aggressive minority recruiting program. [Px 15; Dx C-63; R. 703-710; R. 4744-54.]

Although most black teachers were assigned to predominantly black schools in the pre-1950 period, this also began to change with Dr. Fawcett's superintendency. [A. 575.] By 1973 there were only 27 schools with all white teaching staffs. [R. 5700.] On July 10, 1973, the Columbus Board concluded a conciliation agreement with the Ohio Civil Rights Commission. [Px 229.] Although the Board denied that its past hiring and assignment practices had been discriminatory, it nonetheless agreed to hire and assign black teachers in a manner which would insure racially balanced faculties in all schools in the system beginning in September 1974. While the plaintiffs attempted to show non-compliance with the agreement, the district court held that it "... cannot find, as plaintiffs urge, that the Columbus defendants have failed to comply with the consent order and have down-graded efforts to recruit black faculty and administrators. The effort to comply with the consent order appears to be substantially successful; also, the effort to recruit black teachers appears to have been sincere and reasonable." 429 F. Supp. at 260. [Pet. App. 59.] Thus, the Columbus public schools have had racially balanced teaching faculties in each school since before the filing of the second amended complaint in October 1974.

b. Hiring and assignment of administrators

The evidence established that the Columbus Board has initiated an affirmative recruitment and assignment program for administrators, and has actively sought to assign all administrators on a non-discriminatory basis.

The hiring of administrators has been accomplished primarily through a cadet principal program, which trains teachers for administrative positions. [R. 4384-86.] Since 1969, 44 percent of the cadet appointments have been black teachers. [Dx C-57.] Since August 1, 1971, over 30 percent of the new administrator appointments have been black. [Dx C-117.]

With respect to assignment of black administrators, there have been differences of opinion among black leaders as to whether black administrators should be assigned to predominantly black schools. Plaintiffs' own expert, Dr. Robert L. Green, and a local NAACP leader, Mr. Clarence Lumpkin, have advocated such a policy. [R. 569, 2544.] Nonetheless, the Columbus Board has taken steps to improve the racial balance of administrative staffs through the assignment of black administrators to majority white schools. [R. 713-714, 5731-32], and white administrators have been assigned to majority black schools. [Px 410B.] Since 1973, the Board's employment practices with respect to administrators have been governed by the terms of the Ohio Civil Rights Commission conciliation agreement. [Px 229.]

c. Other employment practices

Plaintiffs also sought to establish discrimination in the hiring and assignment of substitute teachers and non-professional staff. The district court found this evidence to be unconvincing:

"Evidence was introduced in attempt to prove or disprove racial preferences in student transfers, assignment of non-teaching and non-administrative employees, assignment of students and substitute teachers and special education programs. The plaintiffs' proofs regarding these matters do not bear suf-

ficient impact to be helpful in the resolution of the issues.

It is noted that the assignment of non-professional staff is racially suspect; however, the Court does not find sufficient nexus between that fact and the issues being litigated, and it is not a part of the factual setting from which the Court draws conclusions against defendants."

429 F. Supp. at 240 n.2. [Pet. App. 20, n. 2]

4. Pre-1954 History of the School System

The plaintiffs relied heavily on evidence concerning events which occurred prior to 1950 in support of their claim of a current condition of racial segregation in schools. The historical evidence was of two types. Witnesses Helen J. Davis, Barbee Durham, and Lucien Wright testified about personal experiences prior to 1950. [A. 177-91, 194-203, 357-75; 2037-2052.] Witnesses Myron Seifert and W. A. Montgomery did not testify from first-hand knowledge, but mainly read from newspaper accounts or other compilations of events, most of which concerned the period 1900-1940. [Px 351; A. 254-79, 364-91.] There was no statistical evidence concerning the racial composition of the schools prior to 1954, because enrollment data was not required by the Federal government to be recorded by race until 1964.

Given the hearsay nature of the documentary evidence, and the subjective quality of the remainder, the plaintiffs' evidence of practices prior to 1954 had little probative value. Furthermore, although some of the incidents described by these witnesses were reprehensible, there was no attempt to demonstrate a current impact on the racial composition of schools in the Columbus system. Nonetheless, the district court relied heavily on this evidence in reaching a judgment of systemwide liability in this case. 429 F. Supp. at 234-36. [Pet. App. 7-11.]

D. The District Court's Liability Decision

The keystone of the district court's March 8, 1977 liability decision was the significance which the court attached to the pre-1954 history of the public school system. Although the court conceded there was "substantial racial mixing of both students and faculty in some schools" in 1954, it found that certain board actions which occurred prior to 1943 had led to the creation of five predominantly black schools on the near east side of Columbus. The trial court found that the existence of these five schools at the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) compelled the conclusion that there was not a "unitary school system" in Columbus in 1954. 429 F. Supp. at 234-36. [Pet. App. 7-11.]

This finding by the district court is critical to an understanding of the balance of the court's opinion, because of the standard of liability applied by the district court to all post-1954 decisions by the school board. The court concluded that its finding of a non-unitary school system in 1954 imposed an affirmative duty on school officials to take action "to correct and prevent the increase in racial imbalance." 429 F. Supp. at 255. [Pet. App. 50-51.] The court found that the imposition of this duty on the defendants justified drawing an inference of segregative intent "from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance." 429 F. Supp. at 241. [Pet. App. 20.] As will be demonstrated in the Argument portion of this brief, the district court's conclusions here were erroneous, both legally and factually.

Applying this standard of proof to post-1954 school construction, the court made a generalized finding that "in some instances the need for school facilities could have

been met in a manner having an integrative rather than a segregative effect." 429 F. Supp. at 243. [Pet. App. 25.] Nonetheless, the court found only two specific instances where an integrative opportunity was not pursued.¹⁹

In addition to its school construction findings, the district court found only isolated specific actions from which it could infer segregative intent. These actions were (1) the rejection of a proposal to pair the Innis Road and Cassady elementary schools,²⁰ (2) the creation of the "near-Bexley" and Highland-West Broad-West Mound optional attendance zones,²¹ and (3) the creation of the Moler and Heimandale discontinuous attendance areas.²²

The court also made a generalized finding that segregative intent could be inferred from the mere continuance of a "non-racially motivated" neighborhood school policy with knowledge of segregated housing patterns. 429 F. Supp. at 254-55. [Pet. App. 48-49.]

The district court determined that these findings justified a judgment of "systemwide liability." In so finding, however, the court made no attempt to compare the racial composition of the schools in 1976 with what the racial composition would have been in the absence of the specific constitutional violations found. To the contrary, the district court found that:

"[i]t is plainly the case in Columbus that had school officials never engaged in a single segregative act or omission, the systemwide percentage of black students would nevertheless not be accurately reflected in each and every school in the district."

429 F. Supp. at 267. [Pet. App. 74.]

¹⁹These instances were the construction of the Sixth Avenue and Gladstone elementary schools. See pp. 22-24, *supra*.

²⁰See pp. 24-26, *supra*.

²¹See pp. 28-31, *supra*.

²²See pp. 31-34, *supra*.

Indeed, the district court also found that no "reasonable action by school authorities could have fully cured the evils of residential segregation." 429 F. Supp. at 259. [Pet. App. 58.] Nevertheless, by imposing a statistical racial balance remedy upon the Columbus school system, and without determining what, if any, racial imbalance today was proximately caused by discriminatory school board action, the district court forced the school system to "fully cure the evils of residential segregation" in Columbus.

E. Remedial Proceedings

As directed by the district court, the Columbus Board prepared and filed, on June 10, 1977, a systemwide desegregation plan, reserving its rights to appeal and to contest the imposition of a systemwide remedy. After this Court's decisions in *Dayton*, *Brennan* and *Omaha*, the Columbus Board sought leave to file a more limited remedy plan designed to racially balance all predominantly black schools cited in the district court's liability opinion as being involved in constitutional violations. On July 7, 1977, the district court granted leave to file the amended plan, but opined that *Dayton*, *Brennan* and *Omaha* had no effect on this litigation. [Pet. App. 90.] Thus, the hearings scheduled for the week of July 11, 1977, were to proceed on the assumption that "systemwide liability is the law of this case pending review by the appellate courts." [Pet. App. 95.]

At the start of the remedy hearings, the Columbus Board of Education made written and oral motions to the district court requesting that it determine the incremental segregative effect of the constitutional violations identified in the March 8 liability opinion. The State Board of Education joined in the motions. [A. 53-63, 715-30.] The district

court summarily overruled the motions, and refused to determine incremental segregative effect. [A. 740-41.]

On July 29, 1977, the district court rejected all proposed plans of desegregation presented by the Columbus and State Boards, and ordered development of another plan to desegregate "the entire Columbus school system." [Pet. App. 111.] The court found the Columbus Board's original submission of June 10 unacceptable because it did not racially balance 22 predominantly white schools on the periphery of the system. The State Board's June 14 submission was rejected because of educational and logistical shortcomings. [Pet. App. 106.] The Columbus Board's July 8 post-*Dayton* submission was rejected as constitutionally unacceptable because it "falls far short of providing a reasonable means of remedying the systemwide ills." [Pet. App. 100.]

The district court's July 29 order approved the "numerical face" of an early planning exercise by the school administration staff which had developed school pairings to racially balance each school to within $\pm 15\%$ of the 32.5% mean black student enrollment in the district. The court pointed out that this racial balance approach "would desegregate all schools, would avoid claims that some but not all share the burden of a remedy, and would not leave 22 school areas to which white flight may be precipitated." [Pet. App. 105.] The court then proceeded to order development of a new systemwide plan to "legally desegregate the entire Columbus school system under the principles set out in this order." [Pet. App. 111.] Under that order, it was clear that the district court required a statistical racial balance remedy designed to balance each of the system's 170 schools.

As directed, the Columbus Board formulated and filed, on August 31, a new systemwide desegregation plan which satisfied the district court's requirement of statistical

balance in each school.²³ On September 26-27, 1977, the Court conducted a hearing on the new plan, but confined the scope of the hearing to questions concerning the cost and availability of transportation equipment and whether the elementary school implementation should be delayed until September 1978. [A. 173-75.]

On October 4, 1977, the district court entered an order that the new systemwide remedy plan be implemented in September 1978. [Pet. App. 125.] In addition, the court ordered that, on or before October 19, 1977, the Columbus Board commence the bidding process under Ohio law for the acquisition of transportation equipment necessary to implement the plan. The court's order also required the Columbus Board to file, by November 9, a report concerning the desegregation budget, a progress report on Phase I preparatory efforts, notification of commencement of the transportation equipment acquisition process, and a progress report and timetable for activities in preparation for implementation of the desegregation plan. [Pet. App. 136-37.]

The desegregation remedy ordered by the court was extensive. The plan employed pairing and clustering techniques, boundary changes, grade level reorganizations, and school closings, in order that every school in the sys-

²³Although the Board developed and submitted the plan in accordance with the court's remedy directives, the Board in no way approved of the racial-balancing provisions of the plan and reserved its right to appeal all orders requiring implementation of the plan or any part of it. The Board has persistently contended that a systemwide racial balance remedy is not constitutionally required in this case. The Columbus Board believed, however, that if any such plan was to be ordered, its staff had the ability and expertise to design the most reasonable form of such plan for its school system. The alternative was to permit the court to choose a plan prepared by someone unfamiliar with the school system.

tem be racially balanced to within $\pm 15\%$ of the system's overall racial composition. [A. 68-71.] This massive reorganization involves the reassignment of over 42,000 school children [A. 148], the alteration of the grade organization of nearly every elementary school in the system [A. 122-36], the closing of thirty-three school buildings, with 11 of the buildings to be reopened under alternate organizations [A. 72-73], and the reassignment of teachers, staff, and administrators. Under the desegregation plan, a total of 50,949 students would be required to be transported by bus, or 33,216 more students than the system expected to transport in 1977-78. [A. 148.] About 37,000 students would be transported solely to achieve racial balance. These transportation requirements demanded 213 additional 65-passenger school buses to augment the system's existing bus fleet. [A. 151.] Even with the additional equipment, the plan contemplates four different school schedules so that each bus could make an average of three trips each morning and afternoon. [A. 150.]

Implementation of the plan was projected to be extremely costly, an additional financial burden on a school system whose financial resources were already insufficient to maintain its educational operations. [A. 171-72.] At the time of the district court hearings on the plan, the Board estimated a total desegregation plan cost for the 1978-79 school year of \$12.3 million. [A. 171.]

On October 19, 1977, the Columbus Board commenced the bidding process for the 213 new buses and related equipment, as ordered by the district court. The process was completed on December 6, 1977, when the Columbus Board authorized the issuance of purchase orders and the award of contracts totaling \$3.5 million.

On November 9, 1977, the Board filed the detailed progress report and revised budget ordered by the district court on October 4. The revised budget estimated total

desegregation costs through the 1978-79 school year to be \$13 million.²⁴

F. The Court of Appeals' Judgment

The United States Court of Appeals for the Sixth Circuit affirmed both the liability and remedy judgments of the district court against the Columbus Board, but remanded the case for additional findings concerning the liability of the State defendants. *Penick v. Columbus Board of Education*, 583 F.2d 787 (1978). [Pet. App. 140.]

As was the case with the district court's liability findings, the court of appeals' affirmance was founded upon the conclusion that a "dual school system" existed in Columbus in 1954, and that "under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for 24 years." 583 F.2d at 787. [Pet. App. 160.] With that finding as its predicate, the court of appeals approved and adopted the standard of liability which the district court had applied to all post-1954 actions of the Columbus Board. That standard of liability was that any action taken by the board which did not have the effect of eradicating racial imbalance was unconstitutional *per se*:

"[T]he District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil assignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. *On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation.*"

583 F.2d at 800 (emphasis added). [Pet. App. 165.]

²⁴The Columbus Board's post-October 4 submissions to the district court were included in a supplemental record certified to the court of appeals by the clerk of the district court, and became a part of the record on appeal.

Although it found the existence of racial imbalance in Columbus schools to be a sufficient ground for affirmance, the court of appeals also commented upon the post-1954 history of the school system, quoting extensively from the district court's liability opinion.

With respect to school construction, the appellate court found that statistics alone, indicating that 87 of 103 new schools opened "racially identifiable" under the district court's definition, and that 71 of the 87 were still "racially identifiable" at the time of trial, "requires a very strong inference of intentional segregation." 583 F.2d at 804. [Pet. App. 173.]

With respect to the remainder of the post-1954 events described by the district court, the appellate court characterized them as "isolated in the sense that they do not form any systemwide pattern" of segregation. 583 F.2d at 805. [Pet. App. 175.]

Despite the fact that the district court explicitly refused to make the mandatory *Dayton* inquiry into the incremental segregative effect of the violations which it had identified, the appellate court found that the district court's pre-*Dayton* liability findings were sufficient, by employing a presumption that "[s]chool board policies of systemwide application necessarily have systemwide impact." 583 F.2d at 814. [Pet. App. 198.] Through the use of this presumption, and without reference to any record evidence of systemwide impact, the appellate court found that the violations discussed by the district court "clearly" or "of course" had a systemwide impact. *Id.*

The court then went on to hold that even if the district court's findings were insufficient under *Dayton*, it would supplement those findings with its own generalized finding of "systemwide impact," but again without any reference to evidence in the record which would support such a conclusion. 583 F.2d at 814. [Pet. App. 199.] The court of appeals, like the district court, made no attempt to compare the racial distribution of the Columbus school

population as presently constituted to what that distribution would have been in the absence of the constitutional violations it had found.

Having supplied a generalized finding of systemwide liability, the court of appeals devoted only two short paragraphs to the question of the validity of the extensive desegregation remedy ordered by the district court, and affirmed the district court's remedy judgment. 583 F.2d at 818. [Pet. App. 207.]

SUMMARY OF ARGUMENT

1. The courts below violated this Court's explicit instructions in *Dayton*, *Brennan*, and *Omaha* by refusing to make the required factual determination concerning the current incremental segregative effect of the remote and isolated constitutional violations described in their opinions, and by refusing to tailor a remedy confined to the correction of that effect. Instead, both courts imposed a systemwide statistical racial balance remedy which goes far beyond the correction of any current effect which is discernible from this record of the limited violations found. Furthermore, in imposing a remedy which requires a strict racial balance in every school, the courts below have violated the explicit directions of *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). See pp. 52-67, 79-81, *infra*.

2. The factual inquiry required by *Dayton* was avoided through the employment of a legal presumption that remote and isolated constitutional violations had a current systemwide effect. The key to this approach was the lower courts' misinterpretation of *Keyes v. School District No. 1*, 413 U.S. 189 (1973), to authorize a presumption that, because of the existence of five predominantly black schools within the Columbus system in 1954, the entire system was "dual" when this Court decided *Brown*

v. Board of Education, 347 U.S. 383 (1954). Both courts found that this conclusion justified a further presumption that the current condition of racial imbalance in the system was attributable to intentional acts of school officials. This "fruit of the poisonous tree" analysis violates the requirement of *Keyes* that plaintiffs must prove a condition of intentional segregation at the time of trial, and directly contravenes the mandate of *Dayton* by substituting legal presumptions for the required detailed factual inquiry into incremental segregative effect. See pp. 67-79, *infra*.

3. In reaching their judgments of liability, both courts employed a "foreseeable effect" standard, permitting discriminatory intent to be inferred solely from evidence that official actions had a disproportionate impact. Both courts held that such a standard justified drawing an inference of segregative intent from the Board's adherence to a neighborhood school policy in a system with racially imbalanced residential patterns. By equating intent with disproportionate impact, both courts violated *Washington v. Davis*, 426 U.S. 229 (1977), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). See pp. 81-90, *infra*. The inference of segregative intent drawn from the adherence to a system of neighborhood schools not only violates *Washington v. Davis* and *Arlington Heights*, but also attributes to school officials the responsibility for imbalanced residential patterns, contrary to *Austin Independent School District v. United States*, 429 U.S. 990 (1976), and *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). See pp. 91-95, *infra*.

ARGUMENT

In reviewing the voluminous record, the extensive opinions below, and the closely drawn legal arguments of the parties, it is easy to become bogged down in a morass of detail and to lose sight of the fundamental legal and public policy question which is presented in this case. That

single question is whether the social harms which are perceived to flow from racially imbalanced residential patterns can logically be attributed to the fault of elected local officials responsible for the operation of our public schools, and whether the burden of correcting these harms should be placed on their shoulders and on the shoulders of schoolchildren, their parents, and taxpayers.

Although both courts below purported to carefully weigh the extensive evidence and to apply complex and sophisticated legal principles to arrive at a logically defensible judgment, it is plainly apparent that the conclusions reached below can be defended only through the application of legal fictions to broad factual generalizations which are not supported in the record evidence.

If the approach to the adjudication of school desegregation cases adopted by the courts below is not clearly rejected by this Court, any urban school system serving a community with racially imbalanced residential patterns may be presumed to be in violation of the equal protection clause and under a constitutional duty to achieve a strict racial balance in every school in the system. Such an outcome is inevitable, since the uncontrolled use of legal presumptions of intent and effect adopted below results in an affirmative constitutional duty to racially balance all schools.

The opinions of the courts below illustrate the need for explicit guidelines from this Court to limit school desegregation remedial orders to the correction of segregation caused by school officials and not that caused by others. The lower federal courts must be instructed that in both the liability and the remedy phases of school desegregation litigation, they are not to forsake factfinding, properly supported and justified by a reasoned statement of legal principles, in favor of what they may find to be more fair or socially desirable, based only upon idealistic generalizations. However well-intentioned, federal courts

have no general jurisdiction to restructure public education. Under the aegis of constitutional authority and with the improper use of presumptions, the federal courts are doing just that. Large urban school districts are being forced to restructure their entire school systems, to transport students away from their nearby neighborhood schools, and to use scarce financial and human resources to implement ambitious racial balance remedies. This is seen as wasteful by taxpayers, undesirable and threatening by parents whose children are forced to participate in these massive relocations, and counterproductive by many educators.²⁵

This Court should therefore correct the substantial legal errors committed by the courts below, and set forth explicit standards confining equitable remedial decrees to the correction of the demonstrated effects of specific unconstitutional conduct on the part of school officials.

In requesting this relief, the petitioners are not asking this Court to authorize a retreat from the constitutional principle that equal educational opportunity may not be denied on the basis of race. Neither are we asking the Court to sanction a retreat by government from its moral obligation to strive to improve the status and condition of minority citizens. Rather, we are asking that decisions concerning the manner in which these goals are to be accomplished should be left to elected local school officials and to their constituents, and that federal judicial intervention into this province of the community should be

²⁵See, e.g., N. ST. JOHN, *SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN* (1975); Kirp, *Politics and Equal Educational Opportunity: The Limits of Judicial Involvement*, 47 HARV. EDUC. REV. 117 (1977); Kirp, *School Desegregation and the Limits of Legalism*, 47 THE PUBLIC INTEREST 101 (1977); ARMOR, *The Evidence on Busing*, 28 THE PUBLIC INTEREST 90 (1972); ARMOR, *The Double Double Standard: A Reply*, 30 THE PUBLIC INTEREST 119 (1973); GLAZER, *Is Busing Necessary?* 53 COMMENTARY 39 (March, 1972).

confined to cases where constitutional violations have been clearly proven, and then only to the extent necessary to remedy the effect of those violations.

I. IN A SCHOOL DESEGREGATION CASE, WHERE MANDATORY SEGREGATION BY LAW CEASED LONG AGO, A FEDERAL COURT IS WITHOUT JURISDICTION TO IMPOSE A REMEDY WHICH EXCEEDS THAT NECESSARY TO CORRECT THE CURRENT INCREMENTAL SEGREGATIVE EFFECT OF SPECIFIC CONSTITUTIONAL VIOLATIONS.

The decisions of the courts below reflect a flagrant disregard for three controlling principles which govern and delimit the remedial jurisdiction of federal courts in equal protection cases. The first and foremost of these is that the nature or effect of the violation determines the scope of the remedy. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*); *Austin Independent School District v. United States*, 429 U.S. 990, 995 (1976) (Powell, J., concurring); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 433-34 (1976); *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (*Milliken I*); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).²⁶ In other words, the purpose of equitable

²⁶The Congress has also clearly articulated this principle in legislation:

"[I]n formulating a remedy for a denial of equal educational opportunity, or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

* Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. § 1712.

relief is to restore the plaintiff to the position in which he would have been but for the defendant's misconduct. *Dayton, supra*, 433 U.S. at 420; *Milliken II, supra*, 433 U.S. at 280; *Milliken I, supra*, 418 U.S. at 746.

The second controlling principle ignored by the courts below is that principles of federalism restrict the extent to which federal courts may intrude upon local governmental processes. *Milliken II, supra*, 433 U.S. at 280-91; *Hills v. Gautreaux, supra*, 425 U.S. at 293-96; *Milliken I, supra*, 418 U.S. at 749; *Wright v. Council of City of Emporia*, 407 U.S. 451, 471-83 (1972) (Burger, C.J., dissenting). This principle is especially applicable to cases dealing with public schools, as this Court has "firmly recognized that local autonomy of school districts is a vital national tradition." *Dayton, supra*, 433 U.S. at 410. See also *San Antonio School District v. Rodriguez*, 411 U.S. 1, 50 (1973). "It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton, supra*, 433 U.S. at 410.

The third controlling principle violated by the courts below concerns the limited role of the courts in our system of government. Courts do not fashion public policy, and cannot act in an administrative or legislative capacity. *Milliken I, supra*, 418 U.S. at 744; *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973). "Remedial judicial authority does not put judges automatically into the shoes of school authorities whose powers are plenary." *Swann, supra*, 402 U.S. at 16.

Adherence to these principles is critical when a federal court is not asked simply to render judgment in favor of one private party against another, but is asked to restructure the administration of the public school system of a large city. *Dayton, supra*, 433 U.S. at 410. Consequently, this Court has required that, in such a case, the scope of

the remedy must be confined to the correction of the incremental segregative effect of specific constitutional violations on the part of school officials.

A. The Courts Below Improperly Imposed a Systemwide Remedy Without Determining the Incremental Segregative Effect of the Violations Found.

Three months after the district court entered its liability judgment in this case, this Court decided three important cases in which it gave explicit instructions to the lower federal courts concerning the manner in which liability is to be determined and a remedy fashioned in a school desegregation case. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Brennan v. Armstrong*, 433 U.S. 672 (1977); *School District of Omaha v. United States*, 433 U.S. 677 (1977). In the lead case, *Dayton*, the Court stated:

"The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, *must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.* The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."

Dayton Board of Education v. Brinkman, 433 U.S. at 420. (Emphasis added.)

As directed in *Dayton*, the trial court must first determine whether there were specific instances in the operation of the school system where school officials had acted with an intent or purpose to discriminate against minority pupils, teachers, or staff. Once these discrete acts of intentional discrimination have been ascertained, the court must then determine the incremental segregative effect of these acts on the current racial distribution of the school population. That effect is to be measured by comparing the present racial distribution in individual schools within the system to that which would have existed but for the specific acts of discrimination. The formulation of a remedy is then to be confined to the correction of that effect. Only if the current impact on the racial composition of schools is systemwide in scope may the remedy be systemwide, and if there is no current effect there can be no remedy.

An examination of the district court's liability opinion discloses that this was not the manner in which the district court arrived at its judgment in this case. Although the court discussed a few discrete instances of school board action which it characterized as being intentionally discriminatory, there was no attempt to determine the incremental segregative effect of these actions on the current racial distribution within the school system. Instead, the court premised its judgment of systemwide liability on a presumption of systemwide impact.

Although the court conceded that racially imbalanced schools were caused primarily by racially imbalanced residential patterns, it made no attempt to determine what portion, if any, of that racial imbalance could be traced to specific unconstitutional acts of school officials. In fact, the court found that no "reasonable action by the school authorities could have fully cured the evils of residential segregation." 429 F. Supp. at 259. [Pet. App. 58.] More importantly, it concluded that:

"It is plainly the case in Columbus that had school officials never engaged in a single segregative act or

omission, the system-wide percentage of black students would nevertheless not be accurately reflected in each and every school in the district."

429 F. Supp. at 267. [Pet. App. 74.]

In view of these findings, it would seem that the court would have made some attempt to find what portion of this racial imbalance was properly attributable in fact to unconstitutional acts by the school board. Yet the court admitted that no such attempt had been made, and stated that none was required. When viewed in the light of this Court's subsequent opinion in *Dayton*, this statement is particularly revealing:

"The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools would have looked like today without the other's influence. I do not believe such an attempt is required."

429 F. Supp. at 259. [Pet. App. 58.]

Such an attempt is required by this Court's decision in *Dayton*, which mandates a detailed factual inquiry into the current effect of specific acts of discrimination by school officials, thereby sorting out that portion of racial imbalance in schools proximately caused by school officials from the portion of racial imbalance attributable to housing patterns and the discriminatory acts of others. Although perhaps a "difficult task . . . [n]onetheless, that is what the Constitution and our cases call for." *Dayton*, *supra*, 433 U.S. at 420.

Admittedly, the district court did not have the benefit of the explicit instructions of *Dayton* when it rendered its liability decision in this case. Until *Dayton*, no opinion of this Court set explicit guidelines concerning the permissible scope of a remedy in school systems "where manda-

tory segregation by law of the races in the schools has long since ceased."²⁷ *Dayton*, *supra*, 433 U.S. at 420.

Yet, despite the fact that *Dayton* set forth such guidelines, the district court continued to adhere to the theories which it had adopted in its liability opinion. Although both the Columbus and State defendants requested the court to make the inquiry mandated by *Dayton* [A. 53-63, 715-30], the court summarily overruled the motions. [A. 740-41.]

In the district court's eyes, there was no conflict between its approach of using presumptions to extrapolate systemwide violations from a few isolated events, and the guidelines set down in *Dayton*. In its July, 1977 order [Pet. App. 90-96] granting the Board leave to file its post-*Dayton* amended desegregation plan, the court stated:

"In my view, the hope that the *Dayton* case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried."

[Pet. App. 93.]

To the extent that *Dayton* was viewed as inconsistent with the theories applied in its liability opinion, the district court sought to distinguish *Dayton* on the basis that it was not applicable to cases where there is a generalized conclusion of systemwide liability, regardless of the nature and extent of the underlying constitutional violations. [Pet. App. 94-95.]

²⁷Although *Keyes v. School District No. 1*, 413 U.S. 189 (1973), did not involve a school system with statutorily mandated segregation, it did not address the question of remedy. *Milliken v. Bradley*, 418 U.S. 717 (1974), did speak to the question of remedy, but only in a limited context, holding that a metropolitan remedy could not be imposed where suburban school districts had not been implicated in the constitutional violation.

The district court's attempt to confine the principles of *Dayton* to cases where there was no finding of systemwide liability clearly contradicted this Court's decisions in *Brennan v. Armstrong*, 433 U.S. 672 (1977), and *School District of Omaha v. United States*, 433 U.S. 667 (1977), decided two days after *Dayton*. In both cases, the lower courts had made unambiguous findings of systemwide liability, and had ordered systemwide remedies.²⁸ Despite these findings by the lower courts, this Court vacated the judgments and remanded the cases with the direction that the *Dayton* guidelines be adhered to.

Although *Brennan* and *Omaha* indicated that *Dayton* could not be distinguished on the grounds asserted by the district court, the court attributed no significance to these decisions. Instead the trial court stated that the "Seventh and Eighth Circuit Courts of Appeal, and perhaps ultimately the Supreme Court, will decide whether the cases

²⁸In *Brennan*, the district court found intentional segregation in the "entire" Milwaukee school system and that Milwaukee officials had operated a "dual" system. *Amos v. Board of Directors*, 408 F. Supp. 765, 821 (E.D. Wis. 1976). The Seventh Circuit affirmed the finding of systemwide liability. *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976). Thereafter, the district court ordered implementation of a systemwide desegregation plan. *Armstrong v. O'Connell*, 427 F. Supp. 1377 (E.D. Wis. 1977). Despite the finding of systemwide violations, this Court vacated and remanded the liability judgments with the direction that the mandatory *Dayton* inquiry be made. 433 U.S. 672.

In *Omaha*, the district court had ordered a systemwide desegregation plan in conformity with an earlier decision by the Eighth Circuit, 521 F.2d 530 (8th Cir. 1975), finding extensive constitutional violations which created systemwide liability. 418 F. Supp. 22 (D. Neb. 1976). The plan was affirmed by the court of appeals. 541 F.2d 708 (8th Cir. 1976). Despite the unambiguous finding of the courts below that the violation was "systemwide," this Court vacated the judgments and directed the courts below to conduct the *Dayton* inquiry. 433 U.S. 667.

cited by the Supreme Court [*Washington v. Davis*, *Village of Arlington Heights*, and *Dayton*] have any impact upon the Omaha and Milwaukee litigation." [Pet. App. 93-94.]

The district court then went on to impose a remedy which requires that every school within the system be racially balanced to within 15 percentage points of the overall systemwide racial composition. Despite the court's earlier finding that schools would not have been racially balanced even had the defendants not committed a single constitutional violation, 429 F. Supp. at 267 [Pet. App. 74], it nonetheless required a remedy to achieve that effect. By the district court's own admission, the scope of the remedy clearly exceeded any possible effect of the violation found.

In view of the clear conflict between the district court's decisions and the opinions of this Court in *Dayton*, *Brennan*, and *Omaha*, the minimal obligation of the Sixth Circuit on appeal would have been to vacate the judgments and remand the case with instructions that the district court adhere to the guidelines mandated in *Dayton*. Instead, the court of appeals affirmed the judgments below in an opinion which sought to avoid the clear mandate of *Dayton* through a tortured legal analysis employing presumptions, shifting burdens of proof, and a contrived definition of "incremental segregative effect."

The court of appeals first constructed a garbled definition of "incremental segregative effect" which effectively negates the principles of *Dayton*. While the court admitted that *Dayton* requires that incremental segregative effect be determined "by judging segregative intent and impact as to each isolated episode," it then went on to contradict itself by stating that there is no requirement that each "episode" be judged "solely upon its separate impact upon the system." 583 F.2d at 813-14. [Pet. App. 197.] It was upon this latter pretext that the court appar-

ently believed it could assign systemwide significance to isolated instances.²⁰

The second vehicle employed by the court to circumvent *Dayton* was to invent a presumption that "school board policies of systemwide application necessarily have systemwide impact." 583 F.2d at 814. [Pet. App. 198.] Thus, the appellate court sought to avoid the requirement of *Dayton* that the impact of official action be "established by factual proof," 433 U.S. at 410, and that the trier of fact must make "complex factual determinations" on this issue. 433 U.S. at 420.

The final means used by the appellate court in its attempt to circumvent the requirements of *Dayton* was to enter a general finding of systemwide impact "as the findings of this court." 583 F.2d at 814. [Pet. App. 199.] As was the case with the appellate court's employment of a presumption of systemwide impact, this "finding" was unsupported by any reference to the record evidence. It was clearly not the type of "complex factual determination" required of the finder of fact by *Dayton*, and lacks the

²⁰In its decision in the companion case from *Dayton*, No. 78-627, the Sixth Circuit further explained its definition of the concept of incremental segregative effect:

"[w]e are convinced that the term 'incremental segregative effect' used by the Supreme Court in the *Brinkman* decision, was not intended to change the standards for fashioning remedies in school desegregation cases The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, *even if minor in itself*, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution."

Brinkman v. Gilligan, 583 F.2d 243, 257 (6th Cir. 1978) (emphasis added). [Pet. App. 244-45.]

specificity required by Rule 52, Fed. R. Civ. P.³⁰ Indeed, as will be demonstrated *infra*, the record in this case cannot support a conclusion of a current systemwide impact. Instead, the Sixth Circuit's decision was a rather transparent attempt to avoid a remand to the district court for the factual determinations which it had failed to make.

Petitioners recognize their contention that the Sixth Circuit evaded its responsibility in this case, and that it intentionally sought to circumvent the binding decisions of this Court, is a serious allegation. However, it is not made irresponsibly. The Sixth Circuit's decisions in this case, and in the companion case from *Dayton*, clearly indicate that the appellate court has adopted an errant interpretation of this Court's decisions in *Dayton*, *Brennan* and *Omaha*. By presuming that remote and isolated acts have a current systemwide impact, the Sixth Circuit has substituted presumptions for the "complex factual determination" required by *Dayton*.

Therefore, since the mandatory inquiry has not been conducted, the judgments below should be reversed; or they should be vacated, and the case remanded directly to the district court with the direction that it identify the incremental segregative effect of specific constitutional

³⁰The attempt to make the necessary "complex factual determination" was also clearly outside the proper scope of appellate review. If the appellate court felt that the trial court failed to make adequate findings under Rule 52, Fed. R. Civ. P., it should not have attempted to make these findings itself, but should have reversed, or vacated the judgment and remanded the case for additional findings by the trial court. *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940); 5A Moore, *Federal Practice*, ¶¶ 52.06[2], 52.11[4] (1977); 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2577 (1971). Civil rights cases do not present an exception to this general rule. See, e.g., *Echols v. Sullivan*, 521 F.2d 206 (5th Cir. 1975); *Davis v. Board of School Commissioners*, 422 F.2d 1139 (5th Cir. 1970).

violations and limit the remedy to the correction of that effect.

B. The Scope of the Systemwide Remedy Exceeds any Possible Incremental Segregative Effect of the Violations Found.

The failure of the courts below to make the required determination of incremental segregative effect led to the imposition of a remedy which far exceeds any possible effect of the violations found by the district court. Indeed, the application of the *Dayton* standard to the record evidence conclusively demonstrates the absence of any current effect.

1. The Remote and Isolated Violations Found by the Courts Below Have No Current Systemwide Effect.

A review of the decisions below will reveal that the judgment of systemwide liability in this case was founded upon only a few specific instances where Columbus school officials were found to have acted with intent to discriminate. To summarize, these instances are:

- (a) the creation prior to 1943 of five predominantly black schools on the near east side of Columbus;
- (b) site selection and construction of the Sixth Avenue and Gladstone elementary schools;
- (c) the rejection of a proposal to pair the Innis Road and Cassady elementary schools;
- (d) the creation of the "near-Bexley" and Highland-West Broad-West Mound optional attendance zones; and
- (e) the creation of the Moler and Heimandale discontinuous attendance areas.

Because of the district court's failure to make the required inquiry into the incremental segregative effect of these actions at the time of trial, there are no factual findings in either opinion below which identify their current impact. In fact, there is no evidence in this record that *any* of these past instances have a current impact.

a. Although intentionally discriminatory actions by predecessor boards of education during the period 1909-1943 may have had the immediate impact of causing the student bodies of five schools to be predominantly black, the racial composition of those schools at the time of trial cannot be logically attributed to the lingering effects of school board actions which occurred during that period.³¹

These schools were located at the very core of Columbus' concentrated black residential population in 1943, in 1954, and at the time of trial. Even if a single act of discrimination on the part of school officials had never occurred, the residential areas served by these schools would still be overwhelmingly black today. The schools are so distant from areas of significant white population that they cannot be racially balanced without extensive transportation.

It is therefore illogical to conclude that the present racial makeup of these schools can be said to have been "caused" by school officials. The record simply does not support the claim that black students in these schools would have attended racially balanced schools but for the

³¹Only three of the schools identified by the district court were still being operated at the time this case was tried: Champion, Pilgrim, and Garfield. Felton elementary school was closed in 1974. 429 F. Supp. at 260 n.4. [Pet. App. 60 n.4.] Mt. Vernon was closed in 1954, and its students transferred to the new Beatty Park elementary school. [R. 4356.] All of these schools had racially balanced faculties at the time this case was tried.

segregative acts of school officials.³² *Spangler, supra*, 427 U.S. at 434-36; *Milliken I, supra*, 418 U.S. at 756 n.2 (Stewart, J., concurring); *Swann, supra*, 402 U.S. at 31-32.

b. The record demonstrates that the site selection and construction of both Sixth Avenue and Gladstone elementary schools were not discriminatorily motivated, but were undertaken in conformity with recommendations of the Bureau of Educational Research of Ohio State University, in order to serve expanding enrollments in the area. *See* pp. 22-24, *supra*. Yet even if it is assumed that these acts were intentionally discriminatory, the record and the district court's findings demonstrate the *absence* of a current effect.

Sixth Avenue was closed in 1973, and its students were reassigned to Weinland Park and Second Avenue elementaries. Both of these schools had racially balanced enrollments at the time of trial. [A. 745-50 (Px 11).]

Any balancing effect which might have resulted in 1965 from constructing Gladstone in the area recommended by the district court would have been only temporary, due to the expanding black population in the area. By 1975, the enrollments of Gladstone and surrounding schools had become predominantly black, reflecting the expansion of

³²The development in Columbus of a core of predominantly black schools and an expanding residential core of black population is not unlike the genesis of a similar situation, although on a larger scale, in Detroit, described by Mr. Justice Stewart as "caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears." *Milliken I, supra*, 418 U.S. at 756 (Stewart, J., concurring). "The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist." *Id.* As was the case in *Milliken I*, no record has been made in this case which shows that the present racial composition of these core schools is attributable to intentionally segregative acts by school officials.

the black residential population to the northeast. [A. 745-50 (Px 11).] Nearby Linden elementary, which the district court noted to have been 100% white in the early 1960s, had become racially balanced by 1975. [A. 748 (Px 11).] All of these schools had racially balanced faculties by 1975. [A. 789-96 (Px 385).] The record therefore indicates the absence of any current incremental segregative effect with respect to these schools.

c. The rejection of the proposal to pair Innis and Cassady was not racially motivated. *See* pp. 24-26, *supra*. Again, however, even presuming that the rejection of the pairing alternative was intentionally discriminatory, intervening demographic trends in the area would have made the pupil population over 60 percent black in the combined attendance area. The result of the pairing alternative would have been the creation of two "identifiably black" schools. The rejection of the pairing alternative resulted in only one school being identifiably black, while the other was racially balanced. *See* p. 25 n. 10, *supra*.

d. Although the Board did not intend to discriminate in the creation of the "near-Bexley" and Highland-West Broad-West Mound optional zones, even if these acts were intentionally discriminatory, the evidence fails to demonstrate any significant impact at the time of trial. Only one or two public school students resided in the near-Bexley zone at the time of trial [A. 770 (Px 140)], and the schools which they attended under the option were for the most part racially balanced. *See* p. 29 n. 13, *supra*. Assuming that these students would have elected to attend the predominantly black public schools to which they would have been assigned in the absence of the option, their presence in these schools would have had only a minimal effect on the schools' racial composition. *Id.*

e. The evidence clearly established the non-racially motivated reasons behind the creation of the Moler and

Heimandale discontinuous zones. See pp. 31-34, *supra*. Again, however, even if it is assumed these actions were intentionally discriminatory, the record indicated the absence of any current effect. The Moler zone had an integrative effect at the time of trial. See p. 33, *supra*. The Heimandale zone was discontinued in 1963, and Heimandale has had racially balanced enrollments ever since. [A. 778 (Px 383).]

In addition to the evidence concerning these specific schools, there was also other substantial evidence which demonstrates the absence of current segregative impact. For example, as a result of the 1973 Ohio Civil Rights Commission conciliation agreement, all Columbus schools had integrated faculties at the time of trial. The racial balance transfer provisions of the Columbus Plan, along with integrated career and vocational programs, had substantially improved racial balance in many schools by the time this case was tried. The school segregation indices prepared by Dr. Taeuber indicate that the Columbus Public Schools, as a whole, were becoming more racially balanced in the years prior to trial, and that they were significantly more integrated than the Columbus residential population as a whole. [A. 802 (Px 505); A. 283, 309.]

Therefore, even if the isolated actions cited in the district court's liability opinion were conceded to be intentionally discriminatory, the evidence overwhelmingly supports the conclusion that there was no current impact or effect of these actions on the racial composition of schools in the system at the time of trial. Despite the evidence of no current effect, however, and despite the concession that Columbus schools would not be racially balanced even in the absence of constitutional violations, the courts below imposed a remedy which requires each school in the system to be racially balanced to within a statistical range of the system's overall racial composition.

The conclusion is therefore inescapable that the scope of the remedy imposed exceeds any possible current incre-

mental segregative effect which may have been established in this record.

2. *The Imposition of a Systemwide Racial Balance Remedy Cannot be Based Upon a Presumption of a Causal Connection Between Remote and Isolated Acts and Current Racial Imbalance.*

The foregoing discussion demonstrates that there was no factual foundation for the conclusion of the lower courts that there was a systemwide effect of the identified constitutional violations. In the absence of factual support, therefore, the courts below resorted to conclusive presumptions of systemwide effect in an attempt to justify the imposition of a systemwide racial balance remedy. The employment of such presumptions is unfounded in this record, unsupported by any decision of this Court, and clearly contradicts *Dayton's* requirement that the imposition of desegregation remedies be supported by factual proof of intent and current effect.

a. *The presumption of systemwide impact cannot be supported by merely characterizing the system as "dual" in 1954.*

The first justification advanced by the courts below for the employment of a presumption of systemwide impact in this case was the district court's characterization of Columbus as a "dual" system at the time this Court decided *Brown I* in 1954. In the district court's view, after *Brown I* the Columbus school officials had an affirmative duty to racially balance all schools:

"Since the 1954 *Brown* decision, the Columbus defendants or their predecessors were adequately put on notice of the fact that action was required to correct and to prevent the increase in racial imbalance." 429 F. Supp. at 255. [Pet. App. 50-51.]

Any board decision thereafter which did not have the effect of alleviating racial imbalance was held to be a violation of that duty, and the continued existence of racially imbalanced schools up to the time of trial was

viewed as conclusive proof that the defendants had not discharged their constitutional duty to eradicate racial imbalance. For example:

"The Court has found that the Columbus Board of Education has never actively set out to dismantle this dual system." 429 F. Supp. at 260. [Pet. App. 61.]

"They have repeatedly failed to seize opportunities, large and small, which would have promoted racial balance in the Columbus Public Schools." 429 F. Supp. at 264. [Pet. App. 69.]

The district court therefore adopted the standard of liability applicable to cases involving former statutorily segregated school systems, by presuming that all racial imbalance throughout the school system was caused by intentionally discriminatory official action. The court of appeals affirmed the application of this standard of liability.³³

In cases where there has been a long history of consistent adherence to a system of statutorily mandated segregation, it has been presumed that there is a causal connection between intentional discrimination and a current condition of racially imbalanced schools. See, e.g., *Wright v. Council of the City of Emporia*, 407 U.S. 451, 462 (1972). However, in a school system "where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists, but that it was brought about or maintained by intentional state action." *Keyes, supra*, 413 U.S. at 198. No presumption of causation is permitted in such cases. The Court reaffirmed and refined this principle in *Dayton* by holding that in school systems "where mandatory segregation by law of the races in the schools has long since ceased," plaintiffs are required to prove *both* discriminatory intent *and* current incremental segregative effect. *Dayton, supra*, 433 U.S. at 420.

³³In its decision in the companion case from Dayton, the Sixth Circuit stated that this duty was "to diffuse black and white students throughout the Dayton school system." *Brinkman, supra*, 583 F.2d at 256. [Pet. App. at 242.]

Since no statutory dual system existed in Columbus,³⁴ the courts below were required to adhere to the principles of *Keyes* and *Dayton* by requiring proof of intentional acts of discrimination and the current incremental segregative effect of those acts, rather than presuming a causal connection between remote and isolated instances and a current condition of racial imbalance.

The record and the district court's own findings are also clear that the Columbus Public Schools did not operate the factual equivalent of a statutory dual system in 1954. Relying heavily on historical evidence of questionable probative value,³⁵ the district court found that certain Board actions prior to 1943 led to the creation of five schools which remained predominantly black at the time *Brown I* was decided. Even so, the court conceded that there was "substantial racial mixing of both students and faculty" in other Columbus schools at the same time. 429 F. Supp. at 236. [Pet. App. 10.] The record also demonstrates that affirmative action was taken as early as 1949 to integrate student bodies and teaching faculties, to select black teachers for the cadet principal program, and to recruit black teachers. [A. 573-75.]

The district court's findings and the record evidence therefore clearly establish that the condition of racial imbalance in schools in 1954 in no way approached the absolute racial separation which existed in statutory dual sys-

³⁴Since 1887, an Ohio statute has required the assignment of students to public schools without regard to race. 84 Ohio Laws 34; *Board of Education v. State*, 45 Ohio St. 555, 16 N.E. 373 (1888); *Board of Education v. State*, 114 Ohio St. 188, 151 N.E. 39 (1926). See 429 F. Supp. at 235. [Pet. App. 8.] See also *Dayton Board of Education v. Brinkman*, 433 U.S. at 410 n. 4.

³⁵This evidence consisted of a paper on the history of the schools, old newspaper articles, and the personal experiences of a few witnesses. Much of the documentary evidence, especially the newspaper articles, was inadmissible hearsay. Nonetheless, the district court admitted it under the exception to the hearsay rule for "ancient documents." FED.R.EVID. 803(16).

tems. The characterization of the system as "dual" in 1954 is simply not founded in fact.

There was also no effort by either the plaintiffs or the district court to demonstrate the relevance of conditions as they existed in 1954 to the question of whether the Columbus schools were unconstitutionally segregated at the time this case was tried in 1976. Indeed, it would be impossible on this record to demonstrate a causal connection because of the evidence of a myriad of intervening events and forces which are responsible for the current racial composition of the school system. These factors include the phenomenal growth of the school system's student population, the fourfold growth in geographic size through annexation, and the growth of the black population. There are also intervening forces of economics, personal choices and other demographic factors which have created the current residential mosaic in Columbus. Finally, there are the intervening effects of the discriminatory practices of federal agencies, realtors, lending institutions, and other private actors. These intervening forces clearly have negated, diluted, or totally obscured any possible contemporary effect of isolated actions of predecessor school boards in the remote past.

Remoteness in time may not make these past actions any less intentional, *Keyes*, *supra*, 413 U.S. at 210-11, but remoteness in time, especially when combined with significant intervening demographic forces, certainly makes the conclusion of a causal relationship more tenuous. *Dayton*, *supra*, 433 U.S. at 410-11; *Spangler*, *supra*, 427 U.S. at 434-36; *Swann*, *supra*, 402 U.S. at 31-32.

- b. *The presumption of systemwide impact cannot be supported by a retroactive application of Keyes to the system as it existed in 1954.*

In the absence of any factual evidence of a causal connection, both courts below resorted to the use of presumptions founded upon a misapplication of this Court's decision in *Keyes*. Both courts believed that, by applying the

Keyes presumption to the school system as it existed in 1954, the system could be characterized as dual, and the requirement of proof that a current condition of intentional segregation existed at the time of trial could be abandoned.

The language in *Keyes* which was claimed to support such an approach reads:

"... where plaintiffs prove that school authorities have carried out a *systematic program of segregation* affecting a *substantial portion* of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system."

Keyes, *supra*, 413 U.S. at 201. (emphasis added.)

This language was acknowledged by the Sixth Circuit as "the legal predicate for the District Judge's finding of a dual system" in 1954. 583 F.2d at 799. [Pet. App. 160.]

Nonetheless, whatever can be said about the evidence concerning the state of the Columbus school system in 1954, the courts below committed a fundamental legal error in applying the *Keyes* presumption *retroactively*. If the employment of such a presumption retains any viability after *Dayton*,³⁶ it is clear that both *Keyes* and *Dayton*

³⁶The Court's insistence in *Dayton* upon factual proof of current segregative effect, and its criticism of the "fruit of the poisonous tree" approach, certainly calls into question the continued viability of the *Keyes* presumption:

"This emphasis on actual proof of the demographic effects caused within a district by a constitutional violation clearly marks the demise of the *Keyes* presumptions, which allowed a court to assume that all incremental segregation in a district resulted from the board's intentional constitutional violation."

Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 Nw.U.L.Rev. 382, 404 (1978).

(Footnote 36 continued on page 72)

would require that the presumption be applied to the facts *as they exist at the time of trial*. Neither *Keyes*, nor any other decision of this Court, has authorized the retroactive application of this presumption.

In *Keyes*, the Court insisted upon proof of a current condition of segregation brought about or maintained by intentional state action. In finding such a condition to exist in Denver at the time of trial, the Court relied on recent practices of the school authorities in the Park Hill area of Denver. There was no attempt by this Court, nor by the lower courts, to rely on events in the remote past in reaching the conclusion that the Park Hill schools were segregated at the time of trial³⁷.

If there was ever any doubt whether this Court might approve a retroactive application of the *Keyes* presumption to conditions existing in 1954, that doubt was clearly removed by *Dayton*. Despite the fact that such a rationale

(Footnote 36 continued)

While the lower courts in this case relied on the *Keyes* presumption in order to avoid the factual inquiry mandated by *Dayton*, we do not believe it is necessary to ask the Court to explicitly overrule *Keyes* in this respect. As the discussion in the text demonstrates, it is clear that the factual pretext for triggering the *Keyes* presumption was never established in this case.

³⁷The *Keyes* complaint was filed in June, 1969. In authorizing a presumption of a dual system at the time of trial, this Court relied upon proof of "an unconstitutional policy of deliberate racial segregation" in the Park Hill district over the period 1960-1969, and placed primary emphasis on the rescission in 1969 of a plan to desegregate the Park Hill schools. 413 U.S. at 191-93, 198-200.

Likewise, there is no discussion in the decisions of the court of appeals, 445 F.2d 990 (10th Cir. 1971), or of the district court, 313 F.Supp. 61 (D. Colo. 1970), of any event occurring prior to 1960 with respect to the Park Hill schools. Although the district court referred to two pre-1954 instances in another section of the city, 313 F.Supp. at 69-70, 72-73, it found these actions not to constitute violations of the constitution.

was expressly urged on the Court as a basis for upholding the systemwide liability and remedy judgments in that case, this Court insisted upon proof, not presumption, of current incremental segregative effect.³⁸

The proper focus of the inquiry in this case should therefore have been upon the Columbus school system as it existed in fact at the time of trial in April 1976, not as it may have been presumed to exist in 1954. The significance of the schools cited by the district court thereupon shrinks to an imperceptible level. At the time of trial, only three of these schools (Champion, Garfield and Pilgrim) still existed. See p. 63 n.31, *supra*. They were located in the center of the city's black residential population, far from schools with any significant white enrollment. Only approximately three percent of the total black student population attended these schools [A. 745-50 (Px 11)], and all of them had integrated teaching faculties.³⁹ [A. 789-99 (Px 385).] There was therefore no credible evidence that the racial composition of these schools at the time of trial was the result of a "systematic program of segregation," and it was clear that conditions

³⁸The application of the *Keyes* presumption to the 1954 Dayton school system was urged by the respondents in that case to support their argument that the system was "dual" in 1954, and that the responsibility for the current condition of racially imbalanced schools could therefore be attributed to the Dayton school officials without further proof. *Dayton, supra*, Brief for Respondents at 58-71. The Department of Justice advocated the same approach. Brief for United States as Amicus Curiae at 23-33. This rationale was also the subject of extensive discussion at oral argument. Tr. of Oral Arg. at 5, 10-17. Yet, despite the fact that this rationale was urged upon the Court in clear and certain terms, it was effectively rejected by the Court's insistence upon factual proof of current effect.

³⁹In *Keyes*, 38 percent of Denver's black student population attended the Park Hill schools, 413 U.S. at 199, and the schools had segregated teaching staffs. 413 U.S. at 200.

in these schools did not affect "a substantial portion of the students, schools, teachers, and facilities" in the Columbus school system at the time of trial. *Keyes, supra*, 413 U.S. at 201.

Consequently, the presumption of systemwide impact employed by the lower courts cannot be supported by characterizing the Columbus system as "dual" in 1954, or at the time of trial.

c. *The presumption of systemwide impact improperly attributes responsibility for residential racial imbalance to school officials.*

The presumption that remote and isolated acts of the Columbus Board caused the current condition of racial imbalance in schools contradicts the fact, conceded by the plaintiffs' witnesses and the district court, that the primary cause of racially imbalanced schools is racially imbalanced residential patterns for which school officials cannot be held responsible. As this Court noted in *Swann*, however, a school desegregation case "can carry only a limited amount of baggage." *Swann, supra*, 402 U.S. at 22. The objective is to assure that school authorities do not exclude pupils from schools on the basis of race; "it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." *Id.*, at 23.

In *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976), Mr. Justice Powell noted that

"The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pres-

ures and voluntary preferences are the primary determinants of residential patterns."

The evidence adduced at the trial in this case demonstrates that the forces described by Mr. Justice Powell are the principal causes of racial imbalance in the Columbus public schools.

Dr. Karl Taeuber, the plaintiffs' expert witness, testified extensively concerning the causes of residential segregation. Although he acknowledged that a "myriad" of factors [R. 1831] influence housing patterns, he testified that they could be grouped into three categories: choice, economics, and discrimination.

The choice factor pertains to the tendency of citizens of common national or ethnic origins to form homogeneous residential patterns. [A. 285-86, 304.] See also, *Austin, supra*, 429 U.S. at 944 n. 5 (Powell, J., concurring). Economic factors play a major role, accounting for up to 50 percent of residential patterns. See p. 15 *supra*, and n. 5. As Mr. Justice Powell observed to be the case in *Austin*, these two factors are also the primary causes of residential segregation in Columbus.

In addition to these factors, discrimination may influence residential patterns. Within the area of discrimination, Dr. Taeuber recognized numerous practices and policies of the real estate industry, financial institutions, federal and state government, and private individuals, all of which contribute to residential segregation. See pp. 15-16 and n. 6, *supra*. A major part of the plaintiffs' evidence in this case concerned such practices. [See, e.g., A. 243-51, 294-95, 325-42.] Nonetheless, there was no probative evidence concerning the impact of decisions by school officials on housing patterns. Discrimination by school officials was not one of the nine factors listed by Dr. Taeuber as responsible for segregated residential patterns,

and there was no probative evidence directly implicating school officials in the discriminatory practices of others.⁴⁰

Nonetheless, the court found that school board actions had an impact on housing in an indirect manner, finding "a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves." 429 F. Supp. at 259. [Pet. App. 57.] However, there was absolutely no empirical evidence that such an effect occurs in Columbus, or anywhere else for that matter. Instead, the court relied upon the testimony of Martin Sloane, a lawyer who was general counsel for the National Committee Against Discrimination in Housing. [A. 325.] Although the bulk of his testimony related to discriminatory practices by FHA, VA and other federal agencies, Mr. Sloane also expressed an opinion that racial identification of a school as white has a reciprocal effect on its neighborhood. [A. 339-42.]

There are a number of reasons why Mr. Sloane's testimony is of no probative value, and fails to support the district court's finding concerning reciprocal effect. In the first place, Mr. Sloane possessed no qualifications as an expert in demographics, urban planning, geography, or sociology. While his experience and education may have qualified him to testify concerning discrimination in federal housing programs, he was not qualified to express an opinion on residential patterns in general, which another of plaintiffs' witnesses pointed out were attributable to choice, economics, and other types of discrimination. Mr. Sloane conducted no studies in general, nor of Columbus in particular, to support his conclusion. [A. 326.] Furthermore, his

⁴⁰The district court made only one finding concerning the Board's involvement with such practices, and that was to reject the plaintiffs' contention that the construction of a school in an area formerly covered by racially restrictive covenants implicated the defendants in an act of housing segregation. 429 F. Supp. at 243. [Pet. App. 25.]

opinion concerning reciprocal effect was in answer to a hypothetical question which assumed schools were constructed in areas covered by racially restrictive covenants [A. 339-41], yet the district court found that such a practice by school officials could not be considered to be intentionally discriminatory. 429 F. Supp. at 243. [Pet. App. 25.] Mr. Sloane was unable to explain why schools actually built in areas which were formerly covered by racially restrictive covenants actually had predominantly black or racially balanced student bodies. [A. 343-44.]

Finally, even if it is assumed that there is a reciprocal effect between the racial composition of schools and residential patterns, one would expect that in Columbus the effect was beneficial. Dr. Taeuber's indices demonstrated that the Columbus Public Schools have consistently been more racially balanced than the residential population. If the racial composition of schools is assumed to have an impact on residential racial balance, one would therefore expect that schools have an integrative effect on residential patterns in Columbus.

Nonetheless, the existence of racial reciprocity between schools and neighborhoods has no factual or scientific foundation,⁴¹ and has not been established in this record. In fact, the record discloses several instances which provide a factual foundation for the rejection of the reciprocal effect theory. For example, the reciprocal effect theory presumes, as did plaintiffs' witness Dr. Foster, that altering attendance boundaries or changing feeder patterns in a manner which racially balances a school has a stabilizing effect on the surrounding neighborhood. The Columbus Board's experience with Southmoor Junior High,

⁴¹Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63, 83 (1978). In this article, Professor Wolf reviews the academic literature and the results of numerous experiments and studies, with the conclusion that there is no scientific foundation for the reciprocal effect theory.

however, demonstrates that the theory is not supported in fact.

The selection of the site and the drawing of attendance boundaries for Southmoor was a deliberate effort to insure that the school would have a racially balanced student body. As a result of the site selection and attendance area, Southmoor opened in 1968 with a 33.5 percent black student body. [A. 784, (Px 383).] The Board was commended for this integrative step, and Dr. Foster agreed that the school was well sited. [Px 194, p. 20; R. 3709.] However, as the residential population in the area became increasingly black, Southmoor became increasingly black, and by 1975 it had become an "identifiably black" school. [A. 746 (Px 11), A. 784 (Px 383).] Racially balancing Southmoor in 1968 was therefore ineffective to halt the demographic forces which were making the neighborhood increasingly black. Consequently, there was little, if any, reciprocal or stabilizing effect of this school on the neighborhood which it served.⁴²

Although this Court has suggested that practices such as discriminatory school site selection and closing, and the assignment of students on a racial basis, "may" promote segregated residential patterns, *Swann, supra*, 402 U.S. at 20-21, or "may have a profound reciprocal effect on the racial composition of residential neighborhoods," *Keyes, supra*, 413 U.S. at 202, it has never accorded the reciprocal effect theory any legally presumptive weight, nor has it ever adopted a theory that school officials are responsible for residential patterns as a matter of law. Indeed, since Mr. Justice Powell's concurring opinion in *Austin*, this Court has clearly rejected the contention that school officials can be held responsible for segregated residential

⁴²There have been numerous studies and natural experiments which demonstrate that the Board's experience with Southmoor was not an aberration. See Wolf, *supra*, n. 40 at 67-68.

patterns. *Dayton, supra*, 433 U.S. 416; *Spangler, supra*, 427 U.S. at 434-36.

Consequently, it was improper for the courts below to invent a presumption of systemwide impact which places upon school officials the responsibility for racially imbalanced residential patterns.

C. The Lower Courts Exceeded Their Remedial Jurisdiction in Imposing a Remedy which Requires the Racial Composition of Every School in the System to be Brought Within a Statistical Racial Balance.

The district court's order of July 29, 1977 [Pet. App. 97] rejected the desegregation plans proposed by the Columbus Board because they did not racially balance all the schools in the Columbus system, but approved the "numerical face" of a planning exercise which developed school pairings to racially balance each school to within $\pm 15\%$ of the 32.5% mean black enrollment in the district, noting that it "would desegregate all schools." [Pet. App. 105.]⁴³

In directing the Columbus Board to develop and submit a new proposed desegregation plan, the court insisted that the plan "must legally desegregate the entire Columbus school system under the principles set out in this order." [Pet. App. 111.]

In view of the court's objections to a plan which allowed "racially identifiable" schools to remain, the Columbus Board realistically concluded that the plan to be developed and submitted to the court must eliminate all racially identifiable schools, or be rejected by the district court. The Board also recognized that a plan drafted by

⁴³The district court's liability opinion characterized all schools outside of the 32.5% $\pm 15\%$ range as "racially identifiable". 429 F. Supp. at 268-69 [Pet. App. 78-79.] The district court adhered to this definition at the remedy phase, and rejected both plans proposed by the Board because they left some "racially indentifiable" schools. [Pet. App. 99-105.]

its professional staff, who were intimately familiar with the organization and administration of the schools in the Columbus system, would be preferable to one drafted by the district court. Consequently, the Board authorized the development and submission of such a plan. The plan was filed on August 31, 1977. [A. 64-172.]

Even though the Board authorized the formulation of this plan, it strenuously objected to the theory that the correction of any current incremental effect of past intentional discrimination required that each school in Columbus be brought to within the statistical racial balance sought by the district court, and in submitting the plan specifically reserved its rights to appeal.

After hearings confined to questions concerning date of implementation and the cost and availability of transportation equipment, the district court ordered that the plan be implemented in September, 1978. [Pet. App. 125.] The remedy ordered by the district court requires that each school within the Columbus system be brought within $32\% \pm 15\%$ measure of racial balance. Although the Columbus Board strenuously objected to this requirement on appeal, the Sixth Circuit affirmed the plan with no discussion of its racial balance features.

According to the district court's own admission, Columbus schools would not be racially balanced today had school officials never committed a single discriminatory act. Consequently, a remedy which requires such a result exceeds that which is necessary to correct the current incremental segregative effect of past discriminatory acts, and clearly violates the rule of *Dayton*.

Even prior to *Dayton*, however, this Court consistently disapproved of desegregation remedies which required a statistical racial balance to be achieved in every school. See, e.g., *Spangler, supra*, 427 U.S. at 424, *Swann, supra*, 402 U.S. at 23-24; *Milliken I, supra*, 418 U.S. at 740-41. See also, *Spencer v. Kugler*, 404 U.S. 1027 (1972).

In *Swann*, the Court stated:

"If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

Swann, supra, 402 U.S. at 24.

The judgments below impose a remedy which achieves the *exact result* criticized by the Court in *Swann*, and therefore must be reversed.

II. PURPOSE OR INTENT TO DISCRIMINATE MAY NOT BE INFERRED SOLELY FROM EVIDENCE THAT THE DISPROPORTIONATE IMPACT OF OFFICIAL ACTION WAS FORESEEABLE.

Prior to this Court's decision in *Keyes*, there was some confusion in the lower courts concerning the question of whether, in the absence of statutorily mandated segregation, it was necessary for plaintiffs to prove that a current condition of racially imbalanced schools was caused by intentionally discriminatory acts of school officials. However, in *Keyes* the Court made it clear that such proof was required:

"... in the case of a school system . . . where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional state action."

Keyes, supra, 413 U.S. at 198.

Immediately after the Court's decision in *Keyes*, however, a conflict developed among the circuits concerning the manner in which plaintiffs could meet their burden of proof on the intent issue. The Ninth Circuit required proof that the defendant's acts were actually motivated by

an invidiously discriminatory purpose, and rejected the approach of drawing an inference of segregative intent solely from evidence that the defendant's acts had a foreseeably disproportionate impact. See *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973), cert. denied, 416 U.S. 951 (1974). A number of other circuits, however, held that discriminatory intent could be inferred solely from evidence that the disproportionate impact of official action was foreseeable. See, e.g., *Hart v. Community School Board*, 512 F.2d 37, 51 (2d Cir. 1975); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 936 (1975).

Even after this Court's decisions in *Washington v. Davis*, *Austin*, and *Arlington Heights*, a number of appellate courts have continued to adhere to the foreseeable effect test. See, e.g., *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978); *United States v. Texas Education Agency*, 564 F.2d 162 (5th Cir. 1977), reh. denied, 579 F.2d 910 (1978); *United States v. Board of School Commissioners of Indianapolis*, 573 F.2d 400 (7th Cir. 1978); *United States v. School District of Omaha*, 565 F.2d 127 (8th Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

After acknowledging the conflict among the circuits, 429 F.Supp. at 253 n. 3 [Pet. App. 46 n.3], the district court in this case concluded that it was bound by the decision of the Sixth Circuit in *Oliver*, *supra*, and adopted the foreseeable effect approach to its evaluation of the record evidence.

The foreseeable effect test was articulated in two alternative forms by the district court. The first was that if the Board acted with knowledge or reason to know that a collateral effect of its action (whether desired or not) was to maintain or increase racial imbalance, the court could draw an inference of segregative intent:

"The intent contemplated as necessary proof can best be described as it is usually described—intent embodies the expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions."

429 F. Supp. at 252. [Pet. App. at 44-45.]

The alternative formulation of the foreseeable effect theory adopted by the court was that if the Board was presented with two alternative courses of action, one of which would have an integrative effect and one which would have the effect of maintaining or increasing racial imbalance, the failure to choose the integrative alternative justified drawing the inference of segregative intent:

". . . I am constrained, from certain facts which I believe to be proved, to draw the inference of segregative intent from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance."

429 F. Supp. at 240. [Pet. App. 19-20.]⁴⁴

⁴⁴At least one commentator has recognized that the two formulations adopted by the lower courts in this case are improper under *Washington v. Davis* and *Arlington Heights*:

"Some courts and commentators thought that the tort law intent standard—that an actor, here the decisionmaker, intends the probable, natural, or foreseeable consequences of his decision—applied in the equal protection context. [Citations omitted.] Since the village was probably aware of the consequences of its refusal to rezone, *Arlington Heights* seems to preclude this interpretation. In any event, it would generally amount to the impact test rejected by *Washington v. Davis* . . ."

"Other commentators have suggested that a decisionmaker would violate the intent standard of *Washington v. Davis* if

(Footnote 44 continued on page 84)

The court then applied this concept of intent to its review of the post-1954 actions of the defendants, but found that it could draw an inference of segregative intent with respect to only a few specific actions. As a general matter, however, the court also found that it could infer segregative intent from the defendants' adherence to a neighborhood school policy in the face of residential racial imbalance. All of these findings were adopted by the Sixth Circuit.

The approach adopted by the lower courts to the question of proof of an invidiously discriminatory purpose amounted to the adoption of an "effect" standard — that an act would be presumed to be intentionally discriminatory if it had a racially disproportionate impact. The only apparent qualification to the "effect" test which the lower courts adopted was to engraft onto it a requirement that the actor must know or have reason to know that the effect might result. However, the adoption of the "effect" test, even with the qualification as to knowledge of the actor, was improper under this Court's decisions in *Washington v. Davis*, *Austin Independent School District v. United States*, and *Village of Arlington Heights*, all of which require proof of discriminatory motive beyond mere proof of a racially disproportionate impact.

In *Washington v. Davis*, 426 U.S. 229 (1977), the Court held that official action which has a racially disproportionate impact does not violate the equal protection clause unless it is also discriminatorily motivated. Although the Court did not elaborate upon the manner in which

(Footnote 44 continued)

it chose a more segregative measure over an alternative that served its purpose equally well . . . [T]he propriety [of such a standard] is questionable. And *Arlington Heights* seemed to preclude this interpretation of *Washington v. Davis* as well." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 166-167 n. 33 (1977).

such a motive must be proven, it did reject the practice of inferring such an intent or motive from the impact of governmental action in the absence of other relevant facts from which such an intent or motive could be inferred:

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule [citation omitted], that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."

Washington v. Davis, *supra*, 426 U.S. at 242.

The first indication that the Court would apply *Washington v. Davis* in a manner rejecting the "foreseeable effect" standard of intent came in *Austin Independent School District v. United States*, 429 U.S. 990 (1976). In a brief memorandum opinion, the Court vacated and remanded "for reconsideration in light of *Washington v. Davis*" a decision of the Fifth Circuit Court of Appeals which had employed the foreseeable effect test to impose liability upon a school district which followed a neighborhood school assignment policy in a residentially segregated community.⁴⁶

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court elaborated on its holding in *Washington v. Davis* and established the manner in which discriminatory intent or purpose must be proven.

⁴⁶The offending language which Mr. Justice Powell's concurring opinion quoted from the court of appeals' decision is strikingly similar to a question posed and answered by the district court in this case. See pp. 91, 94, *infra*.

First, the Court made clear that a plaintiff claiming that government action was discriminatory had the burden of proving that the action was discriminatorily *motivated*. Although discrimination need not be the "dominant" or "primary" purpose for official action, it must be "a motivating factor" in the decision. 429 U.S. at 265-66. Demonstrating that an invidious discriminatory purpose was a motivating factor, "demands a sensitive inquiry into such circumstantial or direct evidence of intent as may be available." 429 U.S. at 266. While disproportionate impact may provide a "starting point," the cases in which it is determinative are "rare."⁴⁶ Otherwise, the Court must look to other evidence, such as

- (1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;
- (2) the specific sequence of events leading up to the challenged decision;
- (3) departures from the normal procedural sequence;
- (4) substantive departures, particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached;
- (5) the legislative or administrative history of a decision, especially contemporary statements by members of the body, minutes of its meetings, or reports; and

⁴⁶The only case where impact alone is sufficient is where the statistical evidence indicates a disparity or disproportionate impact so stark as to make it impossible to explain other than by reference to an invidiously discriminatory purpose. *Arlington Heights*, *supra*, 429 U.S. at 266. See also *Castenada v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, *supra*, 426 U.S. at 242; *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

- (6) the direct testimony of the actors concerning the purpose of their actions.

429 U.S. at 267-68.

A review of the opinions of the lower courts in this case will disclose that those courts based their conclusion of discriminatory intent solely upon circumstantial evidence of disproportionate impact. In most instances, the only evidence adduced by the plaintiffs was Dr. Foster's unreliable statistical analysis of census data, which he believed to indicate a racially disproportionate impact. The district court's discussion of the construction of Sixth Avenue and Gladstone elementaries, the "near-Bexley" and Highland optional zones, and the Heimandale discontinuous zone, is based entirely upon such a statistical analysis. The discussion of the Moler discontinuous area and the Innis-Cassady alternatives makes only limited mention of any evidence other than bare statistics. The Sixth Circuit's discussion of school construction policies is based entirely upon the statistic that 87 of 103 new schools opened with "racially identifiable" enrollments under the district court's statistical measurement. A review of the record will disclose little, if any, of the other types of evidence required by *Arlington Heights* supporting the inference of segregative intent drawn by the lower courts.

Indeed, all of the direct evidence on the intent issue established the *absence* of an invidiously discriminatory purpose in the particular school board actions faulted by the courts below for their disproportionate impact. For example, there is ample direct evidence that these particular actions were prompted by a desire to alleviate overcrowding in particular schools, or by an unwillingness to depart from the longstanding neighborhood school policy:

- (1) The school construction program was undertaken to meet the demands of a rapidly expanding school population in a growing geographic area.

Schools were constructed in "substantial conformity" with the "comprehensive, scientific, and objective" Ohio State University studies. Racial factors were not among the criteria employed by the University or the Board. *See* pp. 19-22, *supra*. The construction and siting of both the Sixth Avenue and Gladstone elementary schools were specifically recommended by the Ohio State studies as necessary to serve growing student populations in both areas. *See* pp. 22-24, *supra*.

- (2) Optional zones were used to provide flexibility in school boundaries to meet rapidly growing enrollments, for distance and safety reasons, and to phase in new secondary schools. These zones had no racial significance. The Highland-West Broad-West Mound optional zones were established for these reasons. *See* pp. 26-31, *supra*.
- (3) Discontiguous attendance areas were small, geographically isolated, and had student populations too small to justify a separate school. They were assigned to nearby schools which were easily accessible and had available capacity. Both the Moler and Heimandale zones met these neutral criteria. Furthermore, the Heimandale zone was established by the Marion-Franklin school district before the area was transferred to Columbus in 1957, and its discontinuance by the Columbus Board in 1963 had an integrative effect. *See* pp. 31-34, *supra*.

In each of these instances, the evidence clearly established the non-discriminatory purpose of the decision in a manner which would foreclose any finding that it was motivated by an invidiously discriminatory purpose. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 179-80 (1977) (Stewart, J., concurring).

Furthermore, it is only common sense, and sound evidentiary reasoning, that if the Board of Education is

shown by direct evidence to be motivated by an *integrative* purpose at a certain point in time, a court cannot logically make a finding that contemporaneous actions were motivated by an invidiously discriminatory purpose, based entirely upon a mere inference drawn from their disproportionate impact. The fact that there was evidence of contemporaneous integrative actions by the Columbus Board therefore precludes drawing an inference of segregative intent from the impact of other actions.⁴⁷

Consequently, it was a clear violation of *Washington v. Davis* and *Arlington Heights* for the courts below to draw an inference of segregative intent from certain actions by school officials solely because the disproportionate impact of those actions may have been foreseeable. Under *Arlington Heights*, the plaintiffs were re-

⁴⁷For example, in drawing an inference of segregative intent solely from an incidental effect of the rejection of the Innis-Cassady pairing proposal in 1975, the Court ignored contemporaneous evidence of integrative actions to promote racial balance through new school attendance areas and the Columbus Plan programs. In 1975-76, the attendance area for the new Briggs High School was drawn so that Briggs and West High School would have integrated student bodies representative of the western area of the district, and both had 16% black students in that year. [A. 745 (Px 11).] The new attendance area for Independence Junior-Senior High School, in the system's far east area, was also drawn in 1975 so that the school had an integrated 12.4% black student population. [A. 745 (Px 11).]

Similarly, in the siting of the new Southmoor Junior High School in 1968, the Board made a specific effort to draw the new attendance zone so that Southmoor would open with an integrated student body. It opened racially balanced at 33% black. [Px 4.] The Ohio State University Advisory Commission commended the Board for this integrative act. [Px 194.] This direct evidence of integrative intent was totally ignored, however, when the Court drew an inference of segregative intent from the mere existence of the Moler discontiguous zone in 1968.

quired to introduce other direct and circumstantial evidence establishing an invidious discriminatory purpose on the part of school officials. It is also clear from *Arlington Heights* that mere proof of disproportionate impact is insufficient to make out a prima facie case of intentional discrimination, justifying a shift in the burden of going forward to the defendants.⁴⁸ Other evidence is required in order to make the required "threshold showing." 429 U.S. at 271 n. 21.

By inferring an invidiously discriminatory purpose from the foreseeable impact of certain actions of the defendants, the courts below therefore adopted an "effect" test of discriminatory intent. The courts were concerned only with the disproportionate impact of certain decisions, and failed to require the plaintiffs to prove that the decisions were discriminatorily motivated. Since the adoption of such an "effect" or "impact" test clearly violates the rule of *Washington v. Davis* and *Arlington Heights*, the judgments below should be reversed.

⁴⁸Assuming that such a prima facie case had been made out here, the burden would have shifted to the defendants to show that the same decisions would have been made "even if the impermissible purpose had not been considered." 429 U.S. at 271 n.21. See also *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

The district court misunderstood the nature of this burden shifting principle. The burden on defendants would not be to prove that "the present admitted racial imbalance . . . would have occurred even in the absence of their segregative acts and omissions," 429 F.Supp. at 260 [Pet. App. 61], but only that the challenged decisions would have been made "even if the impermissible purpose had not been considered."

It is also clear that shifting the burden of proof in this manner only imposes upon the defendant the burden of going forward with evidence to rebut the plaintiff's prima facie case. The risk of nonpersuasion does *not* shift to the defendant, but remains with the plaintiff. Rule 301, FED. R. EVID. Apparently the district court misunderstood this principle.

III. PURPOSE OR INTENT TO DISCRIMINATE MAY NOT BE INFERRED FROM ADHERENCE TO A NEIGHBORHOOD SCHOOL POLICY IN A DISTRICT WITH RACIALLY IMBALANCED RESIDENTIAL PATTERNS.

The most compelling example of the district court's abandonment of the intent requirement, through the employment of the foreseeable effect test, was the inference of segregative intent which it drew from the Board's adherence to a neighborhood school policy.

This explicit finding was contained in a question posed and answered in the district court's liability opinion:

"If a board of education assigns students to schools near their home pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists?"

429 F. Supp. at 254. [Pet. App. 48.]

After stating that "a majority of the United States Supreme Court has not directly answered this question regarding non-racially motivated inaction," the district court answered the posed question in the affirmative. 429 F. Supp. at 255. [Pet. App. 48-49.] The Sixth Circuit approved, adding that the construction of new neighborhood schools, most of which were "racially identifiable" under the statistical measure adopted by the trial court, required "a very strong inference of intentional segregation." 583 F.2d at 804. [Pet. App. at 173.] Thus, under the foreseeable effect test, the mere continuance of the neighborhood school policy in Columbus, which the district court characterized as "non-racially motivated inaction," became the basis of a finding of unlawful segregation by the school board.

The lower courts' use of the foreseeable effect test to strike down the neighborhood school policy completely ignores the strong educational and public policy reasons for assigning children to schools located in their neighborhood. The purposes and benefits of the policy were forcefully articulated by Mr. Justice Powell in his separate opinion in *Keyes*:

"Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest, and dedication to a public school may well run higher with a neighborhood attendance pattern."

Keyes, supra, 413 U.S. at 246 (Powell, J., concurring in part and dissenting in part).

The United States Congress has declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." Equal Educational Opportunity Act of 1974, 88 Stat. 516, 20 U.S.C. § 1701. Moreover, the same statute provides that "the assignment by an educational agency of a student to the school nearest his place of residence . . . is not a denial of equal educational opportunity or of equal protection of the laws." 20 U.S.C. § 1705.

In addition to these strong public policy foundations, neighborhood schools have a statutory foundation in Ohio. Section 3313.48, OHIO REVISED CODE, requires school boards to:

" . . . provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof." (Emphasis added)

The Sixth Circuit has held that this statute mandates Ohio school boards to construct schools in the neighborhoods where the children live. *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

The Columbus public schools have been operated as a neighborhood school system since before the turn of the century, and this experience has demonstrated the overwhelming benefits of the neighborhood school policy. The policy has provided the Columbus community with the best possible education that limited financial resources would allow, has kept transportation at a minimum, and has provided a sound foundation for parental and community support of the schools. *See pp. 17-18, supra*.

In view of the uncontradicted record evidence concerning the benefits derived from the neighborhood school policy in Columbus, and its strong legal and public policy foundations, the lower courts had absolutely no justification in finding that the maintenance of a system of neighborhood schools in a community with racially imbalanced residential patterns permitted an inference of segregative intent.

The trial court was correct that this Court has not yet directly confronted the question of whether segregative intent can be inferred from the mere adherence to a neighborhood school policy in a school system which is residentially imbalanced. In *Keyes*, the Court specifically reserved the question:

"whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation."

Keyes, supra, 413 U.S. at 212.

The Court's subsequent rejection of the "impact" test in *Washington v. Davis*, *Austin*, *Arlington Heights*, *Spangler*, and *Dayton*, however, now clearly requires that the ques-

tion reserved in *Keyes*, and the question posed by the district court in this case, be answered in the negative.

Particularly in *Austin*, the Court has indicated its negative answer to these questions. In *Austin*, the Court vacated and remanded, for reconsideration in light of *Washington v. Davis*, a Fifth Circuit decision which had explicitly relied on a foreseeable effect concept to draw an inference of segregative intent from the mere adherence to a neighborhood school policy. As the district court in this case had done, the Fifth Circuit held in *Austin* that:

"[S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent."

United States v. Texas Education Agency, 532 F.2d 380, 392 (5th Cir. 1976).

Mr. Justice Powell's concurring opinion in *Austin* correctly found that this holding adopted the "effect" test which the Court had rejected in *Washington v. Davis*. *Austin, supra*, 429 U.S. at 991 and n.1.

By holding that they could infer segregative intent from the use of a neighborhood school policy in Columbus, merely because it foreseeably resulted in racially imbalanced schools, the lower courts in the present case made precisely the same error which the Fifth Circuit made in *Austin*. In both cases, the courts failed to require proof of segregative intent, and elected instead to impose liability under an "effect" standard.

We urge the Court to explicitly answer the question reserved in *Keyes* in the negative, and to reject the inference of segregative intent which the lower courts drew from the maintenance of a neighborhood school policy in Columbus. Since it is an acknowledged fact that residential racial imbalance is a characteristic of nearly all urban

areas of the United States, if the decisions below are allowed to stand, no urban school system in this country can adhere to a neighborhood school policy without being presumed to be in violation of the equal protection clause.

VI. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Petitioners respectfully request that the Court reverse the judgments below and direct that judgment be entered for Petitioners. In the alternative, Petitioners request that the Court vacate the judgments below and remand the case to the district court with the direction that it:

- (a) determine and specify any acts by the Columbus Board which were intentionally discriminatory under the standards of *Washington v. Davis* and *Arlington Heights*;
- (b) determine and specify any current incremental segregative effect of these actions on the racial composition of individual schools within the system, as required by *Dayton, Brennan*, and *Omaha*; and
- (c) only if it finds that there were any intentionally discriminatory acts which have a current segregative effect, to formulate, with the assistance of the parties, a remedy confined to the correction of that effect.

Respectfully submitted,

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Dated: February 22, 1979.

**TABLE OF SCHOOL BUILDINGS
IN USE IN 1976**

**SCHOOL BUILDINGS IN USE IN 1976 WITH
REFERENCES TO DATES CONSTRUCTED AND
STUDY RECOMMENDATIONS OF NEED FOR
FACILITIES BUILT DURING 1950-76**

Name of School	Date Constructed	Recommendations of Need for Facilities Built During 1950-76*
ELEMENTARY		
Alpine	1966	1963 Study, #19, p. 65
Alum Crest	1961	1958 Study, #57, p. 64
Arlington Park	1957	1955 Study, #49, p. 64; #51, p. 64
Avondale	1891	
Barnett	1964	1958 Study, #39, p. 62
Beatty Park	1954	1950 Study, #2, p. 77; 1953 Study, p. 70
Beaumont	1957	1955 Study, #47, p. 64
Beck	1884	
Bellows	1905	
Berwick	1956	1955 Study, #22, p. 60
Binns	1957	1955 Study, #10, p. 58
Brentnell	1962	1958 Study, #23, p. 60
Broadleigh	1952-53	1950 Study, #14, p. 86
Burroughs	1921	
Calumet	1961	1958 Study, #10, p. 58
Cassady	1964	[Annexed from Mifflin, 1971]
Cedarwood	1965	1963 Study, #67, p. 70
Chicago	1897	
Clarfield	1926	[Anexed from Marion- Franklin, 1957]
Clearbrook	1957	1955 Study, #33, p. 61
Clinton	1904-22	
Colerain	1957	1955 Study, #37, p. 62
Como	1954-55	1953 Study, #19, p. 65
Courtright	1927	[Annexed from Whitehall, 1957]
Cranbrook	1957	1955 Study, #38, p. 62
Crestview	1915	
Dana	1911	

Name of School	Date Constructed	Recommendations of Need for Facilities Built During 1950-76*
ELEMENTARY (Continued)		
Deshler	1953	1950 Study, #62, p. 98
Devonshire	1963	1958 Study, #22, p. 59; 1963 Study, #23, p. 66
Douglas	1976	1972 Project UNITE, p. 8
Duxberry	1959	1955 Study, #50, p. 64; #51, p. 64
Eakin	1960	1958 Study, #29, p. 60
East Columbus	1920	
Eastgate	1954	1953 Study, #15, p. 64
Easthaven	1968	1963 Study, #44, p. 67
East Linden	1911	[Annexed from Mifflin, 1971]
Eleventh	1906	
Fair	1890	
Fairmoor	1950	1950 Study, #13, p. 85
Fairwood	1924	
Fifth Avenue	1976	1972 Project UNITE, p. 10
Forest Park	1962	1958 Study, #20, p. 59
Fornof	1925-27	[Annexed from Marion-Franklin, 1957]
Franklinton	1953	1950 Study, #10, p. 84
Gables	1976	1972 Project UNITE, p. 21
Garfield	1953	1950 Study, #44, p. 94
Georgian Heights	1959	1958 Study, #30, p. 61
Gettysburg	1969	1968 Study, #39, p. 82 1963 Study, #10, p. 64
Gladstone	1965	1963 Study, #20, p. 65
Glenmont	1952	1950 Study, #27, p. 90
Hamilton	1953	1950 Study, #24, p. 89
Heimandale	1955	[Annexed from Marion-Franklin, 1957]
Heyl	1910	
Highland	1894-1905	
Homedale	1923	[Annexed from Worthington, 1956]
Hubbard	1894	
Hudson	1966	1963 Study, #21, p. 65

Name of School	Date Constructed	Recommendations of Need for Facilities Built During 1950-76*
ELEMENTARY (Continued)		
Huy	1955	1953 Study, #21, p. 65
Indianola	1904	
Innis	1975	1972 Project UNITE, p. 21
Indian Springs	1950	1950 Study, #26, p. 90
James Road	1952	1950 Study, #14, p. 86
Kent	1960	1958 Study, #49, p. 63
Kenwood	1962	1958 Study, #13, p. 58
Kingswood	1952	1950 Study, #12, p. 85
Koebel	1964	1963 Study, #64, p. 70
Leawood	1960	1955 Study, #27, p. 60
Lexington	1966	1963 Study, #22, p. 65
Liberty	1976	1972 Project UNITE, p. 21
Lincoln Park	1924	
Lindbergh	1958	1955 Study, #11, p. 58
Linden	1905, 1921	[Annexed from Mifflin, 1971]
Linden Park	1975	1972 Project UNITE, p. 21
Livingston	1901	
Main	1876-1906	
Maize Road	1960	1958 Study, #14, p. 59
Marburn	1960	1958 Study, #12, p. 58
Maryland Park	1958	1955 Study, #32, p. 61
Maybury	1964	1963 Study, #52, p. 68
McCuffey	1927	
Medary	1892	
Milo	1894	
Moler	1963	1963 Study, #62, p. 69
North Linden	1950	1950 Study, #23, pp. 88-89
Northridge	1956	1953 Study, #23, p. 66
Northtowne	1968	1963 Study, #17, p. 65
Oakland Park	1952	1950 Study, #24, p. 89
Oakmont	1966	1963 Study, #47, p. 68
Ohio	1893	
Olde Orchard	1965	1963 Study, #48, p. 68
Parkmoor	1966	1963 Study, #16, p. 64
Parsons	1960	1958 Study, #55, p. 64
Pilgrim	1922	

Name of School	Date Constructed	Recommendations of Need for Facilities Built During 1950-76*
ELEMENTARY (Continued)		
Pinecrest	1959	1955 Study, #26, p. 60
Reeb	1904	
Salem	1962	1958 Study, #16, p. 59
Scioto Trail	1927	[Annexed from Marion-Franklin, 1956]
Scottwood	1957	1955 Study, #25, p. 60
Second	1874-1883	
Shady Lane	1956	1953 Study, #17, p. 64
Sharon	1947	[Annexed from Worthington, 1956]
Shepard	1906	
Siebert	1888-1902	
Sixth Avenue	1961	1958 Study, #11, p. 58
Smith Road	1915	[Annexed from Marion-Franklin, 1957]
South Mifflin	1952	[Annexed from Mifflin, 1971]
Southwood	1894	
Stewart	1874-1893	
Stockbridge	1959	1958 Study, #54, p. 64
Sullivant	1954	1950 Study, #11, p. 84
Thurber	1922	
Trevitt	1964	1958 Study, #37, p. 62
Valley Forge	1963	1958 Study, #15, p. 59
Valleyview	1957	1955 Study, #12, p. 58
Walden	1968	1963 Study, #18, p. 65
Walford	1961	1958 Study, #17, p. 59
Watkins	1961	1958 Study, #56, p. 64
Wayne	1968	1963 Study, #40, p. 67
Weinland Park	1952	1950 Study, #33, pp. 91-92
West Broad	1910	
West Mound	1952	1950 Study, #4, pp. 82-83
Westgate	1952	1950 Study, #5, p. 83
Willis Park	1958	1955 Study, #24, p. 60
Windsor	1959	1955 Study, #46, p. 64
Winterset	1968	1963 Study, #9, p. 64
Woodcrest	1961	1958 Study, #44, p. 62

Name of School	Date Constructed	Recommendations of Need for Facilities Built During 1950-76*
JUNIOR HIGH		
Barrett	1898	
Beery	1956-57	[Annexed from Marion-Franklin, 1957]
Buckeye	1963	1958 Study, #77, p. 69
Champion	1909	
Clinton Jr.	1955	1953 Study, #46, p. 70
Crestview	1915	
Dominion	1956	1953 Study, #47, p. 71
Eastmoor Jr.	1962-63	1958 Study, #73, p. 68
Everett	1898	
Franklin	1898	
Hilltonia	1956	1953 Study, #45, p. 70
Indianola Jr.	1929	
Johnson Park	1958-59	1955 Study, #56, p. 65
Linmoor	1957	1955 Study, #58, p. 66
McGuffey	1927	
Medina	1959-60	1955 Study, #59, p. 66
Monroe	1963-64	1958 Study, #71, p. 67
Ridgeview	1966	1963 Study, #69, p. 70
Roosevelt	1916	
Sherwood	1966	1963 Study, #82, p. 73
Southmoor	1968	1963 Study, #87, p. 73
Starling	1908	
Wedgewood	1965-66	1963 Study, #77, p. 72
Westmoor	1958-59	1955 Study, #55, p. 65
Woodward Park	1967	1963 Study, #72, p. 71
Yorktown	1967	1963 Study, #83, p. 73
SENIOR HIGH		
Beechcroft Jr.-Sr.	1976	1972 Project UNITE, p. 21
Briggs	1976	1972 Project UNITE, p. 21
Brookhaven	1961-63	1958 Study, #61, p. 65
Centennial	1976	1972 Project UNITE, p. 21
Central	1924	
East	1922	

Name of School	Date Constructed	Recommendations of Need for Facilities Built During 1950-76*
SENIOR HIGH (Continued)		
Eastmoor	1955	1953 Study, #48 and #51, p. 71
Independence Jr.-Sr.	1976	1972 Project UNITE, p. 21
Linden McKinley	1928	
Marion-Franklin	1952-53	[Annexed from Marion-Franklin, 1957]
Mifflin Jr.-Sr.	1924	[Annexed from Mifflin, 1971]
Mohawk Jr.-Sr.	1953	1950 Study, #7, p. 79
North	1924	
Northland	1966	1963 Study, #71, p. 71
South	1923	
Walnut Ridge	1961	1958 Study, #72, p. 68
West	1929	
Whetstone	1961	1958 Study, #60, p. 65

*THE RECOMMENDATIONS ARE ABBREVIATED AS FOLLOWS:

- 1950 Study: "A Re-Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, 1950. [Px 59.]
- 1953 Study: "A Further Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, May, 1953. [Px 60.]
- 1955 Study: "The 1955-56 Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, January, 1956. [Px 61.]
- 1958 Study: "The 1958-59 Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, July, 1959. [Px 62.]

1963 Study: "The 1963-64 Study of the Public School Building Needs of Columbus, Ohio," by the Bureau of Educational Research, College of Education, The Ohio State University, June, 1964. [Px 64.]

1968 Study: "The 1967-68 Study of the Public School Building Needs of Columbus, Ohio," by the Educational Administration and Facilities Unit, College of Education, The Ohio State University, March, 1969. [Px 63.]

1972 Project UNITE: "Report of the Buildings Search and Solve Team to the Project UNITE Steering Committee," March, 1972. [Px 219.]

Supreme Court, U. S.
FILED

FEB 21 1979

W. WOODAK, JR., CLERK

In The
Supreme Court of the United States
October Term 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al,
Petitioners,

vs.

GARY L. PENICK, et al,
Respondents.

**MERITS BRIEF OF RESPONDENTS,
THE OHIO STATE BOARD OF EDUCATION AND
SUPERINTENDENT OF PUBLIC INSTRUCTION**

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OPINIONS BELOW

The July 14, 1978 opinion of the Court of Appeals is reported at 583 F. 2d 787 (Sixth Cir., 1978). It is reproduced in the appendix to the petition for certiorari at pages 140-207.

The March 8, 1977 liability opinion and order of the United States District Court for the Southern District of Ohio is reported at 429 F. Supp. 229 and is reproduced in the appendix to the petition at pages 1-86.

The July 7, 1977 Memorandum and Order of the District Court commenting on this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) does not appear in an official reporter. It is reprinted in the appendix to the petition at pages 90-96.

The July 29, 1977 order of the District Court concerning desegregation plan guidelines is not reported officially but is reproduced in the appendix to the petition at pages 97-124.

The October 4, 1977 order of the District Court requiring implementation of a systemwide desegregation plan is not reported officially but is reproduced in the appendix to the petition at pages 125-137.

The present case has been set for oral argument in tandem with No. 78-627, *Dayton Board of Education v. Brinkman*. In that case the opinion of the Court of Appeals for the Sixth Circuit is reported at 583 F. 2d 243 (Sixth Cir., 1978) and is reprinted in the appendix to the petition in this action at pages 219-247. The opinion of the U.S. District Court for the Southern District of Ohio in that case is reported at 446 F. Supp. 1232 (S.D. Ohio, 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1978. The petition for a writ of certiorari was filed

on October 11, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution, Section 1.

"... nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. In a school desegregation case, where mandatory segregation by law has long since ceased, does the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceed the equitable jurisdiction of a federal court where the court has failed to determine how much incremental segregative effect discrete and isolated segregative acts had on the racial composition of the individual schools within the system at the time of trial, as compared to what the racial composition would have been in the absence of such acts?

2. May a federal court employ legal presumptions, in combination with evidence of discrete and isolated constitutional violations, to justify a systemwide racial balance remedy where (i) there is no evidence of a causal connection between those unconstitutional actions and the existence of other racially imbalanced schools, (ii) there is a high degree of residential segregation, and (iii) the systemwide remedy would not be warranted by the incremental segregative effect of the identified violations?

3. May a federal court infer segregative intent from the mere assignment of students to schools nearest their homes pursuant to a long-standing, statutorily required and educationally sound neighborhood school policy where

the foreseeable effect of such assignment, because of segregated housing patterns in the urban school district, is to cause some schools to be racially imbalanced?

4. Where there was no direct proof that segregation of students was a factor which motivated the decision of school officials, may a federal court infer segregative intent solely from evidence that a collateral foreseeable effect of the decision made would be to continue or increase statistical racial imbalance within schools when the same decision would have been made for educational and administrative reasons?

STATEMENT OF THE CASE

Introduction

These respondents, The Ohio State Board of Education and Superintendent of Public Instruction, were the "state defendants" referred to in the opinions of the lower courts. The District Court found that they violated their constitutional responsibilities by failing to correct de jure segregation and racial imbalance caused by the Columbus Board of Education and its superintendent. The Court of Appeals for the Sixth Circuit affirmed the District Court's judgment as to the Columbus defendants. As to the state defendants, however, the Court of Appeals remanded to the District Court for further findings and consideration of the state defendant's liability. [Pet. App. 204-207.]

Because of errors which the lower courts committed in their treatment of the issues presented by this case, these respondents, The State Board of Education and Superintendent of Public Instruction, supported the Columbus defendants' petition for a writ of certiorari. For the reasons given hereafter, we urge this Court to reverse the judgment of the Court of Appeals and remand the action to the District Court for further consideration of the issues

of constitutional violation and incremental segregative effect.

A Note on References to the Record

At the time of the preparation of this brief the appendix was in the process of assembly and printing. Accordingly, there are no references in this brief to the merits appendix. All references are to the appendix which was filed in support of the petition for certiorari and are cited "Pet. App.," e.g., Pet. App. 14-16.

THE FINDINGS AND ORDERS OF THE DISTRICT COURT

"Duality" in 1954

In its opinion of March 8, 1977 the District Court found that when *Brown I* was decided in 1954 the Columbus Board of Education had caused five schools to be "overwhelmingly black." [Pet. App. 11.] They were located in "an enclave . . . on the near-east side of Columbus." [*Ibid.*] The Court also found that black children had attended racially mixed schools in Columbus as long ago as 1879 [Pet. App. 8.], in the first decade of the twentieth century [*ibid.*], in the 1920's and 1930's [*id.*, 9.], and that in 1954 there was "substantial racial mixing of both students and faculty in some schools." [*Id.*, 10.] Notwithstanding the presence of racially mixed schools, the Court concluded that because of the five segregated schools "there was not a unitary school system in Columbus." [*Id.*, 11.]

Post-Brown Segregative Incidents

The Court found that between 1954 and the time of trial in 1976 the Columbus School Board violated its constitutional duty by failing to pursue alternatives which would eliminate or lessen racial imbalance. [Pet. App.

19-20.] The incidents from which the Court drew its inference of segregative intent were the following:

1. Gladstone Elementary School could have been located somewhat northerly of its chosen site, with more integrative effect. [*Id.*, 21-22.]
2. The boundary lines for Sixth Avenue Elementary School could have been drawn east-west rather than north-south with better integrative effects. [*Id.*, 22-24.]
3. The "near-Bexley" optional zone (in effect from 1959 to 1975) allowed about 25 elementary age white children to attend predominantly white schools instead of all-black schools. [*Id.*, 26-29.]
4. In four west side elementary schools different decisions on boundary lines and optional zones could have enhanced racial balance. [*Id.*, 29-33.]
5. A discontinuous attendance area for Moler Elementary School (in effect from 1963 to the time of trial) allowed about 70 mostly white elementary pupils to attend "whiter" Moler rather than the school closest to their homes. [*Id.*, 33-34.]
6. A discontinuous attendance area which terminated twelve years prior to trial allowed pupils living on three streets in a predominantly white neighborhood to attend a "whiter" school (Fornoff) instead of the one closest to their homes. [*Id.*, 34-35.]
7. The Board built a new elementary school (Innis) in an area served by an overcrowded racially mixed school, Cassaday. The Board elected to provide grades K-6 in each school rather than to put grades K-3 in one and 4-6 in the other one. Although it knew that the latter structuring would be more integrative, it opted to adhere to its basic policy of providing K-6 services in each elementary building. [*Id.*, 35-42.]
8. Of the five schools mentioned above which were "overwhelmingly black" in 1954, one was closed in 1974 [Pet. App. 60.], and the other four remained identifiably black at the time of trial. All were in the central area of the city, the historic center of the black community. [*Id.*, 25.]

The District Court did not find any constitutional violation in the assignment of teachers at the time of trial. [*Id.*, 15-16, 59.] It found:

The number of black teachers in each school almost compares to the ratio of black and white teachers in the total system. [*Id.*, 59.]

The Court found that the plaintiffs had failed to prove any discriminatory intent respecting student transfers, the assignment of nonteaching staff, the assignment of substitute teachers, or special educational programs. [Pet. App. 20, footnote 2.]

The District Court's Remedial Requirements

In June, 1977 there were 167 schools. [*Id.*, 101-102.] Columbus proposed to close five, leaving 162. Of these, 37 were identifiably black. [Pet. App. 103.] In the June 10, 1977 plan which Columbus developed to comply with the Court's March 8, 1977 order, those 37 schools were neutralized. Each was brought within plus or minus fifteen percent of the district-wide average of 32.5% black. [*Id.*, 103-104.] This left 22 schools on the periphery of the district which were identifiably white. [*Ibid.*] Even though the plan placed all black children in statistically desegregated schools, and even though the Court had previously held that the remedy "should provide black school children with the *Brown I* promise of an integrated education," [Pet. App. 74, 75.], the District Court held that the existence of 22 identifiably white schools was "constitutionally unacceptable." [*Id.*, 102-105.]

The District Court's Refusal to Ascertain Incremental Segregative Effect

The Columbus School Board submitted its original remedial plan on June 10, 1977. On June 27, 1977 the United States Supreme Court announced its decision in

Dayton Board of Education v. Brinkman, 433 U.S. 406. The District Court addressed the significance of *Dayton* in a memorandum filed July 7, 1977. In pertinent part it stated:

The Court is of the opinion that the litigants in the present case and the community . . . are entitled to know whether the *Dayton* decision alters the law applicable to this proceeding. * * *

* * * In my view, the hope that the *Dayton* case would provide new and clear instructions for trial courts has not been realized. I do not view these principles as any different from those under which the litigants were operating when this case was tried.

* * *

* * * Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administered. These were not the facts of the *Dayton* case.

Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which the defendants owe no responsibility. This they did not do, 429 F. Supp. at 260.

[Pet. App. 92-95.]

At remedial hearings on July 11, 1977 counsel for both the state and Columbus defendants moved the Court to determine the incremental segregative effect of the violations which it had found. Their motions were denied. [Transcript of July 11, 1977 hearing, pp. 4-42.]

The Remedial Orders

On July 29, 1977 the Court filed an order assessing the remedial plans proposed by the defendants. [Pet. App. 97-121.] It held that the Columbus Board's plan of June 10, which left 22 identifiably white schools, was "constitutionally unacceptable," [*id.*, 105], as was the Columbus Board's July 8 plan. [*Id.*, 99-102.] Under the State Board's plan each school in the system would reflect district-wide racial averages, plus or minus fifteen percent, except for four schools on the western edge of the city. The Court held that this was constitutional. [*Id.*, 106.]

On August 31, 1977 the Columbus Board filed its third plan. [*Id.*, 125.] On the same day the State Board of Education and Superintendent of Public Instruction concurred in that plan's pupil reassignment component. [*Id.*, 126.] On September 13, 1977 the plaintiffs concurred in it [*id.*, 127], and on October 4, 1977 the District Court approved it. [*Ibid.*] As finally approved by the District Court the remedial decree requires every school in the system to be racially balanced within fifteen percent of the district's overall racial composition. Approximately 42,000 children will be reassigned to schools in different geographic areas. Those reassignments will involve the cross-town transportation of over 37,000 students. The incidental pairing and clustering will alter the grade structures of nearly every elementary school in the district.

THE OPINION OF THE COURT OF APPEALS

The Court of Appeals approved the District Court's conclusion that "in 1954 there was not a unitary school system in Columbus" [Pet. App. 153] because of the existence of five segregated schools in that year. "This is the legal predicate for the District Judge's finding of a dual school system." [*Id.*, 160.] The Court of Appeals held:

Under these circumstances, the Columbus Board of Education has been under a constitutional duty to desegregate its schools for twenty-four years.¹

[*Ibid.*]

• • •

We recognize, of course, that racial separation based upon facts and circumstances beyond the control of school boards may constitute de facto segregation without necessarily representing violation of the Fourteenth Amendment. However, we have previously pointed out that the District Judge on review of pre-1954 history found that the Columbus schools² were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools.³ The pupil assignment figures for 1975-76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation.

[Pet. App. 165.]

The Court of Appeals held that because there was segregation of five schools in 1954, the school board was under a duty thereafter to desegregate not just those schools but all the Columbus schools — the entire system. When it spoke of "desegregating" it meant ending racial separation, wherever and however it was caused, just as if Columbus was a statutory dual system of the type struck down in *Brown*.

The Court of Appeals continued:

Of course, this Northern school case is distinguished from the classic Southern school cases in two important respects: first, Ohio did not, after 1887, require dual school systems by state law; and second, some

¹Note "its" schools, not the five segregated schools.

²Note "the Columbus schools," not the five schools which were found to be segregated.

³Note "the Columbus schools," not the five schools.

black students did go to school in Columbus in 1954 in largely white schools.⁴ Since, however, a substantial portion of black students . . . were intentionally segregated in 1954, we do not believe these two distinctions serve to invalidate the District Judge's findings of a de jure dual school system.

[Pet. App. 165.]

The Court of Appeals noted that between 1954 and the filing of the complaint in 1975 Columbus "grew enormously in boundaries (from 40 to over 173 square miles) and in public school population from 46,352 to 95,998." [Pet. App. 168.] One hundred three schools were built between 1950 and 1975. [*Ibid.*] Of those, 87 opened with "racially identifiable" student bodies, and 71 remained racially identifiable at the time of trial. [*Ibid.*]⁵ The Court of Appeals held that this alone "requires a very strong inference of intentional segregation." [Pet. App. 1973.]

The Court of Appeals' Construction of "Incremental Segregative Effect"

In construing this critical term the Court of Appeals stated that if a school district had more than one hundred schools, and evidence disclosed a constitutional violation in one of them, the proper remedy would be "an order to take effective means to desegregate that school." [Pet. App. 197.]

The remedy might affect one or more nearby schools. The isolated single violation obviously would not call for a systemwide desegregation order.

[*Ibid.*]

⁴The District Court found "substantial racial mixing of both students and faculty in some schools" in 1954. [Pet. App. 10.]

⁵A school was considered to be "racially identifiable" or "imbalanced" if the racial mix of its pupils exceeded the district-wide average by plus or minus fifteen percent. [Pet. App. 78.]

The Court said there should be an effort to determine the "incremental segregative effect" of each violation:

It is clear to us that the phrases 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact *as to each isolated practice, or episode*. [Emphasis supplied.]

[*Ibid.*]

This says plainly that a court should look at the effect of each violation, and it implies that after all the incremental effects have been measured a court can then determine whether there has been a systemwide impact requiring a systemwide remedy, or whether more limited remedies would be appropriate.

In the next two sentences, however, the Court of Appeals abandoned what it had just declared. It stated that if there are "fifty" segregative practices or episodes, the impact of each need not be measured.

Dayton does not, however, require each of fifty segregative practices or episodes to be judged solely upon *its* separate impact on the system. [Italics are the Court's.] The question posed concerns the impact of the total amount of segregation found — after each separate practice or episode has added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood.

[*Ibid.*]

This obscure language suggests that in a case of multiple violations it is not necessary to make the incremental segregative effect analysis mandated by *Dayton*. The Court failed to explain what a district court should examine if it need not measure the impact of each violation.

The Court of Appeals' Findings of Violations and the Systemwide Effects Thereof

The Court of Appeals refused to remand the case to the District Court for further findings on incremental segregative effect, as the defendants had requested. [Pet. App. 199.] Instead, it made its *own* findings on incremental segregative effect.

We now turn to the consideration of the *incremental segregative effect* of the major constitutional violations found by the District Judge. [Italics supplied.]

[Pet. App. 198.]

It found that five violations of the Columbus Board of Education had "systemwide impact" justifying a racial balance remedy for every school. The first of these was:

(1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as 'black' schools, as found by the District Judge, clearly had a 'substantial' — indeed, a systemwide — impact.

[Pet. App. 198.]

(While the District Judge found that those five schools were maintained in violation of the Constitution, he made no finding that they had a systemwide impact).

The second "major constitutional violation" found by the Court of Appeals was:

(2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so

[Pet. App. 198.]

(This assumes a constitutional duty to produce racial balance in a school system if part of the system was segregated in 1954, something which this Court has not held).

The third "major constitutional violation" with systemwide impact found by the Court of Appeals was:

(3) . . . the Columbus Board's segregative school construction and siting policy. . . .

[Pet. App. 198.]

(The District Judge had found one instance of segregative site selection — Gladstone Elementary School. See Pet. App. 21-22).

The fourth "major constitutional violation" found by the Court of Appeals was the Board's —

(4) . . . student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the school year 1975-76.

[Pet. App. 198.]

(The student assignment policy was the policy of assigning children to their neighborhood schools. This Court has not held that such a policy offends the Fourteenth Amendment. While the Board's policy had systemwide application, it was not a constitutional violation).

The final "major constitutional violation" which the Court of Appeals found was:

(5) The practice of assigning black teachers and administrators only or in large majority to black schools

[Pet. App. 198.]

(This overstates the findings of the trial court. The District Judge found that at the time of trial "The number of black teachers in each school almost compares to the ratio of black to white teachers in the total system"). [Pet. App. 59.]

The Court of Appeals concluded:

Each such policy or practice also added an increment to the sum total of the constitutional violation found.

Beyond doubt the sum total of these violations made the Columbus school system a segregated school system in violation of the Fourteenth Amendment and thoroughly justified the District Judge in ordering a systemwide remedy.

[Pet. App. 198-199.]

SUMMARY OF ARGUMENT

The Court of Appeals erred in not requiring the District Court to make specific findings concerning the incremental segregative effect of the violations which the District Court found. Such findings were clearly required by this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). The refusal of the Court of Appeals to remand for such findings on the ground that *Dayton* is distinguishable from the present case is without merit. The distinctions asserted by the Court of Appeals are unpersuasive.

The Court of Appeals not only failed to give effect to the *Dayton* mandate. It misconstrued *Dayton*. Its construction of the concept of "incremental segregative effect" was inconsistent, muddled, and not commensurate with the intention which *Dayton* expressed. The plain teaching of *Dayton* is that remedial decrees may be shaped to correct the effects of segregative action by school officials but may not go farther to require school officials to overcome conditions of racial imbalance in schools which are merely the result of demographic influences in society at large.

In any proceeding in a district court concerning the incremental segregative effect of school officials' violations, the burden of proof as to such issue remains with the plaintiffs as part of their continuing obligation to prove all the material elements of their cause of action. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189

(1973) does not warrant imposing on school officials the burden of proving the *non-effect* of constitutional violations.

Both lower courts erred in holding that the existence of some *de jure* segregation in the Columbus school district in 1954 transformed it into a "dual" school system of the type invalidated by *Brown I*. Both held that the existence of some segregation in Columbus in 1954 imposed a constitutional duty on the Columbus school system to achieve racial balance in all of the schools of the system thereafter. In a school desegregation case, the issue is not whether unlawful segregation existed in 1954, or any other year, but whether there are *present effects* from present or past violations.

Both lower courts erred in holding that there is a constitutional duty to achieve racial balance in unitary school systems. There is no duty to achieve racial balance except to correct previous constitutional violations. The essence of the Equal Protection duty is to refrain from discrimination.

The Court of Appeals' presumption of segregative intent arising solely out of school officials' inaction on racial imbalance is inconsistent with the requirement of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) that there be a "sensitive inquiry" into *all* relevant factors before any judicial determination is made concerning discriminatory intent. The Sixth Circuit's presumption of discriminatory intent fails to give any weight to the racially neutral factors a board of education may evaluate in judging the extent to which racial balancing actions might be taken.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN NOT REQUIRING THE DISTRICT COURT TO MAKE SPECIFIC FINDINGS CONCERNING THE INCREMENTAL SEGREGATIVE EFFECT OF THE VIOLATIONS WHICH IT FOUND.

This Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), mandates findings on the segregative effect of constitutional violations which a lower court may find. *Dayton* held that if such violations are found —

• • • the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.

433 U.S. at 420.

The District Court firmly declined to make that determination. Both the state and city boards moved the Court on July 11, 1977 for findings on incremental segregative effect. The motion was argued at length by counsel. (See the transcript of remedy hearings, July 11, 1977, pages 4-42). The Court denied those motions. [*Id.*, 42.] Its views on the meaning of *Dayton* were initially expressed in its order of July 7, 1977 [Pet. App. 90-96.], in which it stated that the Supreme Court failed to "provide new and clear instructions for trial courts." The District Judge said:

I do not view these principles as any different from those under which the litigants were operating when this case was tried.

[Pet. App. 93.]

Dayton did more than rehash old doctrine. It emphasized that school officials were responsible for rectifying the effects of *their* constitutional violations, not the larger effects of social forces which can produce racial imbalances in schools.

This had been suggested in some of the earlier decisions. For example, the Chief Justice noted in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22 (1971):

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from *Brown I* to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.

• • •

Mr. Justice Powell's concurring opinion in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), expressed the recognition that not all racially imbalanced schools should be regarded as the product of discrimination by school authorities:

Rather, the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essentially the same: one of segregated residential and migratory patterns . . . [*Id.*, 222-223.]

• • •

Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our

minority citizens in the inner cities while the more mobile white majority disperse to the suburbs. [*Id.*, 236.]

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) had disapproved an order which obligated school authorities to achieve better racial balance in their schools when there was no evidence that the existing imbalance was caused by them. And in *Austin Independent School District v. United States*, 429 U.S. 990 (1976) three members of the Court cautioned that remedial decrees should not "exceed that necessary to eliminate the effect of any official acts or omissions."

Dayton held flatly that remedial decrees should extend no farther than the incremental segregative effect of the violations of *school authorities*. Writing for a unanimous court Mr. Justice Renquist noted:

It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution. *Spencer v. Kugler*, 404 U.S. 1027 (1972); *Swann, supra*, at 24.

[*Id.*, 417.]

• • •

In effect, the Court of Appeals imposed a remedy which we think is entirely out of proportion to the constitutional violations found by the District Court, taking those findings of violations in the light most favorable to the respondents.

[*Id.*, 418.]

• • •

The power of the federal courts to restructure the operation of local and state governmental entities 'is not plenary.' It 'may be exercised only on the basis of a

constitutional violation.' [Citations omitted.] Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature of the violation.' [Citations omitted.]

[*Id.*, 419-420.]

• • •

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra*.

• • •

If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes, supra*, at 213.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as 'cumulative violation' than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

[*Id.*, 420.]

Subsequent to *Dayton* a remedy concerning pupil reassignments may not be ordered without findings by a

district court defining the incremental segregative effect of the school board's violations. Those findings must express the differential between the "racial distribution of the school population as presently constituted" and the distribution which would have existed had school officials not been guilty of their unlawful acts.

The District Court refused to make the mandated findings. [Pet. App. 199; transcript of remedy hearing, July 11, 1977, p. 42.] The Court of Appeals erred in permitting the District Court to avoid its *Dayton* responsibility. The case should be remanded to the District Court with instructions to make the findings which *Dayton* requires.

The Court of Appeals' reasons for refusing to remand are without merit. None of the "distinctions" it drew between *Dayton* and this case can justify its refusal to give *Dayton* the acceptance it is entitled to. The "distinctions" were:

(1) That Columbus was a "dual" system in 1954 whereas in *Dayton* "mandatory segregation by law of the races has long since ceased." (But such was also the case in Columbus, where mandatory segregation by law had also long since ceased by virtue of the identical Ohio statute in 1887).

(2) That *Dayton* involved "only three isolated constitutional violations," whereas the District Judge here had found "many more." [Pet. App. 199.] (*Dayton's* principle was not confined to cases involving a few violations).

(3) That *Dayton* did not present systemwide violations, whereas this case did. (But this presupposes that which the incremental effect analysis is intended to disclose — the *scope* of the violations' effect).

(4) That the lower courts in this case had an opportunity to consider the *Dayton* standard, whereas in *Dayton*

the lower courts' rulings antedated the Supreme Court's definition of the standard. (This is just a correct statement of chronological fact, not a distinction of any substance).

The Court of Appeals erred in failing to remand to the District Court for findings on incremental segregative effect, in conformance with the letter and spirit of this Court's *Dayton* decision.

II. THE COURT OF APPEALS MISCONSTRUED DAYTON AND THE CONCEPT OF INCREMENTAL SEGREGATIVE EFFECT.

The Court of Appeals' discussion of incremental segregative effect is remarkable for its inconsistency and obscurity.

... the equitable remedy should be fashioned to fit the actual Fourteenth Amendment violations which were found. The most deliberate and willful violation of the Constitution in one of over a hundred schools would therefore call for an order to take effective means to desegregate that school. The remedy might affect one or more nearby schools. The isolated single violation obviously would not call for a systemwide desegregation order.

It is clear to us that the phases 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own 'increment' to the totality of the impact of segregation. *Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon its separate impact on the system. The question posed concerns the impact of the total amount of segregation found — after each separate practice or episode has added its 'increment' to the whole. It was

not just the last wave which breached the dike and caused the flood.

[Pet. App. 197.]

We agree that a violation in *one* school may call for an order to desegregate *that school*.

We also agree that "the question of systemwide impact [should] be determined by judging segregative intent and impact *as to each isolated practice, or episode*." Once violations have been found, the district court must determine the contemporary segregative effect of each one. The temporal focus is the present because the action seeks a present remedy, and any remedial decree necessarily operates in the present. We do not suggest that past violations are immaterial. They may have continuing effects which are felt in the present, and if that is the case they may be remedied now.

We also agree with the Court of Appeals that each violation may add its increment to the totality of segregation. We would caution, however, that the effects of some violations disappear with changing circumstances, so that at present there may be no segregative effect from certain past violations.

Beyond this point we are unable to understand the Court of Appeals. It went on to say:

Dayton does not, however, require each of fifty segregative practices or episodes to be judged solely upon its separate impact on the system. The question posed concerns the impact of the total amount of segregation found — after each separate practice or episode has added its 'increment' to the whole. [Pet. App 197.]

The Court did not explain why each of fifty segregative episodes should not be evaluated in terms of its segregative effect. In principle, each of these episodes is no different than the one out of a hundred hypothesized by the Court in its first illustration. There is no reason why a

district court should be required to measure the effect of one but not the others. Indeed, unless measurement is made of the individual effects it is impossible to say what their totality is.

The Court's confusion appeared to increase during its discussion of incremental segregative effect in *Dayton IV*. There it held:

The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs *gradually over the years instead of all at once* as in the case where segregation was mandated by state statute or a provision of a state constitution.

[Pet. App. 244-245; italics supplied.]

The concept of "incremental" as something which is *attenuated* "instead of all at once" has no basis in either the common meaning of the word or the decisions of this Court in school desegregation cases. Anyone familiar with the evolving case law has to understand "incremental segregative effect" as the effect of constitutional violations by *school officials*. This is distinguished from the influences in society at large which have caused some of the residential concentrations of racial and ethnic groups which result in racial imbalance in public schools. This Court's opinion in *Dayton* dealt with segregation caused by *school officials* as distinguished from other influences. It held that remedial decrees could properly extend to the correction of the segregative effects of those official actions, but not farther.

The Court of Appeals erred in its interpretation of "incremental segregative effect." Since this was one of the key concepts of *Dayton* it led inevitably to further error in failing to give to *Dayton* the effect which the Supreme Court intended.

III. THE BURDEN OF PROOF RESPECTING INCREMENTAL SEGREGATIVE EFFECT REMAINS WITH THE PLAINTIFFS.

The issue of who carries the burden of proving the incremental segregative effect of constitutional violations did not arise in the present case. It did arise, however, in *Dayton IV*. The Sixth Circuit's view on that subject is now a matter of record, and since it is erroneous we address it here so that the lower courts may be provided with appropriate guidance by this Court in view of the further findings which must be made below.

The Sixth Circuit held in *Dayton IV*:

Secondly, the District Court erred in allocating the burden of proof on the issue of incremental segregative effect to plaintiffs, requiring them to establish both racial discrimination and the specific incremental effect of that discrimination.

[Pet. App. 246.]

In coming to this conclusion the Court of Appeals erred. The District Court was correct as a matter of law in holding:

[T]here is a burden upon plaintiffs to establish by a preponderance of evidence both a segregative intent and an incremental segregative effect in order to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

[Pet. App. 222.]

It is a fundamental rule of civil procedure that one who asserts a cause of action is required to prove its material elements. The elements of a cause of action against a school board for violation of the Equal Protection Clause of the Fourteenth Amendment are: a constitutional duty, breach thereof by the defendant, and resulting injury to the plaintiffs. The breach of a constitutional duty which

does not produce any contemporary injurious effect is not a matter for which equitable relief may be decreed. For a plaintiff class to obtain a remedial decree in such a case, it must establish not only a duty, and a violation, but also the contemporary segregative effect of the violation. These are the basic elements of the plaintiffs' cause of action as to which the plaintiffs must carry the burden of proof.

The presumption of segregative intent enunciated in *Keyes*⁶ does not alter the foregoing principles. *Keyes* cannot be read as working a shift in the burden of proof with respect to all of the elements of the plaintiffs' cause of action.⁷ It simply expresses the reasonable notion that where the plaintiffs prove intentional segregation by school officials in a substantial portion of a school district, the inference arises that segregation existing elsewhere in the district may well have been brought about by the same improper attitudes. The *Keyes* presumption shifts to the school board the burden of going forward with the evidence. It becomes the school board's burden to *meet* the presumption that racial imbalance elsewhere in the system is the product of its discriminatory intent. If the evidence discloses that racial imbalances which exist outside the segregated area have not been caused by them, the presumption will have been met.

Keyes dealt only with the presumption of *segregative intent*. It did not deal with the incremental segregative effect of official misconduct. Nor can the *Keyes* presump-

⁶*Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973).

⁷Rule 301, Fed. Rules of Evidence, states: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

tion reasonably relate to the incremental effect analysis. The presumption of *intent* arises out of the existence of facts which demonstrate the existence of discriminatory intent at work in a meaningful portion of the school district. Those facts suggest that invidious intent may also be operating in other portions of the school district. The school board is therefore required to go forward with evidence to exculpate itself of discriminatory intent in such other areas. If the trial court finds that the inference of discriminatory intent has not been rebutted by the school board and that racial imbalances in other sectors of the school district have been caused by the Board's segregative action, the court must then discharge its duty under *Dayton*. It must make findings concerning the incremental segregative *effect* of the school board's violations. The scope of those effects is something the plaintiffs must prove as part of their continuing obligation to prove the material elements of their cause of action.

In this respect a school case is no different than a tort case or a contract case or any other case entitling the plaintiff to a remedy. Once the plaintiff proves breach of a duty, he must go on to prove the magnitude of the injury. Similarly, in a school desegregation case once the plaintiffs prove a violation they must prove the contemporary segregative effect.

The Court of Appeals erred in holding that *Keyes* shifts the burden of proof on this matter to the defendant, and that it is the defendant's burden to prove the absence of segregative effects. It would be just as wrong in a rear-end collision case to shift to the negligent defendant the burden of proving the absence of injury to the plaintiff. The violation may be clear, in the automobile case as well as in the equal protection case, but in *both* cases the burden of proof remains on the plaintiff to prove the scope of the injurious effect.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE EXISTENCE OF SOME UNLAWFUL SEGREGATION IN A UNITARY SCHOOL SYSTEM MAKES IT A "DUAL" SYSTEM WITHIN THE MEANING OF *BROWN*.

The Court of Appeals approved the District Court's unitary/dual dichotomy. As the District Court put it:

It is essential that one know the 1954 racial picture of the system — whether it was unitary (no^{UN} lawful racial segregation) or dual (unlawful racial separation), and how it became what it was.

[Pet. App. 7.]

The Court of Appeals approved this definition. [Pet. App. 155.] It also affirmed the District Court's conclusion that because there was some unlawful racial separation in the district in 1954 "there was not a unitary school system in Columbus." [*Id.*, 153]

The basis of the District Court's conclusion about the "duality" of the Columbus system in 1954 was the existence of five nearly all black schools in that portion of the district in which the black population was concentrated. [*Id.*, 11, 13, 25.] The Court also found that there was "substantial racial mixing of both students and faculty in some schools" [*Id.*, 10] and that black children had attended racially mixed schools since 1879. [*Id.*, 8, 9.]

Notwithstanding the existence of five segregated schools in 1954, the Columbus district was not a "dual" school system as that term has been expressed in this Court's decisions. A unitary school system, such as Columbus, may be marked by some unlawful racial separation. But that does not make it a dual school system in the sense of *Brown*. It just makes its administration *pro tanto* unlawful. So long as black and white children may and do attend racially mixed schools in a school system, there is no warrant for characterizing it as "dual."

In *Milliken v. Bradley*, 418 U.S. 717, 737 (1974) the Chief Justice said:

The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 5-6 (1971) the Chief Justice wrote:

This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about.

In the dual school systems the local board of education provided two educational establishments — one for blacks, the other for whites. The race of the pupil was the litmus test. It alone determined which school could be attended. Dismantling a dual system to create a unitary system produces an amalgam of schools, teachers, administrators, facilities and services available to all students without regard to race.

School systems in Ohio are unitary. They have been since 1887, when the Ohio General Assembly repealed a statute which allowed local boards of education to organize separate schools for black children. [Pet. App. 8.] The Columbus school system is a unitary system. As the District Court found, black children have attended racially mixed schools in Columbus since 1879, and in 1954 there was "substantial racial mixing of both students and faculty in some schools." [*Id.*, 10.]

Regardless of whether Columbus school officials were guilty of segregative intent with respect to five schools in 1954, Columbus was not a "dual" system in that year. A

school system is dual, within the meaning of *Brown*, *Green*, *Swann*⁸ and all of the other decisions of this Court concerning the dismantling of dual systems, only if it provides two educational establishments, one for blacks, the other for whites. Columbus did not do this. It was therefore not a "dual" system in 1954, and both lower courts erred in holding that it was.

V. THE CONSTITUTIONAL DUTY OF SCHOOL ADMINISTRATORS IS TO REFRAIN FROM RACIAL DISCRIMINATION IN THE PROVISION OF EDUCATIONAL SERVICES. THERE IS NO CONSTITUTIONAL DUTY TO ACHIEVE RACIAL BALANCE IN THE SCHOOLS EXCEPT TO CORRECT CONSTITUTIONAL VIOLATIONS.

The constitutional duty of public school administrators under the Equal Protection Clause of the Fourteenth Amendment is to abstain from racial discrimination in the provision of educational services. It is not to maintain racial balance in the pupil population. *Washington v. Davis*, 426 U.S. 229, 239 (1976) held:

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.

Swann held

Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even

⁸*Brown v. Topeka Board of Education*, 347 U.S. 483 (1954) (*Brown I*); *Green v. County School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

when those problems contribute to disproportionate racial concentrations in some schools.

402 U.S. at 23.

The District Court found that “there is residential segregation in Columbus” — a fact about which there was no disagreement between the parties. [Pet. App. 13.] It found housing segregation in Columbus —

... has been caused in part by federal agencies which deal with financing of housing, local housing authorities, financing institutions, developers, landlords, personal preferences of blacks and whites, real estate brokers and salespersons and restrictive covenants, zoning and annexation, and income of blacks as compared to whites.

[Pet. App. 57.]

The District Court found as a fact one of the inescapable realities of life in American cities:

Given segregated residential patterns, not all schools can be built in an integrated setting.

[*Id.*, 24.]

It is precisely that reality which confronts the administrators of urban school systems. The pupil populations of many city schools are imbalanced racially and ethnically. Racial imbalance in the urban school district is a *given* in the United States today.

A key question which this case presents is: What does the Constitution require school administrators to *do* about that imbalance?

Although the District Court paid passing deference to the statements of this Court that racially imbalanced schools are not *per se* offensive to the Constitution, it was clearly the opinion of the District Court that the Columbus Board was under a constitutional duty to “desegregate” its

schools ever since 1954, and it implied that this involved the attainment of racial balance in the pupil distribution. If the function of a remedial decree is to restore victims of constitutional violations to the position they would have occupied but for the violations (*Milliken I*, 418 U.S. 717, 746) the District Court's requirement of a racial balance remedy involving *all* schools of the district is the ultimate proof of its opinion that racial balance is what the Constitution required in Columbus since 1954.

The Court of Appeals expressed the same view. It stated that "the Columbus Board of Education has been under a constitutional duty to desegregate its schools for twenty-four years." [Pet. App. 160.] To "desegregate," in the lexicon of the Sixth Circuit, is to "diffuse" the races throughout the system in a way which approximates statistical balance. As it said in *Dayton IV*:

Instead of meeting their affirmative duty to disestablish the dual school system extant at the time of *Brown I* and to diffuse black and white students throughout the Dayton school system, defendants pursued a policy of containment through school construction and site selection practices.

[Pet. App. 242; italics supplied.]

The diffusion which the Court of Appeals considered constitutional for Dayton required each school to "be brought within fifteen percent of the black-white population ratio of Dayton" [*Id.*, 221.]

Both lower courts erred in holding that the existence of some segregation in 1954 warrants restructuring the system today to achieve racial balance. In *Dayton* this Court held that the remedy for a constitutional violation is the correction of the *segregative effect* of the violation. The lower courts exceeded this limitation when they held that the Columbus Board had to achieve systemwide racial balance because some imbalance was due to segregative intent in 1954.

1954 is not a talismanic moment. Conditions obtaining in that year are not invested with magical qualities which invoke far ranging legal consequences. The issue in a school desegregation case is not whether unlawful action occurred in 1954 or in any other given year. It is whether there are *present effects* from present or past constitutional violations which result in the exclusion of minority children from schools or services to which they would have had access but for the violations. If the plaintiffs prove the existence of such present effects, they are entitled to a remedial decree which will cure them.

School administrators have no constitutional duty to provide a racially balanced mixture of pupils in all their schools. The Constitution necessarily permits variation and diversity. It does not require racial balance except to remedy violations, and only to the extent of restoring that degree of balance which would have existed if the violation had not occurred. As *Swann* held:

If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

402 U.S. 1, 24 (1971).

Milliken I held:

. . . desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each school, grade or classroom.

418 U.S. 717, 741 (1974).

Pasadena held that racial imbalances arising out of normal patterns of human migration were not condemned by the Constitution. 427 U.S. 424, 435-436 (1976). And *Dayton* held:

It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact, without more, of course, does not offend the Constitution.

433 U.S. 406, 417-418.

American society is characterized by a plurality of races, religions, interests and associations. It is an evolving, highly mobile society. Its communities, like all human societies, wax and wane. There will be inevitable concentrations of racial, religious, ethnic, and economic groups in American communities. School administrators cannot be expected to play a continuous balancing act in opposition to the forces of demographic change to make each school reflect, within prescribed statistical limits, the district's overall makeup. Their constitutional duty is not to provide statistical balance among the heterogeneous groups which make up the urban districts. Their obligation is to provide educational services to all those groups without discrimination.

VI. THE SIXTH CIRCUIT'S PRESUMPTION OF SEGREGATIVE INTENT, BASED SOLELY ON SCHOOL BOARD INACTION IN THE PRESENCE OF RACIAL IMBALANCE, IS UNREASONABLE AND INCOMMENSURATE WITH *ARLINGTON HEIGHTS AND WASHINGTON V. DAVIS*.

In determining whether the Columbus Board acted with segregative intent, the District Court employed a presumption which had been fashioned by the Sixth Circuit. [Pet. App. 43.] The District Court stated:

. . . The law of the Sixth Circuit is applicable in the case at bar.

In *Oliver v. Michigan State Board of Education*, 508 F. 2d 178, 182 (Sixth Cir., 1974), *cert. den.* 421 U.S. 963 (1975), the Sixth Circuit held:

A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

[Pet. App. 48.]

In *Oliver* the Court of Appeals had held:

A finding of de jure segregation requires a showing of three elements: (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools.

[Pet. App. 43.] 508 F. 2d 178, 182.

Under this test, as understood and applied in the Sixth Circuit, de jure segregation exists if there is (1) inaction by school officials, (2) with segregative purpose, (3) which results in continued racial imbalances and concentrations in public schools. Under the *presumption* of segregative intent referred to above, if the continuation of racial imbalances or concentrations is the foreseeable result of inaction, the presence of the first and third elements (inaction plus continued separation) gives rise to a presumption that segregative intent exists.

In the urban school district the continuation of racial imbalances in many schools is unquestionably foreseeable unless major reassignment and transportation is ordered by school authorities. Consequently, inaction by school officials in such a situation becomes presumptively tainted by segregative purpose under the presumption adopted

by the Court of Appeals. The effect of this presumption is to create a substantive constitutional duty to achieve racial balance. Failure to take action to overcome imbalance creates a prima facie case of an equal protection violation.

The Sixth Circuit's presumption is not in harmony with *Washington v. Davis*, 426 U.S. 229 (1976), which held that disproportionate impact alone would not support an equal protection claim. There must be more than mere disproportion. There must be more than continuing imbalance. There must be proof of discriminatory intent. Mere imbalance is not so suggestive of discriminatory intent that it rises to the level of probability warranting a presumption of such intent.

The Sixth Circuit's presumption is also plainly at odds with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where this Court held that proof of discriminatory intent in any equal protection case demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Writing for the Court, Mr. Justice Powell listed a variety of factors which that inquiry ought to consider. *Arlington Heights* teaches that the determination of discriminatory intent in equal protection cases requires careful and balanced consideration of all relevant factors. The Sixth Circuit's presumption of segregative intent, based solely on inaction and foreseeable racial imbalances, fails far short of the "sensitive inquiry" *Arlington Heights* demands.

The presumption is also unreasonable. It is illogical to *presume* discriminatory intent from decisions which can and do proceed from non-discriminatory reasons. School officials are faced with many demands on their resources which they must reconcile and balance. Their means are finite. Decisions concerning the distance pupils should be required to travel to their assigned schools, the extent to which schools nearest to children's homes should be util-

ized, and the appropriateness of investing in major transportation facilities all involve the management of the school board's resources. All such decisions are grounded in considerations of efficiency, economy, and good educational practice. A decision by a school board to forego measures to redistribute the pupil population to achieve racial balance in the schools of the system cannot fairly be *presumed* to proceed from discriminatory intent.

The Sixth Circuit's presumption of segregative intent is neither fair, reasonable, nor consistent with this Court's decisions in *Washington v. Davis* and *Arlington Heights, supra*, and it contributed to the errors of both of the Courts below.

CONCLUSION

For the foregoing reasons, the Ohio State Board of Education and Franklin B. Walter, Superintendent of Public Instruction, respectfully pray that the judgment of the Court of Appeals be reversed and that the cause be remanded to the District Court for further findings and consideration of the issues of liability and, if appropriate, the incremental segregative effect of the constitutional violations which it may find.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, *et al.*,

Petitioners,

v.

GARY L. PENICK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

GARY L. PENICK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

Respondents do not accept the statement of Questions Presented as framed by Petitioners, because the assumptions reflected in the questions are inaccurate, with respect to the status of the Columbus school system (where "mandatory [i.e., state-imposed] segregation by law has [*not*] long since ceased"), with respect to the evidence (there is much more in the record than "evidence of discrete and isolated constitutional violations"), and with respect to the basis for the rulings below (which were not based solely on "legal presumptions"). However, we forsake the semantic exercise of rewording the questions. As Petitioners have described their claims in their brief, and in light of the record made at the trial of this matter, the issue to be

determined by this Court is: what do plaintiffs in a school desegregation action need to prove in order to be entitled to meaningful (usually systemwide) relief?

Statement of the Case

The prior proceedings in this matter are, by and large, accurately described at pages 3-7 of Petitioners' Brief, with the exception of certain characterizations of the parties and the actions of the trial court. The most important of these is Petitioners' contention that the July 29, 1977 Order of the district court (Pet. App. 97) required "development of a new systemwide racial balance remedy plan" or "that every school in the Columbus system be racially balanced." The trial judge did not require racial balance; he did reject the plans proposed by the Columbus Board of Education because "the Columbus defendants did not shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present or past discriminatory action on their part as required by *Swann, supra*, 402 U.S. at 26" and because "adequate justification for the retention of one-race schools must be supplied by the defendants. They have not done so." (Pet. App. 102-03; *see also, id.* at 105.)

Additionally, we do not understand why Petitioners refer to counsel for Respondents as "NAACP lawyers" (Pet. Br. 4, 5). Among counsel for respondents during the course of proceedings in this matter have been salaried attorneys employed by several different organizations, including the NAACP (as well as attorneys in private practice); but the NAACP is not a party to the case and the identification of counsel is without significance.

Statement of Facts¹

Introduction

In school desegregation matters, as in other constitutional cases, the facts are critical to an informed judgment. Petitioners have confined their recitation of facts (Pet. Br. 7-39) to the specific examples of segregative actions enumerated in the trial court's opinion and to other evidence which Petitioners believe weighs in their favor.² The mass of evidence considered by the district judge in reaching the conclusion that there had been systematic, systemwide segregation in the Columbus public schools is hardly ad-

¹ The form of citations employed throughout this Brief is as follows: The opinions below, reprinted in the Appendix to the Petition for Writ of Certiorari, are cited "Pet. App. ____." That portion of the testimony and evidence printed in the Appendix is cited "A. ____." Because of the volume of the testimony and exhibits in the trial court, every effort was made to limit the amount of material designated for inclusion in the printed Appendix, *see* Sup. Ct. Rule 36(2). The major portions of plaintiffs' proof of segregation by Columbus school authorities have been included in shortened, excerpted form. Nevertheless, at various places throughout this Brief it has been necessary to refer to additional evidence in the record. Where reference is made to oral testimony at the hearings on liability held between April 19 and June 17, 1976, it is cited "L. Tr. ____." Where reference is made to oral testimony at the hearings on remedy held in 1977, it is cited "R. Tr. ____." Exhibits not reprinted in the Appendix will be identified as introduced at either the liability or remedy hearings, respectively, through use of the letters "L" and "R" and will be cited in accordance with Sup. Ct. Rule 40(2); for example, "Pl. L. Ex. ____, L. Tr. ____." In accordance with the request of the Clerk of this Court, the trial exhibits were not transmitted as part of the record; however, some of the most important trial exhibits have been withdrawn from the district court and lodged with the Clerk of this Court so that they will be available for inspection if desired. *See* note 6 *infra*.

² On occasion, Petitioners err in their description of the record evidence or propose inapposite comparison of exhibits which are not compatible. These misstatements are noted as appropriate in the course of the factual summary which follows.

verted to.³ For this reason, we believe that a full presentation in our Brief of the record evidence which supports Respondents is necessary.

There is an additional ground why complete factual documentation is indispensable in this instance. Some of the legal questions posed by Petitioners, we contend, do not actually arise on this record. Their presence in this case is traceable to misconceptions about the evidence and to language used (perhaps too loosely) by the Court of Appeals. For example, this case does not involve the application of legal presumptions to proof of only "isolated" constitutional violations (*compare* Pet. Br. 3). An accurate evaluation of the judgments below requires an adequate factual exposition.

The district court had before it an unprecedented amount of information about the policies and practices of Columbus public school authorities, from formation of the district in the 1820's through the date of trial. A significant portion of the historical pre-1954 evidence was documentary—and the documentation was maintained by the school system's own historian. (A. 254-55).⁴ In addition, wit-

³ In some instances Petitioners seem to contest the district court's school-specific findings as expressed in the opinion (*e.g.*, Pet. Br. 22-24). Petitioners also contest the overall finding of systemwide segregation made by the trial court on the basis not only of the incidents detailed in his opinion but also of the entire record (*see* Pet. App. 94-95). Since those findings were explicitly affirmed by the Court of Appeals (*e.g.*, Pet. App. 172-73, 198-99), debating the evidence here would seem to be precluded by the "two-court" rule. *See Berenyi v. Immigration Serv.*, 385 U.S. 630 (1967). However, because Petitioners' argument may be construed as a claim that the findings are "clearly erroneous" on the part of both courts below, *see Brainard v. Buck*, 184 U.S. 99, 105 (1902), the "two-court" rule may not bar their review. But this underscores the importance of examining the entire record.

⁴ Petitioners deprecate the testimony of Myron Seifert (Pet. Br. 39, 69 n.35) but they fail to identify him as a school system employee who collected and maintained historical material about the Columbus school system as part of his official duties (A. 255). Nor

nesses testified from personal recollection dating back at least to 1916 about the school system's discriminatory practices; this testimony was basically undisputed by Petitioners.⁵

For both legal and factual reasons, the pre-1954 history of the Columbus public school system is of significance in this case. First, the district court explicitly found that

... the Columbus school system cannot reasonably be said to have been a racially neutral system on May 17, 1954. The then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had originally intentionally caused and later perpetuated the racial isolation, in the east area of the district, of black children and faculty at Champion, Mt. Vernon, Garfield, Felton and Pilgrim

... As a result, in 1954 there was not a unitary school system in Columbus. (Pet. App. 11.)

The Court of Appeals upheld this finding (Pet. App. 159-60). Hence, unless both courts below were wrong, when

have Petitioners ever denied the accuracy of the facts and occurrences about which he testified, nor presented record evidence to refute his testimony.

⁵ Petitioners now characterize this testimony as "subjective" and of "little probative value" (Pet. Br. 39) but they never rebutted it and have never denied that the events took place. *See, e.g., Taylor v. Board of Educ. of New Rochelle*, 191 F. Supp. 181, 184 (S.D.N.Y. 1961). In contrast, after one of plaintiffs' witnesses described an incident involving reassignment of his child from one school to another in 1952, an incident which he interpreted at the time as demonstrating racial discrimination (L. Tr. 2026-36), Petitioners produced class rosters, monthly school enrollment reports, newspaper clippings, pupil census cards (L. Tr. 4612-33), and a woman who was employed for less than a single school year in 1952 as a substitute teacher by the Columbus public schools (L. Tr. 4713-21) in order to demonstrate that this action did not have a racial purpose or effect.

Brown II was decided in 1955, the Columbus board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 437-48 (1968); see also, *Keyes v. School Dist. No. 1*, 413 U.S. 189, 203 (1973). Second, the pre-1954 actions are also relevant because many of the devices and techniques utilized by the Columbus school authorities prior to *Brown* to maintain segregation are identical or similar to actions taken in later years. The pre-1954 violations are thus persuasive evidence of the system's intent in implementing decisions after that date which entrenched or extended pupil and faculty segregation in its schools. Cf. *Keyes v. School Dist. No. 1, supra*, 413 U.S. at 207, citing 2 J. Wigmore, *EVIDENCE* (3rd ed. 1940).

For the period 1957 through 1975, because more of the official records were extant, the operations of the school system were examined and analyzed in even greater detail before the district court. Directories indicating the exact location of every school attendance boundary and optional attendance area during those years permitted the preparation of demonstrative exhibits which allowed the trial court to evaluate visually the impact of pupil assignment devices used by the system. Maps of the district showing the residential distribution of the white and non-white population of Columbus in 1950, 1960, and 1970, as recorded by the U.S. Census, both aided that evaluation and also corroborated the testimony of witnesses about Columbus residential patterns at the time when school zones were established and modified.⁶ Beginning with the 1964-65 school year,

⁶ These demonstrative exhibits, Pl. L. Exs. 250-52, L. Tr. 3897 (base maps), Pl. L. Exs. 261-320, L. Tr. 3898 (attendance zone

both enrollment and faculty and principal assignment data, by race, were available.

In 36 trial days of hearing on liability, covering more than 6000 pages of transcript, more than 70 witnesses and 750 exhibits were presented by the parties. Based upon all of the evidence, the trial court concluded that

the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown I* was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in recent times, has approved optional attendance zones, discontinuous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools. (Pet. App. 61.)

... The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which *presently* have a predominantly black student enrollment have been substantially and directly affected by the

overlays), and Pl. L. Exs. 336-38, L. Tr. 3899 (new construction overlays) have been lodged with the Clerk of this Court and are available for the Court's inspection.

intentional acts and omissions of the defendant local and state school boards. (Pet. App. 73.) (emphasis added.)⁷

After this Court's opinion in *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) was announced, the district court repeated its findings:

. . . Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. These were not the facts of the Dayton case.

Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. *Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility.* This they did not do, 429 F. Supp. at 260. (Pet. App. 94-95) (emphasis supplied.)

Despite this rather clear statement, Petitioners insist upon arguing this case as if the conclusions of *current*, systemwide impact of their own segregatory actions are based solely on the *examples* of such actions set out at length in the trial court's opinion, combined with "legal presumptions." They repeatedly refer to "remote and isolated" acts of segregation, and attempt to support this thesis by lifting from its context a single sentence used by

⁷ The district court's findings with respect to the State of Ohio defendants were remanded by the Court of Appeals (Pet. App. 208) and are thus not at issue in this Court.

the Court of Appeals in its opinion affirming the district court's judgment:

These instances can properly be classified as isolated in the sense that they do not form any systemwide pattern. (Pet. App. 175.)

Not only does this language of the Court of Appeals refer explicitly only to a *portion* of the evidence before the district court, *compare* Pet. App. 166-74, but it is a characterization not made by the trial court. As we show below, the evidence in this case demonstrates the consistent adoption of segregative devices by the Columbus school authorities up to the very eve of trial. The Court of Appeals' statement must be read in light of the record to mean only that the Columbus school authorities did not succeed in segregating every black student from every white student through the segregative pupil assignment devices discussed under the heading of "Gerrymandering, Pupil Options, Discontiguous Pupil Assignment Areas, Etc." (Pet. App. 174), especially since the Court of Appeals' opinion goes on to recognize that this evidence was most significant because it indicated that the board's selective invocation of the "neighborhood school" concept was but a pretext for a policy of segregation (Pet. App. 175).

Consideration of all of the evidence may not be necessary to interpret the remark in perspective, but meticulous appraisal of the record is crucial because of the pivotal significance accorded the Court of Appeals' language in Mr. Justice Rehnquist's stay opinion, Pet. App. 213:

. . . In both cases the Court of Appeals employed legal presumptions of intent to extrapolate systemwide violations from what was described in the Columbus case as "isolated" instances. [citation omitted] The Sixth Circuit is apparently of the opinion that pre-

sumptions, in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations. . . .

Even if we are wrong about the meaning of the Sixth Circuit's sentence in context, this Court must carefully weigh the trier of fact's determination in light of the entire record. For if the evidence supports the judgment which the Court of Appeals affirmed, then that judgment must be allowed to stand and the remedial decrees of the trial court implemented. *See Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976), and cases cited.

A. Pre-1954 Operation of the Columbus Public Schools.

1. *Demography.* The Columbus district radiates in all four directions from the downtown intersection of Broad and High Streets. The shortest and narrowest of its four "arms" lies to the west, across the Scioto River; to the east, prior to 1950 the district extended around three sides of the City of Bexley (which it now entirely surrounds). To the north, it included a wide band of territory on both sides of the Olentangy River; and to the south was a slightly narrower and shorter extension. As the district court's opinion recites, the Columbus district has significantly increased in area since 1950 (Pet. App. 12). In particular, since that time the district has expanded substantially to the east, southeast, and northeast. (*Compare* Fig. 3, Pl. L. Ex. 59, L. Tr. 3882, at 7 [1950 Ohio State University study] with Pl. L. Exs. 320, 252, L. Tr. 3897, 3898 [overlay of 1975 senior high school attendance areas over 1970 census].) The arena of concern during the pre-Brown years is accordingly the smaller unit. (*See also*, Fig. 14,

Pl. L. Ex. 58, L. Tr. 3882, at 111 [1939 Ohio State University study].)

Prior to 1954 the black population of the city was located generally in the central and east-central portions of the district (see, for example, the 1950 census map, Pl. L. Ex. 250, L. Tr. 3897). The Columbus Board of Education constructed its first all-black schools in this area, and the evidence of pre-1954 constitutional violations in this case concerns that area almost exclusively. For the convenience of the Court in following the summary of that evidence, a line drawing of the area to the east and north of the Broad-High intersection is reproduced on page 13.⁸

2. *Early history: compulsory segregation.* The evidence demonstrates that racial segregation of students and teachers has been a recurrent theme in public education in Columbus since free schooling was first made available. Prior to 1848, free blacks were excluded from the public schools (though they were also exempted from contributing property taxes used for education) (Pl. L. Ex. 351, L. Tr. 3902, at 3). Thereafter, Ohio mandated separate "colored" schools in any district having 20 or more black children (*id.*). Following the Civil War, the pattern of segregation was continued. Black elementary students in Columbus were assigned to separate schools; a Board of Education plan to house all Negro students in a facility on Sixth Street, no matter what their place of residence or the distance they had to travel to get there, provoked opposition

⁸ This drawing was prepared by tracing from the map at Pl. L. Ex. 376, L. Tr. 3907, at 8, and adding indications of the approximate locations of the American Addition and Eleventh Avenue School, both to the north. School names are in italics and locations indicated by heavy dots.

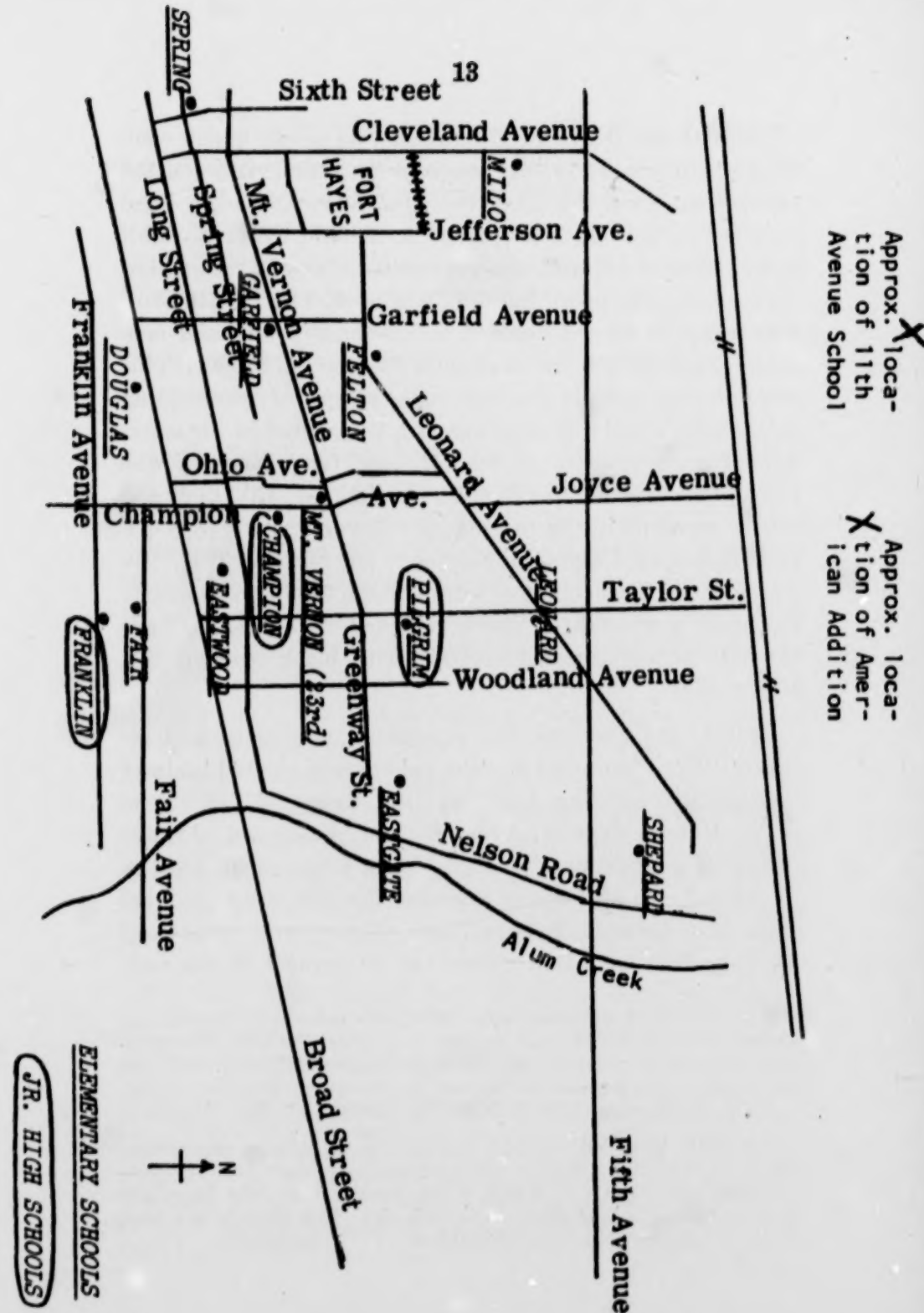
from a black leader (A. 256-58; Pl. L. Ex. 351, L. Tr. 3902, at 113-14). Compulsory segregation in public education was upheld against a Fourteenth Amendment challenge by the Ohio Supreme Court in 1871⁹ (Pet. App. 7-8) and the state legislature reaffirmed this holding in 1878 when it adopted a permissive school segregation statute, 75 Ohio L. 513 (Pet. App. 8).

In the meantime, the Columbus School Board rebuilt a facility for Negro grade school students (the Loving School), named for the Board member who had shown the greatest concern for the education of Negro children even though he was highly critical of its location and adequacy (A. 258-59; Pl. L. Ex. 351, L. Tr. 3902, at 16; *see also*, Dr. Loving's later report of the building's defects, A. 264-66; Pl. L. Ex. 351, L. Tr. 3902, at 33).

3. *Segregation ended and reinstated.* In 1881 the Board was finally persuaded to close the Loving School (A. 266, 270-71; Pl. L. Ex. 351, L. Tr. 3902, at 44-45). For almost three decades thereafter, the Columbus schools were officially not segregated—although the subject of a return to the practice of racially separate schools arose repeatedly (*see* A. 271-72, Pl. L. Ex. 351, L. Tr. 3902, at 46, 49-51). The system also hired a few black teachers during this time.¹⁰

⁹ *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871).

¹⁰ Columbus operated not only a twelve-grade elementary and secondary system, but also a "Normal School" to prepare high school graduates for teaching careers (*see* A. 178), but the first black to complete high school in the city did not receive a diploma until 1878 (A. 262; Pl. L. Ex. 351, L. Tr. 3902, at 26; Pet. App. 8).



By 1907 the Board of Education was again under community pressure to restore school segregation; it requested an opinion from the City Solicitor concerning the legal permissibility of such a course (A. 365-67; Pl. L. Ex. 351, L. Tr. 3902, at 58) and was eventually advised that explicit segregation was invalid under Ohio law¹¹ (L. Tr. 3169-70). However, the Board decided to purchase a site and construct a new facility on Champion Avenue (A. 273-76). This decision was widely viewed as a means of effectuating segregation: when first announced, it resulted in presentation of a petition to the school board from Negroes who feared that this was the Board's purpose (A. 370-72);¹² and it was reported in the press as a "Clever Scheme to Separate Races in Columbus Schools" (A. 272-73, 370). By January, 1910, when construction of the facility was nearly complete, a newspaper story reported, "Negroes to have fine new school" staffed entirely with black teachers (A. 276-79, 372).

Despite the protests, the newspaper stories proved accurate. The Champion Avenue School was located midway between two existing facilities (the Twenty-Third Street [now Mount Vernon Avenue] and Eastwood Avenue Schools), approximately three blocks from each. (See p. 13 *supra*.) An attendance area for the school was created from the former Twenty-Third Street and Eastwood Avenue zones such that more than 90 percent of the resi-

¹¹ In 1887 the Legislature repealed Ohio's permissive segregation statute, 84 Ohio L. 34, and despite its earlier *McCann* ruling before the statute was enacted, the Ohio Supreme Court ruled that the repeal made segregation illegal in the state. *Board of Educ. v. State*, 45 Ohio St. 555, 16 N.E. 373 (1888); see Pet. App. 8.

¹² In 1907, the school board's request for an opinion on segregation from the City Solicitor also produced a protest petition from the black community, in which it was alleged that "the boundary lines of certain school districts in this city [had already so] been drawn as to segregate colored children . . ." (A. 367-70).

dences within the zone were occupied by black families, compared to less than four percent in the new areas for the other two schools (A. 377-78; L. Tr. 3310-15).¹³ Black teachers were reassigned from other schools to Champion (A. 179-80); in 1916, a black applicant was told that Champion was the only school in the system at which Negro teachers would be hired (A. 180; see also *id.* at 188). Champion was the only school in Columbus which had a black principal (L. Tr. 176-77).

4. *Extending segregation: grade restructuring, optional zones, faculty replacement, boundary changes, and gerrymandering.* As the black population in Columbus grew, the educational authorities embarked upon a series of actions to maintain a high degree of racial separation in the public schools. In 1922, the same year that Pilgrim Junior High School opened, ninth grade students were withdrawn from 23rd Street and added to Champion's enrollment despite protests that this would further reduce most Columbus black children's opportunity for an integrated educational experience (A. 378-79; L. Tr. 3324-28). In 1925, as the black population expanded westward toward the business center, the Board created the so-called "Downtown Option". Students residing within this large area (which included the zone of the former Spring Street School, which was integrated in 1921, L. Tr. 136-37) could elect to attend any

¹³ A black parent brought suit against the Board, challenging the zone established for Champion as part of a plan to operate a segregated school in violation of Ohio law. The complaint pointed out, for example, that the northern boundary of the Champion zone was an alley immediately adjacent to the site of the 23rd Street School (A. 373-76). The Board claimed that construction of a new facility was made necessary because of overcrowding and because junior high school grades were being established at the 23rd Street School (see A. 178), which Champion would feed (L. Tr. 3306). The state Circuit Court dismissed the suit, holding that it had no authority to interfere with the Board's administration of the school system (A. 376-77).

of the surrounding schools, which varied widely in their racial compositions. White students could thus avoid attending the closest facilities if they happened to be integrated or predominantly black (A. 478-86).¹⁴ By 1928, many black students were attending the Twenty-Third Street School; it was renamed the Mt. Vernon Avenue School and its white principal and faculty were replaced with a principal and staff of black teachers (A. 315).

That same year, the Champion facility was enlarged (L. Tr. 3349). Attendance areas for Champion and Mt. Vernon were altered in 1931 with a concomitant reduction in size of the Eastwood zone. The Champion boundaries were expanded eastward to Taylor Street and south to Long Street to add black residences formerly in the Eastwood zone, and a portion of the Eastwood area south of Long Street and east of Ohio Avenue was added to Mt. Vernon School (L. Tr. 3351-57). (See p. 13 *supra*.) Eastwood's enrollment further declined in 1932, when students in several grades residing in the Eastgate subdivision were housed in a portable building in that area (A. 383-84). Then in 1933, the Eastwood facility was shut down entirely. White students residing in the eastern portion of its former zone were assigned to a "school" composed solely of portable buildings located in the predominantly white Eastgate subdivision across Woodland Avenue,¹⁵ while white students in the western end of its zone (as altered in 1931)

¹⁴ The "Downtown Option" was paralleled by an optional attendance area, or "neutral zone", at the junior high school level (L. Tr. 3345-47).

¹⁵ As early as 1925, the Board had created a similar "portable school," this one staffed entirely with black teachers, for black students living in the "American Addition" well to the north (see p. 13 *supra*), rather than accommodate these children at nearby Leonard Avenue Elementary. Black junior high school students living in this area were required to attend Champion rather than the closer schools with junior high grades—Pilgrim and Eleventh Avenue. Not until 1937 did the school system provide these stu-

were assigned to the predominantly white Fair Elementary School south of Broad Street (A. 384-86). None of the white former Eastwood pupils were reassigned to Champion or Mt. Vernon (A. 181). (Cf. L. Tr. 150-51.)¹⁶

In 1932 the Garfield Elementary School was converted from an all-white to an all-black faculty and principal (A. 315). That year also, the Board detached the virtually all-white Eastgate and Shepard Elementary areas from the nearby Pilgrim junior high school zone and, despite vehement protest about segregation (L. Tr. 3936-38), transferred them to the more distant Franklin Junior High, to the south below Broad Street (A. 380-83). This action removed a significant number of white students from Pilgrim and signaled its expected transformation into a school for black children. The transformation was completed in 1937 when an all-black faculty was transferred to the Pilgrim school (A. 184-85). It was made an elementary-level facility, and Champion became a junior high school serving graduates of the newly created black elementary schools (Mt. Vernon, Garfield and Pilgrim) (A. 387-89).¹⁷ Franklin

dents with transportation to Champion. (L. Tr. 3334-43.) The all-black elementary grades in portables remained in the American Addition until a new Superintendent of Schools arrived after 1949. He found deplorable conditions and directed that the students be housed in vacant classrooms at Leonard (A. 574-75).

¹⁶ Looking back on this sequence of events in 1941, the Vanguard League (an integrated civic group, see A. 194-95; L. Tr. 182) complained that the low enrollment at Eastwood which was used to justify its closing was the result of the 1931 zone changes. The League recommended that Eastwood be reopened (A. 386-89; Pl. L. Ex. 51H-5(b), L. Tr. 3994.)

¹⁷ The 1938 attendance zone maps at Figs. 13-14, pp. 107, 111 of the 1939 Ohio State University facilities study, Pl. L. Ex. 58, L. Tr. 3882, indicate that the zone for Champion Junior High also included the Felton Elementary area. Although the exact racial enrollment of Felton at this time is not known, by 1943 it was a heavily black school and a black principal and staff were reassigned there (see text *infra*).

Junior High (south of Broad Street), on the other hand, served the still-white Fair, Douglas, Eastgate, and Shepard elementary schools although Shepard and Eastgate were well north of Broad (*compare* Figs. 13 and 14, Pl. L. Ex. 58, L. Tr. 3882, at 107, 111). Both Champion and Pilgrim were provided with used furniture and books (A. 182-84; L. Tr. 162-63), and black children living in the vicinity of other elementary schools were assigned to those two schools (A. 184; note 15 *supra*). White students living within their attendance zones, however, were permitted to enroll in other schools (A. 191).

After Pilgrim was changed to a grade school, the attendance zone for Fair Elementary retained the former Eastwood areas reassigned to Fair in 1933, and also extended far north of Broad Street, very close to Pilgrim—now also an elementary school (*see* Fig. 14, Pl. L. Ex. 58, L. Tr. 3882, at 111). It was gerrymandered to exclude black students from Fair (Pet. App. 9), as vividly described in a 1944 pamphlet of the Vanguard League,¹⁸ “Which September?” (Pl. L. Ex. 376, L. Tr. 3907 at 7):

School districts are established in such a manner that white families living near “colored” schools will not be in the “colored” school district. The area in the vicinity of Pilgrim school, embracing Richmond, Parkwood, and parts of Greenway, Clifton, Woodland, and Granville streets, is an excellent example of such gerrymandering. A part of Greenway is only one block from Pilgrim school, however, the children who live there are in the Fair Avenue school district, twelve and one half blocks away!

A more striking example of such gerrymandering is Taylor and Woodland Avenues between Long Street

¹⁸ See note 16 *supra*.

and Greenway. Here we find the school districts skipping about as capriciously as a young child at play. The west side of Taylor Avenue (colored residents) is in Pilgrim elementary district and Champion Junior High. The east side of Taylor (white families) is in Fair Avenue elementary district and Franklin for Junior High.

Both sides of Woodland Avenue between Long and Greenway are occupied by white families and are, therefore, in the Fair Avenue-Franklin district. Both sides of this same street between 340 and 500 are occupied by colored families and are in the Pilgrim-Champion, or “colored” school, district. White families occupy the residences between 500 and 940, and, as would be expected, the “white” school district of Shepard-Franklin applies.

In 1943 yet another school (Felton) was officially converted into a black school by replacing its entire white faculty and administrative staff with blacks (A. 195, 313-15; Pet. App. 9-10). Thus by the end of World War II, five schools in east Columbus had been created and identified as black schools by Board action. At the same time, a facility (Eastwood) which would have been integrated, had it remained open, was closed and its attendance area divided among black (Mt. Vernon and Champion) and white (Eastgate portable and Fair) schools. The area of east Columbus within which the five black schools had been created and maintained was hardly insubstantial; in 1950 it included the major share of black residences in the city (*see* Pl. L. Ex. 250, L. Tr. 3897).

Yet desegregation of these schools within the constraints of the operational practices of the Columbus school system was possible at all times. By drawing zone lines on a

north-south basis across Broad Street prior to 1954—as the school board was willing to do when Eastwood was closed in 1933, in order to provide white students living east of Woodland Avenue with an alternative to predominantly black Champion or Pilgrim—desegregated student bodies at all of the schools in the area could have been achieved and maintained. Particularly if the same techniques utilized to preserve segregation had been employed to avoid it (conscious shaping of attendance boundaries and transportation of pupils, as was done in the case of the American Addition pupils), a stable situation in which the existence of racially isolated white and black schools would not have provided an incentive for residential relocation (*compare* A. 240-41) could have been created. Certainly there was no educational impediment to such possibilities. For the school system's willingness to have children living in the "Downtown Option" area—or in the American Addition—travel long distances to reach their classes¹⁹ refutes any possible claim that desegregation was infeasible prior to 1954. Furthermore, as suburban areas were annexed to Columbus in the decades following *Brown*, school authorities more and more frequently made use of pupil transportation (busing) to get pupils to school facilities.²⁰ However, pupil transportation was eschewed when it would have resulted in desegregation.²¹

¹⁹ This is graphically apparent on the overlay of the 1957-58 elementary school zones, Pl. L. Ex. 261, L. Tr. 3898.

²⁰ See, for example, the Willis Park Elementary zone in 1958-59, Pl. L. Ex. 262, L. Tr. 3898. By the time of trial, the system transported more than 9,000 pupils daily exclusive of transfers under its voluntary desegregation program (A. 233-34). See also, A. 229-31, 400.

²¹ From 1956-75, Columbus did transport classes from crowded schools to those with space available (A. 401-02). In many instances, white pupils were bused from one white school to another white school, and black pupils from one black school to another,

Throughout the period, black faculty were assigned in rigidly segregated fashion, only to schools with black students (A. 188-89). There were no black principals of predominantly white schools or white principals of predominantly black schools (A. 402-06; L. Tr. 176-78; Pet. App. 10). When a new Superintendent of Schools arrived on the scene in 1949, he found systemwide faculty segregation (A. 573-74). Racial designations appeared on substitute teacher assignment cards (A. 225-26; Pl. L. Exs. 494B, 494C, L. Tr. 3921) and on enrollment reports submitted by teachers (A. 685-87) and black substitute teachers were assigned only to schools with black students (A. 187-88; L. Tr. 168-70).

In sum, when *Brown I* was decided, the Columbus school system was riven with segregation. In the preceding 45 years the Board of Education disregarded complaints that its actions were discriminatory and segregative. Taking advantage of grade structure alterations, population growth, and other systemwide patterns, it had utilized construction, transportation, school closings, boundary changes, grade restructuring, faculty and administrative staff assignments to designate schools as intended for

despite the availability of receiving schools which were not similarly racially identifiable (L. Tr. 3601-3620). At other times, this sort of transportation had no racial consequences or could have had an integrative effect (L. Tr. 5339-78). However, when black students were sent to predominantly white schools, they were moved with their teacher in class groupings, remained on the rolls of the sending school, and did not participate in academic activities with the students at the receiving schools (A. 612-13). Sometimes they were separated for recess and other functions as well (A. 701-14). The Columbus system was insensitive to the humiliating connotation of keeping black students confined to a separate classroom with a black teacher in an otherwise predominantly white facility (A. 400). From 1969-70 until 1973-74, for example, classes from Sullivant (61% to 70% black) were transported on an intact basis to Bellows (4% to 9.5% black) rather than adjusting the boundary, pairing the schools, etc. (A. 639-40).

only black or white students. White students living in east-central Columbus were "protected" from having to attend school with black children through precise gerrymandering and optional zone techniques. The stigma of black undesirability was reinforced by overcrowding and inferior materials, equipment and facilities at black schools, and by the absence of black administrators anywhere in the system except at black schools. As the district court aptly put it, ". . . the Columbus school system cannot reasonably be said to have been a racially neutral system on May 17, 1954" (Pet. App. 11).

B. Post-Brown Administration of the Schools.

Even after this Court announced that compelled segregation of the public schools was unconstitutional, *Brown v. Board of Education*, 347 U.S. 483 (1954), Columbus school authorities continued to employ a wide variety of techniques to maintain significant, if not total, separation of the races in its public schools. Because the enrollment of the system grew sizably both as a result of the post-World War II "baby boom" and also as the geographic size of the district more than tripled through annexation of adjacent territory, the school plant consistently grew as well. The combination of residential relocation within the pre-1954 area of the district and settlement of the suburbs meant that numerous boundary adjustments, school site and construction decisions, grade structure modifications, and staff-faculty assignments had to be made each year. The result was a high degree of school segregation (*see* Pl. L. Exs. 461A-461D, L. Tr. 2135-36; A. 775-87, L. Tr. 3909 [PX 383]; Pl. L. Exs. 409A-409D, 448A-448D, 450A-450D, L. Tr. 3910, 3911), which defendants ascribed solely to their pursuit of "neighborhood schools." Plaintiffs sought to demonstrate, to the contrary, that the only consistent policy of the school system was one lead-

ing to increased segregation; that the Board used an ever-changing concept of "neighborhood schools" to entrench that segregation; and that every manner of exception to "neighborhood schools" was tolerated in the interest of segregation. The district court found "that the evidence clearly and convincingly weighs in favor of the plaintiffs" (Pet. App. 2).

1. *Demography.* Between 1954 and the present, the Columbus school district has expanded along all four geographic axes. Although there has been a nearly continuous series of annexations of small parcels of territory, several major additions can be identified which account for much of the total growth of the system. Annexations from 1954 to 1955 included the airport, two small parcels to the south, and a large tract to the south of the City of Whitehall.²² None was densely settled at the time.²³

By 1959, additional areas to the far north, around the airport, immediately south of Columbus, to the east and south of Whitehall, and at the edge of the district's western projection across the Scioto River, had been added, increasing its size by more than half.²⁴ In a small annexed area to the northeast, the Columbus district purchased a site, constructed a building, and opened a new elementary school (Arlington Park) in 1957.²⁵ The major acquisition was in 1957, involving a large section to the south of the district and including several school buildings previously operated by Marion-Franklin Township.²⁶ *See* Fig. 1, Pl. L. Ex. 62, L. Tr. 3882, at 7.

²² *See* Fig. 1, Pl. L. Ex. 61, L. Tr. 3882, at 7.

²³ *Id.* at 2, 5.

²⁴ Pl. L. Ex. 62, L. Tr. 3882, at 5.

²⁵ *Id.* at 48.

²⁶ *Id.*

Few significant additions took place between 1959 and 1964, except for an area north of McKinley Avenue along the northern edge of the city's projection toward the west.²⁷ The same situation prevailed in 1969; a substantial amount of territory to the west, north and northeast had been annexed by the City of Columbus but not added to the school district.²⁸ The major subsequent growth was to the northeast, in 1971. *Compare, e.g.* Pl. L. Exs. 312, 320, L. Tr. 3898 [overlays of senior high school zones in 1967-68, 1975-76].

The same period of time witnessed school-age population increases both within the "old" district and in the annexed areas. To serve this burgeoning school enrollment, Columbus undertook an ambitious school construction program.²⁹ Between 1950 and 1975, a total of 103 new schools was built (Pet. App. 21). Not all of these were to serve either the annexed territory or areas of residential population increase; the number includes reconstructions of schools on the same site (*e.g.*, Garfield and Franklinton) and replacements of portables with a permanent facility (*e.g.*, Fairmoor and Eastgate). Finally, the district made extensive renovations and building additions at almost every school in the system during this period (*see* Pl. L. Exs. 22, 23, L. Tr. 3881, 3991). For new facilities, attendance

²⁷ *Compare* Fig. 1, Pl. L. Ex. 64, L. Tr. 3882, at 8 with Fig. 1, Pl. L. Ex. 62, L. Tr. 3882, at 7.

²⁸ *Compare id.* with Fig. 1, Pl. L. Ex. 63, L. Tr. 3882, at 13.

²⁹ Columbus also consistently altered the capacities of its existing facilities to reflect changing policy objectives chosen by the Superintendent or the board. For example, the policy decisions to create and site remedial classes, or to reduce pupil-teacher ratios, had implications for building capacities. The choice and timing of such decisions was almost always within the control of school officials, who could opt to proceed integratively or segregatively. The decision to site special programs at a particular school, for example, was simultaneously a decision not to use that school's space to relieve overcrowding at another, opposite-race, school.

zones had to be established and existing zones modified (*see* A. 631, 398). As many as sixty boundary changes a year were recommended to the school board for approval (A. 242, 577; *see* A. 234-37). The exact location of the building and the pupil capacity for which it is designed limit the zone-drawing opportunities (along with administrative decisions about pupil transportation) (A. 322-23, 643-44). Hence, Columbus' multifaceted building program between 1950 and 1975 presented the school board with more than a thousand instances in which decisions would have an impact on the racial composition of school enrollments.³⁰

At the same time, shifts in the residential location of Columbus blacks were occurring, in patterns which were apparent and well delineated. Between 1950 and 1960, for example, the black population settled in substantial numbers to the south of Broad Street in the east-central portion of the city which was the locus of most pre-Brown segregation. (*Compare* Pl. L. Ex. 251, L. Tr. 3897, with Pl. L. Ex. 252, L. Tr. 3897.)³¹ By 1960, blacks predom-

³⁰ This is not a case in which the school board has suggested by way of defense that it attempted to avoid segregation but was undone by population shifts which it had been unable to anticipate. The school system's employees who had responsibility for the establishment and alteration of recommended attendance zone boundaries testified that they had never sought to avoid segregation or racial imbalance (*e.g.*, A. 406; *cf.* A. 577, 598-99 [Ohio State study teams never instructed to consider race]). Even after the school board in 1967 adopted a formal policy of considering racial balance when drawing attendance zones (Pet. App. 16; *see* A. 684-85), the policy was disregarded when it might otherwise have feasibly been applied to schools already in existence or previously planned (A. 361, 606).

³¹ The census maps for 1950, 1960 and 1970 were based on block data, which results in a more accurate representation of population movement than use of figures aggregated into larger census tracts (A. 192). Census "blocks" are not, however, identical to city blocks and where land is devoted to institutional use or density is sparse, census "blocks" may be as large as tracts (L. Tr. 281-83).

inated in the area of the Eastgate school established in 1933 and were a substantial, but not majority proportion, of the residents in the Shepard zone (*id.*).

The black population also moved northeast toward the Linden area. Where there had been comparatively few blacks living north of 5th Avenue in 1950 (*see* Pl. L. Ex. 250, L. Tr. 3897), by 1960 there were substantial numbers south of 17th Avenue—especially east of the Pennsylvania Railroad lines (*see* Pl. L. Ex. 251, L. Tr. 3897). At least prior to the passage of the Fair Housing Act of 1968³² (and in reality for most if not all of the period thereafter), widespread racial discrimination limited and channeled the residential mobility of Columbus blacks. Realtors could describe with precision what areas or streets were “approved” for Negro residence at any given time (A. 244-46; L. Tr. 1504-21, 2148-56; *cf.* L. Tr. 1298-1305). The minority population also increased in the areas immediately adjacent to small Negro settlements which had existed in 1950 in the middle of the district’s western projection, and to what was the extreme south of the district prior to the 1957 annexation from Marion-Franklin Township (*see* Pl. L. Exs. 250, 251, L. Tr. 3897).

These trends continued and accelerated in the 1960’s (*see* Pl. L. Ex. 252, L. Tr. 3897 [1970 census]; L. Tr. 288). Thus, not only the activity in the area east and north of the High-Broad intersection, but also most of the other school construction and zoning decisions made by the school board had a direct and immediate impact on the minority composition of the Columbus public schools. As the district court found (Pet. App. 25):

This opportunity [to bring about integration rather than segregation through school construction and

³² 42 U.S.C. §§3601 *et seq.*; *see also*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

zoning without pupil transportation] existed, and continues to exist in those areas of the city where the population shifts from one race to another. An examination of the census maps for the years 1950, 1960 and 1970 discloses a general pattern of high density (50 to 100%) black population in the center of the city fringed by areas of lesser, but still substantial (10% to 50%), black population. The remainder of the city is predominantly white, although there are pockets of white population within the central city area, and pockets of black population in the outlying areas.

Unfortunately, these opportunities to avoid segregation were not seized. Instead, the consistent result of school board policy and action since 1954 has, with rare exception, been to keep blacks in black schools where they are located in established areas of black residence, and to protect whites from attending schools with substantial black student populations for as long as possible in areas into which blacks were moving.³³ Despite the growth of the system in absolute terms and the redistribution of white and minority population, there has been little change in the patterns of school segregation (Pl. L. Exs. 458, 460, L. Tr. 2135-36).³⁴

³³ This was the pattern of school board actions in the Park Hill area held segregative in *Keyes v. School Dist. No. 1, Denver*, 303 F. Supp. 279, 289 (D. Colo. 1969), *aff’d* 445 F.2d 990 (10th Cir. 1971), *vacated and remanded on other grounds*, 413 U.S. 189 (1973); *see* 413 U.S. at 199 n. 10 and accompanying text. *See also*, *Milliken v. Bradley*, 418 U.S. 717, 725-26, 738 n. 18, 745 (1974).

³⁴ These exhibits indicate that in 1964, 36.3% of Columbus’ black student enrollment was in schools over 90% black, and in 1975, the corresponding figure was 30.2%. At the elementary grade level, the percentage of black students in schools at least 90% black in 1964 was 38.1%; in 1975-76 it had declined only to 34.6%. Segregation actually *increased* during the middle of that time span;

2. *Post-Brown actions leading to segregation.* In his opinion on liability, the district judge remarked that

[t]he complexity and the sheer volume of the evidence presented in this case have delayed this opinion long past the point at which the Court would have preferred to have rendered a decision.

(Pet. App. 2.) Based upon his extensive and thorough review of that evidence, as noted above (pp. 7-8 *supra*) the district court found system-wide intentional segregation having pervasive current effects. Because the district court's opinion elaborates only upon *examples* of post-1954 discrimination by the school authorities, rather than setting out *every* act at *every* school (*e.g.*, Pet. App. 21, 29, 61; *cf.* Pet. App. 94),³⁵ this case has been portrayed as one involving only isolated segregative acts. (*E.g.*, Pet. Br. 19, 22). See discussion, pp. 3-10 *supra*. In the factual summary which follows, we attempt to sketch the overwhelming nature and broad compass of the evidence which supports the trial judge's ultimate findings.³⁶ In the dis-

in 1970-71 51.7% of black elementary pupils and 45% of all black pupils were in virtually all-black schools. Pl. L. Ex. 459, L. Tr. 2135-36.

³⁵ See *Keyes v. School Dist. No. 1*, *supra*, 413 U.S. at 200.

³⁶ The evidence may be placed in three categories according to its treatment by the district court. *First*, certain evidence was fully described in the trial judge's opinion, such as that involving the patterns of faculty and principal-assistant principal assignments. (See Pet. App. 14-15, 60-61). *Second*, a large body of evidence was not summarized in detail in the opinion; but instead, representative examples were set out. (See Pet. App. 20-42.) This evidence included not only other examples of those segregative devices appearing in the internal headings of the court's opinion (school construction, optional attendance areas and boundary changes, discontinuous attendance areas, the Innis-Cassady alternatives) but also other practices of the sort described (school-to-school transportation to relieve overcrowding, *see* note 21 *supra*; rental of non-school facilities for the same purpose, other boundary line shifts,

strict court and Court of Appeals' opinions, this evidence was grouped by administrative technique; this method of presentation necessarily fragmented an either geographic or chronological overview of segregation in the Columbus public schools, and it may have contributed to the picture of the evidence as a group of "isolated instances." Below, we attempt a somewhat different organization of the evidence in order to show the extent to which segregation was practiced throughout all geographic areas of Columbus and during all of the more than score of years between *Brown I* and the trial of this matter.

a. *Faculty and staff assignment policies.* As noted above, Columbus school faculties were rigidly segregated in 1949. Former Superintendent Fawcett testified that by the time he left his post in 1956, a start toward elimination of this practice had been made with assignments of at least one opposite-race teacher at each of approximately 38 schools (A. 575). However, little alteration of the overall assignment pattern appeared prior to 1973. Although the proportion of black faculty systemwide increased in the decades after *Brown*, most continued to be assigned to schools where there were large numbers of black students. A glance at statistics showing which schools had substantial proportions of black faculty between 1964 and 1973 (racial statistics are unavailable on a systemwide basis prior to 1964) gives a clear indication, with few exceptions, of the schools with significant black populations. See A. 775-801, L. Tr. 3909. Each of the 25 Columbus schools which has had a majority-black faculty between 1964 and the time of trial had a majority-black pupil enrollment at the time, with

grade restructuring, etc. *Third*, certain evidence presented by the plaintiffs was found to lack "sufficient impact to be helpful in the resolution of the issues" (Pet. App. 20 n.2). In this brief, therefore, we limit discussion to the first two categories.

only two exceptions: Mohawk Elementary in 1966, and Heimandale. Indeed, every school whose faculty has been 30% or more black since 1964 was majority-black at the time, except for Mohawk, Lincoln Park in 1968, and Heimandale; the latter school was disproportionately black in comparison to adjacent facilities (*see pp. 48, 62-63 infra*. A. 775-801, L. Tr. 3909. *See also* note 164 *infra*).

In many instances, a school's increase in black faculty paralleled its increase in black student enrollment. (A. 775-801, L. Tr. 3909.) For example:

	1964	1965	1966	1967	1968	1969	1970	1971	1972
Alum Crest									
% Black Students	50.0	70.0	80.0	72.9	67.3	77.0	78.6	86.4	78.5
% Black Faculty	33.0	40.0	40.0	50.0	42.9	40.0	46.2	87.5	77.8
Deshler									
% Black Students	7.0	11.0	20.0	35.1	39.1	46.6	51.2	53.8	59.6
% Black Faculty	—	4.2	8.3	—	7.7	12.5	12.5	20.6	16.2
Beery Jr.									
% Black Students	22.3	20.0	35.0	39.6	54.1	61.4	66.9	67.2	68.9
% Black Faculty	—	—	3.1	7.5	10.8	7.5	20.9	19.5	27.3
Linmoor Jr.									
% Black Students	60.0	70.0	75.0	84.4	88.7	89.6	92.5	95.0	97.2
% Black Faculty	—	8.3	15.9	24.3	26.8	25.8	27.4	34.5	32.2
Roosevelt Jr.									
% Black Students	39.6	43.0	45.0	55.8	55.5	55.1	68.2	69.6	74.4
% Black Faculty	5.1	8.8	8.6	9.5	12.5	15.2	19.1	23.3	34.7
Linden-McKinley									
% Black Students	12.1	15.0	34.0	45.0	49.4	55.8	62.2	79.9	89.6
% Black Faculty	—	1.4	2.8	6.1	7.9	10.9	15.4	27.3	44.4

These faculty allocation practices were reinforced by the assignment of black principals and assistant principals. At the time of *Brown* all black principals were assigned to predominantly black schools; no black held a high school principalship. (Pet. App. 10; *see p. 21 supra*; A. 402-06.) Fourteen years later, 11 of 13 black principals were still at schools more than 70% black (Pl. L. Ex. 448A, L. Tr. 3911).

A black had finally reached the post at a senior high school—but was working at East, then 98.9% black (A. 785; Pl. L. Ex. 448B, L. Tr. 3911). As late as 1968, no black principal was assigned to a majority-white school (Pl. L. Exs. 449A, B, C, L. Tr. 3911). In 1972-73, 20 out of 24 black principals were assigned to schools with student enrollments more than 70% black (Pl. L. Ex. 450A, L. Tr. 3911).³⁷ All three black principals of high schools in 1972-73 were placed at such predominantly black facilities (Pl. L. Ex. 450B, L. Tr. 3911). The Division of Administration was aware of this pattern but made no recommendation that it be altered when the assignment of principals was annually reconsidered (A. 316-18, 401-06).

In 1972, as a result of complaints filed by the Northwest Columbus Area Council for Human Relations and the Columbus Area Civil Rights Council, the Ohio Civil Rights Commission commenced enforcement proceedings against the school district for faculty segregation. In 1973, the Commission and the school district reached a settlement agreement contemplating reassignment of faculty to each school in racial proportions generally corresponding to the systemwide representation of minority faculty members. (*See* Pl. L. Exs. 223, 229, 230; A. 253-54.) Recent school-by-school figures reflect the reassignments made pursuant to that agreement (*see* A. 789-801, L. Tr. 3909). However, the Ohio Civil Rights Commission proceedings did not involve the question of assignments for principals and assistant principals, and Columbus did not take voluntary steps having a substantial impact. At the time of trial, 22 of 30 black principals, and 6 of 15 black assistant princi-

³⁷ The assignment of assistant principals reflected much the same patterns. In 1968-69, 2 of 6 black assistant principals were at schools having enrollments greater than 70% black (Pl. L. Ex. 448A, L. Tr. 3911). For 1972-73, the corresponding figures were 10 of 15 black assistant principals (Pl. L. Ex. 450A, L. Tr. 3911).

pals, were still at schools more than 70% black (Pl. L. Ex. 409A, L. Tr. 3910; see A. 317-18.)

b. *Application of the "neighborhood school" policy.* Throughout the post-1954 period of expansion within the Columbus school system, the school board claimed to be proceeding in its school construction and attendance zoning actions on the basis of the "neighborhood school" principle. According to this thesis, school authorities were guided by a set of racially neutral principles and any segregation among the student bodies of the public schools resulted from patterns of housing segregation over which the school authorities had no control and to which they did not contribute (Pet. App. 49-50). This claim raised both a factual and a legal issue. The factual question is whether the post-*Brown* actions of the Columbus school board are consistent with any meaningful elucidation of the "neighborhood school" principle. The legal issue is whether a school board which is aware of patterns of severe residential segregation resulting from racial discrimination may constitutionally choose to superimpose upon this grid of known residential segregation a "neighborhood school" policy of pupil assignment with predictable school segregation results. Relevant to this legal issue are the matters of the school authorities' knowledge about residential patterns and the alternative courses of conduct realistically open to them. Evidence on all of these subjects appears in the record of these proceedings.

As it has been formulated throughout this case, the "neighborhood school" principle involves the location of facilities and establishment of attendance areas such that most pupils may walk to school (A. 227-28). At least since 1950, Columbus has used a specific set of desirable maximum "walking distances" as a guide: usually $\frac{3}{4}$ mile for elementary school students, $1\frac{1}{2}$ miles for junior high school

students, and 2 miles for senior high school students (see Pl. L. Ex. 59, L. Tr. 3882, at 73; Pl. L. Ex. 60, L. Tr. 3882, at 61; Pl. L. Ex. 61, L. Tr. 3882, at 55; Pl. L. Ex. 62, L. Tr. 3882, at 56; Pl. L. Ex. 63, L. Tr. 3882, at 76; Pl. L. Ex. 64, L. Tr. 3882, at 62). However, as articulated in the studies done jointly with Ohio State University educational consultants commissioned by the school system to help document school construction needs to be financed by bond issues (A. 550, 559), the "neighborhood school" concept is not inflexible. The studies consistently noted that schools could successfully serve wider areas where transportation was available (Pl. L. Ex. 60, L. Tr. 3882, at 61; Pl. L. Ex. 61, L. Tr. 3882, at 55; Pl. L. Ex. 62, L. Tr. 3882, at 56; Pl. L. Ex. 63, L. Tr. 3882, at 76; Pl. L. Ex. 64, L. Tr. 3882, at 62). They also recommended that transportation of pupils be continued in appropriate instances. *E.g.*, Pl. L. Ex. 59, L. Tr. 3882, at 87 [American Addition; Eastgate].

The "neighborhood school" concept as it is now practiced does not have a long history in Columbus.³⁸ The 1938 school zones are considerably larger than most attendance areas today (*compare* Figs. 12-14, Pl. L. Ex. 58, L. Tr. 3882, at 105, 107, 111 *with* Pl. L. Exs. 278, 299, 320, L. Tr. 3898). Yet in 1950 the authors of the Ohio State study commented that:

Except in areas of recent residential expansion, Columbus schools are in general well located with respect to distances which pupils must travel in order to attend them.

³⁸ In their Brief, Petitioners claim that the "neighborhood school policy" as now practiced in Columbus "has consistently [been] adhered to . . . since before 1900" (Pet. Br. 17 at n.7). However, Petitioners cite no record evidence to support this statement. See text *infra*.

(Pl. L. Ex. 59, L. Tr. 3882, at 72.) Pupils have always been transported to school within Columbus and in the surrounding township school systems which operated facilities later annexed by the city (A. 233-34).³⁹ Former Superintendent of schools Novice Fawcett testified simply that the "neighborhood school" philosophy was adopted in 1950 because, he assumed, that was the general direction in which the system was headed (A. 556).

The notion of building walk-in schools, together with the contemporaneous adoption of maximum school size goals (see Pl. L. Ex. 62, L. Tr. 3882, at 56) had profound consequences for the racial composition of newly constructed facilities in Columbus. Smaller schools drawing primarily students who lived within walking distance were more likely to contain uniraical populations. Since blacks in particular were subject to widespread discrimination which sharply curtailed their freedom to select places of residence outside informally designated areas of Columbus (see A. 244-46; L. Tr. 1484, 1513, 2145-56; cf. L. Tr. 2463-65, 1794-1800), even a scrupulously neutral application of these criteria⁴⁰ would predictably incorporate residential segregation into school zoning.⁴¹

Successive Columbus Boards of Education chose to adhere to the "neighborhood school" philosophy as a par-

³⁹ Note, for example, the size of the zones for the Clarfield and Courtright elementary schools annexed from Marion-Franklin Township, Pl. L. Exs. 261, 262, L. Tr. 3898. Obviously, most of the students attending these facilities were transported.

⁴⁰ As we demonstrate below, this is not what occurred in Columbus. The so-called "neighborhood school" philosophy as practiced in Columbus was so fluid, so subject to exception and manipulation, as to fail to exist altogether.

⁴¹ Cf. *Brewer v. School Bd. of Norfolk*, 397 F.2d 37 (4th Cir. 1968); *Sloan v. Tenth School Dist. of Wilson County*, 433 F.2d 587 (6th Cir. 1970).

adigm of how the school system should function even though made well aware of the segregative consequences. For example, in the early 1960's, a former Vanguard League official communicated on several occasions with the Board president to point out that schools planned for new subdivisions would be all-white schools unless developers made an affirmative commitment to open housing (A. 197-202). In 1964, the opening of Monroe Junior High as a 100% black school in the east-central part of the city drew sharp protests over segregation (A. 602-03). An NAACP official who became President of the Gladstone Elementary PTA recounted his vain efforts to get the school board to construct a facility of adequate size in a location where it could be integrated (A. 212-14). Many local organizations called the attention of the school board to increasing pupil segregation in the school system, including the NAACP (A. 203-12; L. Tr. 937-50), the Urban League (L. Tr. 2190-2206), the League of Women Voters (L. Tr. 1995-2000, 2010-13), and the Columbus Area Civil Rights Council (L. Tr. 238-40). In 1968, an independent Ohio State University study requested by the Board (Pl. L. Ex. 194, L. Tr. 3885, at 2-3) reported:

Foremost among th[e] problems [in Columbus] is de facto [*sic*] racial and socioeconomic segregation in the schools. Twenty-five percent of Columbus school enrollment is Negro. However, in 38 schools Negroes constitute more than 50 per cent of the student body, in 30 schools more than 75 percent, and in 15 schools more than 95 per cent. . . .

(*Id.* at 21; see A. 606-07). The Cunningham Report, as the document became known, recommended a policy of "managed integration," "at least until genuine open housing is achieved in the metropolitan area" (Pl. L. Ex. 194, L. Tr. 3885, at 90). This report followed close on the heels

of a detailed set of recommendations for integration presented by the NAACP in 1966 to the "Intercultural Council," an advisory body created by the Board of Education (A. 208-09; Pet. App. 16). The recommendations called for contiguous pairings and reshaping of attendance zones (A. 209-12) without long-distance transportation of pupils. Indeed, the rebuttal to these recommendations which was prepared by the school system (Pl. L. Ex. 477, L. Tr. 3917) included a series of 13 maps dramatically illustrating examples of contiguous and virtually contiguous attendance areas for schools of substantially differing racial makeup in Columbus.

None of these recommendations was acted upon (A. 203-08; L. Tr. 2203-06, 2220, 2226, 2255). Although the board in 1967 adopted a policy of taking race into account when siting new facilities (Pl. L. Ex. 53, L. Tr. 3882), it continued to adhere to its segregative version of the "neighborhood school" plan. The new policy also was not applied to the zoning or rezoning of existing facilities (A. 359-60, 606). In 1970 and 1971, both a former Vanguard League official and the Housing Opportunity Center of Columbus wrote on several occasions to the board president and to the school board requesting that, if the system was to continue constructing "neighborhood schools" in newly developing subdivisions, it take steps to insure that blacks would have the opportunity to reside in those areas. In response to one such letter, it was suggested that the school board sought to minimize costs by purchasing sites before development was completed, and that other matters should be the responsibility of the city and not the school district (A. 197-202, 249-51). The following year, a majority of the school board voted, along racial lines, not to establish a site advisory committee which would advise the school board of the "probable composition of neigh-

borhoods" and "the probable effects of locating a school on a particular site," as well as seek open housing commitments from developers and lenders with respect to new housing in areas which might require additional school construction (A. 359-60, 646-48; Pl. L. Ex. 44, L. Tr. 3881).

There can be little argument, then, that the Columbus school board has steadfastly maintained a verbal commitment to the so-called "neighborhood school" approach to pupil assignment even though it was aware that this would produce a high degree of racial segregation; and even though it was aware of alternative assignment mechanisms which had been endorsed by leading educators. The district court considered this fact as one element of the case:

... Substantial adherence to the neighborhood school concept with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn. (Pet. App. 49.)

c. *Deviation from the "neighborhood school" system.* In this section we describe, generically, important operational techniques employed by the Columbus school system in the years after *Brown* which were departures from the principle of "neighborhood schools." In numerous instances the result was to create or exacerbate school segregation—and in many of these cases, no educationally grounded rationale for the assignment device could be articulated. In those instances, the only basis on which use of the pupil assignment scheme could be explained was a racial one (as plaintiffs' expert witness Dr. Gordon Foster testified; e.g., A. 474-76, 483, 505).

Several examples of these administrative practices were extensively described in the district judge's opinion (Pet. App. 26-42). The court did not limit its findings only to these specified examples, however (*see* Pet. App. 94). Rather, the district judge's consideration of the entire record was informed by the strong evidence of discriminatory intent revealed by the examples set forth in the opinion as well as from other actions about which proof was presented:

... The Columbus Board even in very recent times, has approved optional attendance zones, discontinuous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has abjured workable suggestions for improving the racial balance of city schools.

Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, *and the other such actions and decisions of the Columbus Board of Education in recent and remote history*, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion. (Pet. App. 61.) (emphasis added.)

We describe in detail in the next section how the administrative decisions of the board and staff created, aggravated or perpetuated racial segregation in the public schools. Here we briefly describe four major devices, other than school construction and faculty assignments, utilized for this purpose.

Optional attendance areas. According to the "neighborhood school" principle, facilities are located within walking

distance of the residences of pupils who are assigned to them by drawing attendance zones. The board's witnesses contended that this permits efficient loading of buildings, avoids the cost of pupil transportation, and permits close identification between students, parents (the "school community"), and the school. (*See* A. 228, 628; Pl. L. Ex. 477, L. Tr. 3917.) To maximize optimal use of each facility, boundaries should remain flexible enough to be adjusted in response to changes in residential density (Pl. L. Ex. 59, L. Tr. 3882, at 40 [1950 Ohio State facilities study]).

In Columbus, an exception to these principles was made when optional zones were created. Students living in such zones could choose to attend any of two or more facilities to which the option applied. Optional areas therefore created greater uncertainty about pupil enrollment prior to the actual start of classes than was the case where fixed zones were established.⁴² They could also weaken the desired identification between home and school. And where the choice offered was between schools of substantially differing racial composition, these devices could serve as potent means of segregating school enrollments.⁴³

Optional zones proliferated in the Columbus system during the post-*Brown* era. Former Superintendent Fawcett recalled them mostly as a means of providing flexibility to deal with overcrowding in "neighborhood schools,"⁴⁴ and did not think they had a racial dimension (A. 576). However, the school system administrator who dealt with zon-

⁴² *Cf. Moses v. Washington Parish School Bd.*, 276 F.Supp. 834 (E.D. La. 1967).

⁴³ *See* cases cited in note 33, *supra*; *cf. Goss v. Board of Educ. of Knoxville*, 373 U.S. 683 (1963).

⁴⁴ This was not the sort of flexibility called for by the 1950 Ohio State facilities study, which had recommended rezoning (Pl. L. Ex. 59, L. Tr. 3882, at 40).

ing on a day-to-day basis found them useful only as temporary devices when new schools were being opened, to preserve continuity for students; they were a "gamble" if used to relieve overcrowding (A. 634-35). He eliminated most optional attendance areas during his tenure because they served no purpose (A. 635-36) and found it "very difficult . . . to grasp the reasons" why his predecessors had created the optional zones in the first place (A. 636). These zones existed between long-established schools, or were maintained long past the transition period when new schools were opened—and many seemed to have no purpose other than to permit students to choose between white and black schools. The district court's opinion describes the "Near-Bexley," Highland-West Mound and Highland-West Broad options at length. Evidence of optional zones having substantial racial effect was also introduced with respect to Franklin and Roosevelt Junior High Schools, the "Downtown Option" (see pp. 15-16 *supra*), Fair and Pilgrim Elementary Schools, Pilgrim, Eastwood and Eastgate Elementary Schools, Main and Livingston Elementary Schools, Linmoor and Everett Junior High Schools, Central and North High Schools, and the East and Linden McKinley High Schools. See text *infra*.

Discontiguous attendance areas. This term refers to geographic portions of a school's attendance zone which are unconnected to other portions of the zone and which may be a considerable distance from the school facility to which they are assigned. In most instances pupils living in discontiguous attendance areas require transportation in order to reach their classes.⁴⁵ Hence the maintenance of dis-

⁴⁵ Optional attendance zones, described in the preceding paragraphs, may be contiguous to the schools they serve, as in the case of the optional zones between Highland, West Broad and West Mound Elementary Schools discussed in the district court's opinion, see Pet. App. 85, or they may be discontiguous, as in the

contiguous areas is inconsistent with the "neighborhood school" concept. While it may be necessary as a temporary measure (for example, when rapid population growth overcrowds all school facilities and construction of additional facilities cannot be completed in a timely fashion), in other circumstances it may serve as a tool to maintain segregated schools. When space is in fact available at nearby schools which are predominantly of one race but students of another race in a discontiguous zone are bused further to schools in which the enrollment is predominantly of their own race, courts have drawn an inference of segregative intent.⁴⁶

The district court's opinion uses the Moler and Heimendale-Fornof discontiguous zones as examples of the Columbus system's use of these devices (Pet. App. 33-35). In addition, there was uncontradicted evidence of discontiguous assignments of American Addition and Arlington Park junior high school students; and of discontiguous assignments of elementary school pupils to the Barnett School in the 1960's, and to the Linden School in the late 1950's and early 1960's. See note 15 *supra* and text *infra*.

Segregative relocation of classes in other schools. Closely related to discontiguous zoning is the practice of maintaining formal contiguous zone lines for an overcrowded facility but transporting one or more classes (along with their teachers) to another school after the pupils have assembled

case of the "Near-Bexley" options, see Pet. App. 82-84. Usually, when the discontiguous area is an optional zone, the pupil is responsible for providing transportation. On the other hand, the Columbus school system furnished transportation in the case of non-optional "discontiguous areas."

⁴⁶ "Satellite" or "island" zoning, which utilize discontiguous assignment areas, are common *desegregative* techniques. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 8-9, 27-29 (1971).

at a central pickup point (usually the "neighborhood" school). During the post-*Brown* era when the student population of the district was rapidly expanding, Columbus made extensive use of this technique (see A. 401-02, 612).⁴⁷

Often, classes from a school predominantly of one race were transported past schools predominantly of the other race to "same-race" facilities (L. Tr. 3601-13). In other instances, students were sent to schools of differing racial composition (L. Tr. 5339-78); however, classes from the separate schools were maintained intact rather than being integrated (L. Tr. 3612-21; see also, A. 701-14). While the trial court's opinion did not focus on the segregative consequences of the district's intact class transportation, neither did it exclude evidence of such practices from its consideration.

Rental facilities. Another way in which overcrowding can be accommodated is by the leasing of non-school system facilities. When such facilities are available at locations close to the overcrowded schools, they make assignments without additional transportation possible. However, if space is available elsewhere in the school system but the rental device is still employed, it may result in avoidable segregation of pupils. Taken together, a system's choices about how to deal with overcrowding through a combination of intact class transportation and renting can have very significant consequences for pupil segregation or integration. In the 1970's, Columbus used rented facilities segregatively when integrative reassignments would have been possible, especially if other, same-race intact class arrangements had been modified. See text *infra*. Testi-

⁴⁷ In 1950, the Ohio State facilities study had recommended shifting the boundaries of adjacent schools in order to deal with such situations, rather than intact class relocation. See Pl. L. Ex. 59, L. Tr. 3882, at 40.

mony about the segregative use of rental facilities was received and reviewed by the district court in reaching its conclusions as to systemwide intent and liability.⁴⁸

Construction and boundary establishment. Even the most elaborate "neighborhood school" theory leaves a great deal of discretion to school officials with respect to the construction of facilities and the setting of boundaries for attendance areas.⁴⁹ The recommended walking distances are merely general guides, and transportation is often required. (A. 229-31, 361-62). It is the establishment of the zone line, in fact, which defines the "neighborhood" (A. 323). Although obstacles such as highways and railroad tracks are considered (A. 627), even at the elementary school level in Columbus zones have always crossed such barriers.⁵⁰ As population density changes, established "neighborhood school" zones may be subdivided, or capacity expanded through an addition or separate primary grade center which may "contain" students of one racial group at the school (see A. 319-20). Schools may be constructed at the request of private developers (A. 401; see also, A. 601; L. Tr. 1485) or sites selected even before development starts (A. 562, 601-02). The choices which are made among all of these factors each time a school is to be

⁴⁸ See also note 36 *supra*.

⁴⁹ That discretion may, of course, be exercised to accomplish either segregation (as in the matter of gerrymandering the Fair Elementary boundary in 1937, see pp. 18-19 *supra*), or integration (as in the case of the boundaries for Southmoor Jr. High School established in 1968, see p. 71 *infra*).

⁵⁰ For example, the 1937 Fair and Douglas Elementary zones crossed Broad Street, see Fig. 14, Pl. L. Ex. 58, L. Tr. 3882, at 111; the 1957-58 elementary school zones for Forno and Clarfield crossed railroad tracks along which they were subsequently aligned (compare Pl. L. Exs. 251, 261, 266, L. Tr. 3897, 3898); since 1970, the Barrett Junior High Zone has crossed the Scioto River (see Pl. L. Exs. 252, 294, 299, L. Tr. 3897, 3898).

built, or a zone line established or modified, may have much to do with the racial distribution of pupils among a district's school buildings.⁵¹

The district court's opinion recognized the critical importance of school construction and zoning (Pet. App. 20-25). The evidence in the record on these subjects goes far beyond the two examples selected by the court for discussion in the body of its opinion. *See text infra*.

⁵¹ The school board's principal defense during the liability trial was that it had constructed facilities at locations recommended in the periodic facilities needs surveys commissioned by the board from Ohio State University (e.g., A. 571). The district court did not find this explanation persuasive. The evidence indicates that the principal function of the studies was to document anticipated population growth so that voters in bond campaigns could be assured that the school board was not proposing unnecessary school building (e.g., A. 550, 559). The system used the University's technical expertise, for example, in defending a reduction in the rated pupil capacities of its secondary grade level facilities based on a system developed by an Ohio State faculty member (A. 582-83). However, the Ohio State studies were limited in scope and they were hardly the independent product of outside researchers. The basic methodology was for school system administrators to have the major responsibility. They would gather data and prepare a draft report, subject to general supervision from University representatives (Pl. L. Ex. 59, L. Tr. 3882, at iii; P. L. Ex. 61, L. Tr. 3882, at iii; Pl. L. Ex. 62, L. Tr. 3882, at iii; Pl. L. Ex. 63, L. Tr. 3882, at iii; Pl. L. Ex. 64, L. Tr. 3882, at iii. *Compare* Pl. L. Ex. 194, L. Tr. 3885, at 2-3). Basic constraints such as desirable school size and walking distances were established by the school system subject to Ohio State's agreement that they were not educationally unsound (A. 597).

While the reports included recommendations for construction on specific sites, they did not purport to suggest how pupils should be assigned to those facilities but only to document the need for additional capacity in certain areas of the district. Moreover, the studies did not include any consideration of means either to desegregate the schools or to avoid reinforcing the existing segregation (A. 577, 599). The record is clear that Ohio State could have provided valuable assistance toward dismantling the segregated system had it been asked (*see* Pl. L. Ex. 194, L. Tr. 3885). The Columbus system studiously avoided asking for this assistance.

d. *The 1950's*. In the 1950's, the growth of the black population and its territorial expansion outside the area north of Broad and east of High Street presented the Columbus school system with opportunities to afford a desegregated education. Instead, the same techniques used prior to *Brown* to extend segregation (*see* pp. 15-21 *supra*) were employed anew.

For example, although the "Downtown Option" area still included many white residences (A. 479-80), the option permitting white students to avoid attending predominantly black schools east of High Street remained in effect until 1975, with only minor modifications (A. 480-84).

Additional optional zones were created in areas of racial transition. In 1951, the gerrymandered Fair Elementary zone north of Broad Street was modified to create an optional area between Fair and Pilgrim (A. 501). When the Eastwood School was reopened in 1954, the boundary for Fair was reestablished at Broad Street (*see* Fig. 2, Pl. L. Ex. 61, L. Tr. 3882, at 17) and the option changed to one between Pilgrim and Eastwood; in 1955, following construction of the permanent Eastgate facility, it was altered to allow students to select any of the three (*see* Pl. L. Exs. 261, 250, L. Tr. 3897, 3898), and in 1960 it was again limited, this time to Pilgrim and Eastgate (A. 501-03).⁵² Plaintiffs' expert witness Dr. Gordon Foster could discover no capacity problem which these optional zones could have been designed to ease and concluded that the purpose was to facilitate white students' avoidance of Pilgrim as the black population moved eastward (A. 503).

⁵² Interestingly, the first Ohio State facilities study had recommended retention of portables at Eastgate because the site was isolated on the north and west by railroad tracks (Pl. L. Ex. 58, L. Tr. 3882, at 116). The optional zones established in the mid-1950's crossed the tracks.

The black population was also growing in the area south of Broad Street (*compare* Pl. L. Exs. 250, 251, L. Tr. 3897). In 1954, the board established an optional area between Main and Livingston Elementary Schools which was retained for eight years although neither school had more severe capacity problems than the other; in 1964, Main was 77% non-white but Livingston only 27% non-white (A. 485-87, 489). In 1955, an optional zone was established between the Franklin and Roosevelt Junior High Schools (*see* Pl. L. Ex. 281, L. Tr. 3898). This optional area had previously been a part of the Franklin zone and was returned to Franklin in 1961; during the period of its existence, Franklin was under capacity and Roosevelt was first overcrowded and subsequently less underutilized than Franklin. The optional zone was in a racially changing area and it permitted white students formerly assigned to Franklin to attend Roosevelt during the residential transition. In 1964, Roosevelt was 40% non-white; Franklin was 86% non-white. (A. 458-64).

Also in 1955, the Franklin Junior High zone was modified in the area north of Broad Street. The Shepard Elementary zone was reassigned to newly opened Eastmoor Junior High School while the Eastgate elementary area remained assigned to Franklin.⁵³ (*See* Pl. L. Exs. 261, 281, L. Tr. 3898.) The 1960 census shows blacks to have been moving much more rapidly into the Eastgate area than into Shepard (Pl. L. Ex. 251, L. Tr. 3897). In 1964, Franklin was 86% non-white and Eastmoor 30% non-white (A. 783, L. Tr. 3909).

Four years later, the board created another set of optional zones (the "Near-Bexley" option) in this part of the city. The area of Columbus to the east of Alum Creek,

⁵³ Both had been assigned to Pilgrim Junior High prior to 1932. *See* pp. 17-18 *supra*.

formerly a part of the Fair Elementary, Franklin Junior High and East Senior High zones, was made optional for those schools or Fairmoor Elementary and Eastmoor Junior-Senior High (*compare* Pl. L. Exs. 261, 281, 302, L. Tr. 3898, *with* Pl. L. Exs. 263, 283, 304, L. Tr. 3898; *see* maps at Pet. App. 82-84).⁵⁴ The 1960 and 1970 census maps, based on block data, show the optional zone to be virtually all-white, in contrast to the rest of the Fair Elementary zone, for example. (Pl. L. Exs. 251, 252, L. Tr. 3897). Dr. Foster concluded that the options, which were still available at the time of trial, were racial in nature. (A. 449-58; *see also*, Pet. App. 26-29).

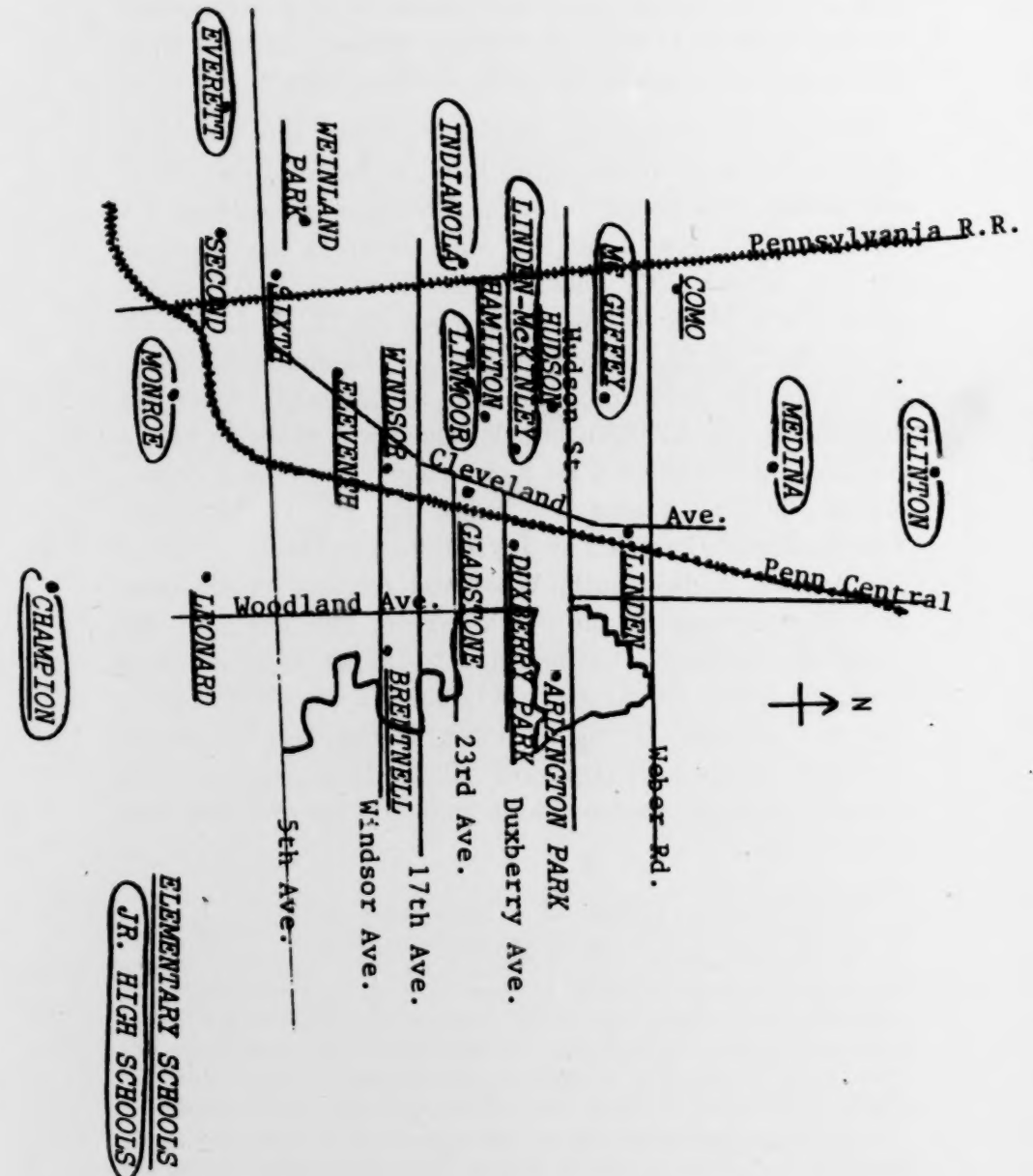
In the western part of the school district, the board also took steps to retain segregation. As the concentration of blacks in the "Hilltop" area west of the Columbus State School expanded (*compare* Pl. L. Exs. 250, 251, L. Tr. 3897), major changes were made in the boundaries of the school which previously served the area, Highland Elementary. (*See* map at Pet. App. 85.) First, in 1955 the portion of the zone which had extended north of Broad Street west of the State Hospital for nearly twenty years (*see* Fig. 14, Pl. L. Ex. 59, L. Tr. 3882, at 111) was made optional between the Highland and West Broad schools until 1957-58, when it was rezoned completely to West Broad. The receiving school was far more crowded than Highland, so the optional zone and boundary shift did not solve any capacity problems. Second, the board in 1955 established another optional zone, this one between Highland and West Mound elementary schools. It lasted until 1961-62 when it was permanently placed in the West Mound attendance area. While it did relieve slight overcrowding

⁵⁴ Between 1961 and 1963 the option included Johnson Park Junior High School in addition to Franklin (A. 454).

in Highland in some years, it also involved a predominantly white portion of Highland's attendance area and a predominantly white receiving school, West Mound. In 1964, Highland was 75% black, West Broad 100% white, and West Mound 85% white. There were available, feasible alternatives which would not have produced the same, predictable, segregative result (A. 469-78; *see also*, Pet. App. 29-33.) Highland remained significantly different from adjacent schools in racial composition at the time of trial (*see* A. 775-82, L. Tr. 3909).

Across the river in the southern portion of the school district, a 1957 annexation brought the Heimandale and Fornof elementary schools into the system (Pl. L. Ex. 62, L. Tr. 3882, at 48). Their attendance areas included, at the time of annexation, a discontinuous zone within Heimandale but assigned to Fornof (A. 504; *see* Pl. L. Ex. 261, L. Tr. 3898). The census maps for 1960 indicated that the discontinuous zone coincided with blocks on which whites lived in greater proportions than in most of the rest of the Heimandale area (*see* Pl. L. Exs. 261, 251, L. Tr. 3897, 3898). Columbus kept the discontinuous area in effect until 1963; in 1964, when enrollment statistics are first available, Heimandale was 40% black and Fornof less than 1% black. (A. 504-06; *see also*, Pet. App. 34-35).

To the northeast of the central business district, movement of the black population into areas formerly occupied by whites, together with annexation of predominantly white suburban areas, also resulted in new school construction, rezoning, and segregation. (A map of this part of the school district showing approximate locations of schools and streets appears on the opposite page; the demonstrative exhibits—maps and overlays—to which reference is made have been lodged with the Clerk and are available for the Court's reference.)



In 1957, the Arlington Park area was annexed to the Columbus school district. The system had previously purchased a site in the area and opened a new elementary facility in 1957. It enrolled no black students in 1964, when data are first available (A. 776, L. Tr. 3909).⁵⁵

Before the annexation, territory within the Columbus district just west of Arlington Park, as far south as Windsor Avenue, was zoned to Linden Elementary, less than 1% black in 1966, even though it was closer to the Eleventh Avenue school, 79% black in 1964, or to the Leonard School, 94% black in 1964 (*id.*). (See Fig. 2, Pl. L. Ex. 61, L. Tr. 3882, at 17.) The area just to the south, taking in the American Addition, was sent to Leonard. After the annexation, the Arlington Park School was zoned to take a portion, but not all, of what had formerly been the southern end of the Linden zone (see Pl. L. Ex. 261, L. Tr. 3898). The remainder, bounded by Joyce Street on the west, Windsor Avenue on the south, Woodland Avenue on the east, and 23rd Avenue on the north—again, just north of the American Addition—was assigned to Linden as a discontinuous area (see Pl. L. Exs. 261, 251, L. Tr. 3897, 3898). No white students living in this area were sent to either Eleventh Avenue or Leonard Elementary Schools even though capacity was available and Arlington Park was overcrowded.⁵⁶

⁵⁵ Unfortunately, because of a typesetting error, Pl. L. Exs. 383 and 385, L. Tr. 3909, as they were reprinted at A. 775-801, did not distinguish between years for which no statistics were available and years in which a school had either no black students or no black teachers. Both blank spaces and horizontal slashes were set as horizontal lines. Counsel have deleted the extra lines from the Court's copies and filed a copy of the original exhibits with the Clerk. Remaining lines on these pages indicate "zero" values.

⁵⁶ The following table, and others appearing in the footnotes in this section, are based on the grades 1-6 capacity and enrollment

This discontinuous zoning ended in 1959-60 with the opening of two new schools, Duxberry Park and Windsor. However, zone lines for these schools were drawn in a way which maintained racial separateness. The 1960 census indicates the main growth of black residential areas in the previous decade to have been between Cleveland Avenue, on the west, and the Penn Central railroad tracks, on the east (*compare* Pl. L. Exs. 250, 251, L. Tr. 3897). A small zone for Windsor was carved out of the Eleventh Avenue area westward from the railroad tracks; it was subsequently enlarged slightly and extended north to 17th Avenue (Pl. L. Exs. 263, 284A, 264, L. Tr. 3898), then a racial dividing line (A. 246). In 1964, Windsor was 91% black (A. 782, L. Tr. 3909). The Duxberry Park school zone took in the 1957-58 Linden discontinuous area, the territory adjacent to the Arlington Park annexed area, and a small plot north of 17th Avenue previously zoned to

figures in the Ohio State University facilities needs studies. In several instances, Petitioners make claims about the utilization of school facilities which they attempt to support by referring to the enrollments listed in Pl. L. Exs. 1 and 2, L. Tr. 3881, and the capacity figures in the Ohio State studies (*e.g.*, Pet. Br. 33). This comparison is improper for elementary schools since the enrollments in Pl. L. Exs. 1 and 2 include kindergarten figures but the Ohio State capacities are based on classrooms available for grades 1-6. See, *e.g.*, Pl. L. Ex. 61, L. Tr. 3882, at 49, 50. See also, *e.g.*, note 83 *infra*.

School	1957-58 Enrollment*	1956 Capacity**
Eleventh Avenue	776	792
Leonard	250	264
Linden	852	924
Arlington Park	402	384*

* Pl. L. Ex. 62, L. Tr. 3882, at 25, 26

** Pl. L. Ex. 61, L. Tr. 3882, at 49, 50

Although Linden had adequate space in 1957 to relieve overcrowding at Arlington Park, the following year it was well over capacity with an enrollment of 1,026, while Eleventh (803) and Leonard (261) were at far more comfortable levels.

Eleventh (Pl. L. Exs. 261, 263, L. Tr. 3898). In 1964, Duxberry Park was 30% black (A. 777, L. Tr. 3909).

At the junior high level, additional capacity was provided in the northeast when Linmoor Junior High opened in 1957. Although Linmoor was phased in one grade at a time, and Linden-McKinley's junior high school capacity was subsequently replaced in the 1960's,⁵⁷ the school's opening was the occasion for a series of zone alterations which had marked and long-term racial consequences. First, during the period when both Linmoor and Linden-McKinley were operating as junior high schools, a boundary was fixed such that Linden-McKinley served areas north of Hudson Avenue and east of the railroad tracks, including the Duxberry Park elementary zone (see Pl. L. Exs. 263, 283, L. Tr. 3898). The Linden-McKinley building, however, was actually located within the Linmoor zone (A. 494). Linmoor included the Cleveland Avenue corridor of increasing black concentration (*id.*).⁵⁸ Second, there appears to have been no reason why Linden-McKinley could not have been phased out as a junior high school upon the completion of Linmoor. Linmoor could then have served a zone which extended east beyond the railroad tracks and north beyond Hudson Street (as Linden-McKinley had previously done (see Fig. 3, Pl. L. Ex. 61, L. Tr. 3882, at 18)).⁵⁹

⁵⁷ Linden-McKinley became a senior high school only in 1964. Medina and McGuffey junior highs were opened to the north of Linden-McKinley and Linmoor, whose northern boundary was then maintained along Hudson Street—the racial demarcation line above 17th Avenue. See pp. 77-80 *infra*.

⁵⁸ The American Addition still sent its junior high school students to Champion, although it was located much closer to Linden-McKinley (*id.*).

⁵⁹ As the following table indicates, there was sufficient capacity without Linden-McKinley at Linmoor and adjacent junior high schools prior to the opening of Medina in 1960. Only in 1959-60

The immediate result of maintaining junior high grades at Linden-McKinley was to "underutilize" Linmoor and make possible the addition to its zone, in the guise of an optional attendance area, of territory to the south which had not been a part of the Linden-McKinley zone before Linmoor was constructed. This removed a predominantly black area from another junior high (Everett) and laid the groundwork for its inclusion in newly constructed, all-black Monroe Junior High School in 1964. The patterns thus established persisted at the time of trial.⁶⁰

Third, a year after the opening of Linmoor, an optional attendance area between Everett and Linmoor was established (see Pl. L. Ex. 282, L. Tr. 3882). Formerly the optional area had been a part of the Everett zone in 1956-57 and, for the seventh grade, a part of the Linmoor zone in 1957-58 (A. 491-92). The optional area was predominantly black according to the 1960 census (A. 493). It was not needed to relieve overcrowding at Everett, which was well under capacity (see note 59 *supra*). Dr. Foster concluded that its function was to allow the remaining whites living in the area to avoid a junior high school assignment

would there have been any overcapacity—and it would then have been very slight.

School	1959 Capacity*	Junior High Enrollment**			
		1956-7	1957-8	1958-9	1959-60
Linden-McKinley	—	1,164	995	825	690
Linmoor	1,000	—	270	661	1,021
Everett	1,300	1,326	1,077	968	878
Indianola	950	885	854	793	824
Champion	900	735	713	684	675
Clinton	900	601	667	771	991
Total	5,050	3,711	4,576	4,702	5,079

* Pl. L. Ex. 62, L. Tr. 3882, at 52-53.

** Pl. L. Ex. 62, L. Tr. 3882, at 25; Pl. L. Ex. 64, L. Tr. 3882, at 31.

⁶⁰ In 1975-76, Medina was 24% black, Linmoor 96% black, Monroe 99% black, and Everett 26% black (A. 783, L. Tr. 3909).

with the substantial numbers of black students attending Linmoor (A. 493). The optional zone was expanded in 1959 (*id.*) and continued until the opening of Monroe Junior High School in 1964 (*see pp. 79-80 infra*).

Also related to the Linmoor opening was the treatment of Arlington Park junior high school students. (A. 494-97.) When the area was first annexed, junior high school students were assigned to Linden-McKinley in a contiguous zone (*see Pl. L. Ex. 261, L. Tr. 3898*). As the number of Linden-McKinley senior high students increased, capacity problems seemed imminent. In 1959-60, Arlington Park junior high students⁶¹ were assigned, in a discontinuous zone, to Linmoor. Since Linmoor's attendance area also included the Cleveland Avenue corridor of increasing black concentration⁶² this assignment would have been integrative.⁶³ However, just as the Everett-to-Linmoor rezoning was made optional after a year (permitting whites to avoid Linmoor), the Arlington Park assignment was revoked in 1960. At that time, another new junior high school (Medina) was opened north of Hudson Avenue, taking a portion of the Clinton and Linden-McKinley zones (*see Pl. L.*

⁶¹ The elementary school serving this area was virtually all-white in 1964 (A. 776, L. Tr. 3909).

⁶² It also included predominantly black areas at its southern extremity which had formerly been assigned to Everett Junior High, *see p. 53 supra*.

⁶³ In 1959-60 Linmoor was slightly over its rated capacity (*see note 59 supra*). The following year, even though Arlington Park junior high pupils were removed from the school, *see text infra*, Linmoor was still slightly over capacity with an enrollment of 1,011 (Pl. L. Ex. 64, L. Tr. 3882, at 31). However, as we have previously noted, Linmoor was filled during these years by the inclusion of areas formerly in the Everett zone. Thus, not only did this shaping of attendance areas reduce integration at Everett and lead eventually to the opening of a new all-black junior high school at Monroe in 1964; it also provided a justification for maintaining the assignment of white Arlington Park pupils to white junior high schools (*see text infra*).

Ex. 284, L. Tr. 3898). Arlington Park junior high students were reassigned to Linden-McKinley in 1960-61 and 1961-62. The following year, the Medina zone was pushed even further northward by the conversion of the McGuffey school into a junior high (*see Pl. L. Ex. 286, L. Tr. 3898*). Although McGuffey (southern boundary at Hudson Avenue except for the Duxberry Park zone, *see Pl. L. Exs. 265, 286, L. Tr. 3898*), was closer, as was Linmoor, Arlington Park students were now assigned again as a discontinuous area—this time to Medina (*id.*). They were still so assigned at the time of trial (Pl. L. Ex. 299, L. Tr. 3898). In 1964, Linmoor, was 60% black and Everett was 35% black; McGuffey was 7% black in 1965; Medina was less than 1% black in 1966. By 1975, Linmoor was 96% black, Everett 26% black, and McGuffey 44% black; Medina was 24% black (A. 783, L. Tr. 3909). The defendants' only explanation for the assignments of Arlington Park junior high youngsters was that "it was decided" to handle them in the fashion described (A. 623-24).

Finally, during the 1950's the Columbus school system continued practices which perpetuated the racial isolation of students in the pre-1954-segregated area east of High and North of Broad Street, in addition to the Fair-Pilgrim, Fair-Eastgate-Eastwood, and "downtown" options. When black schools became overcrowded, their pupils were transported to other black schools.⁶⁴ A school construction pro-

⁶⁴ For example, in 1955-56, all sixth graders in the Garfield and Felton zones were sent to Pilgrim, while two classes from East Columbus were sent to Broadleigh (Pl. L. Ex. 61, L. Tr. 3882, at 25 nn. 15, 21). White elementary schools with available space for the overflow of sixth graders included Avondale, Bellows, Crestview, Deshler, Fairmoor, Glenmont, Heyl, James Road, Ninth, Northridge, Oakland Park, and Olentangy (*id.* at 23-24; A. 775-82, L. Tr. 3909). In 1964, Broadleigh was 2% and East Columbus 26% black (*id.*). Felton, Garfield and Pilgrim were all established as black schools prior to 1954, *see pp. 17-20 supra*, and remained overwhelmingly black in 1964 (*id.*).

gram in the area rebuilt Garfield on the same site in 1953, which was the functional equivalent of redrawing the same, heavily black attendance boundaries (A. 322), replaced Mount Vernon with Beatty Park in 1954, and created two new black facilities by further subdividing the area to create attendance zones for the Clearbrook (1957) and Maryland Avenue (1958) schools (Pl. L. Exs. 22, 23, 399, L. Tr. 2135-36, 3881, 3991; *see* Pl. L. Ex. 261, L. Tr. 3898).⁶⁵ Both of the latter schools were closed by 1973.

e. *The 1960's*. This decade saw a continuation of construction, attendance zoning, grade structure, and pupil transportation practices which ignored the possibilities for achieving racially mixed enrollments and instead contributed to further racial separation in the Columbus public schools. Year by year, and throughout the City, school authorities built schools, constructed additions, made assignments and shifted pupils so as to change integrated schools into racially segregated ones.

In the central city area, where optional zones such as those between Main and Livingston Elementary Schools, or Franklin and Roosevelt Junior High Schools, had been employed to allow white students to "escape" schools affected by the residential movement of blacks south of Broad Street (*see* p. 46 *supra*), the decade opened with the construction of Kent Elementary School in 1960. The new facility drew its enrollment from areas previously included in the Fairwood and Main elementary zones and, to

⁶⁵ Both schools were relatively small (*see* Pl. L. Ex. 384, L. Tr. 3909). Clearbrook served the portion of the Douglas zone north of Broad Street (predominantly black in 1950, Pl. L. Ex. 251, L. Tr. 3897) for grades 1-3 (L. Tr. 2885). In 1964, when racial enrollment figures were first collected, Clearbrook was 85% black and Maryland Park was 98% black (A. 775-82, L. Tr. 3909). The creation of these primary school centers contained black student populations which would otherwise have attended more racially mixed schools (A. 319-21); for example, in 1964 Douglas was only 54% black while Clearbrook was 85% black.

a lesser degree, in the Livingston and Ohio zones; the 1960 census indicated the new Kent area was predominantly minority (A. 489). Kent added capacity in an increasingly black part of Columbus south of Broad Street but north of Livingston Avenue; after it opened, the northernmost boundary for the underutilized but virtually all-white Deshler Elementary to the south remained fixed at Livingston, separating white and black pupils (A. 488-89). In 1964, Kent was 75% black and Deshler only 7% black (A. 777, 779, L. Tr. 3909).⁶⁶ Dr. Foster concluded that the siting and size of Kent perpetuated Livingston and Deshler as heavily white schools in an area of racial transition (A. 489).

In 1960 an optional attendance area was established between Central Senior High and North High. The optional zone (heavily white in 1960, *see* Pl. L. Exs. 305, 251, L. Tr. 3897, 3898; A. 464-65), was basically congruent with the lower portion of the Kingswood Elementary area (11% black in 1964, A. 779). It was formerly assigned to Central High and was reassigned to Central, which served the near-

⁶⁶ As the table indicates, Ohio, Main and Fairwood were overcrowded in 1959, but Deshler had a significant amount of space. Livingston, a predominantly white school, was also overcrowded and received an addition in 1960, Pl. L. Ex. 22, L. Tr. 3881. If Kent had been built as a larger facility and located further to the south, both it and Deshler, as well as Fairwood and Main, might have been zoned to include substantial numbers of both black and white students (*see* Pl. L. Ex. 284A, L. Tr. 3898).

School	1959 Capacity*	Enrollment**		
		1959-60	1960-61	1961-62
Main	352	662***	633	661
Livingston	416	469	502***	533
Ohio	544	849	683	696
Fairwood	512	636	616	645
Kent	372 (1964)**	—	272	300
Deshler	704	583	608	577

* Pl. L. Ex. 62, L. Tr. 3882, at 49-50.

** Pl. L. Ex. 64, L. Tr. 3882, at 32-33.

*** Addition constructed in 1960, Pl. L. Ex. 22, L. Tr. 3881.

western portion of the district, in 1975 (see Pl. L. Exs. 284A, 304, 305, 320, L. Tr. 3898; A. 464-66). Since there were no capacity problems at Central which could account for the loss of territory, Dr. Foster concluded that the option was designed to permit white students in the Kingswood area to attend the "white" North High School (A. 466).^{67, 68} A similar option was established in 1962 between East High (95% black in 1964-65) and Linden-McKinley High (12% black in 1964-65) (A. 466-69).

Typical of the manner in which construction, zoning and transportation decisions could be combined with far-reaching segregative consequences is the history, in this decade, of the area to the south of Columbus annexed in 1957 from Marion-Franklin Township. (A drawing of the area with schools and main streets located approximately appears on the opposite page; as previously noted, the demonstrative exhibits are available to the Court.)

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School	Capacity			Enrollment				
	1959*	1964**	1969***	1959-60**	1960-61**	1964-65**	1969-70†	1975-76†
Central	1,900	1,900	1,650	1,710	1,475	1,635	1,319	1,225
North	1,900	1,750	1,600	1,979	1,900	1,425	1,420	1,489

* Pl. L. Ex. 62, L. Tr. 3882, at 52.

** Pl. L. Ex. 64, L. Tr. 3882, at 31.

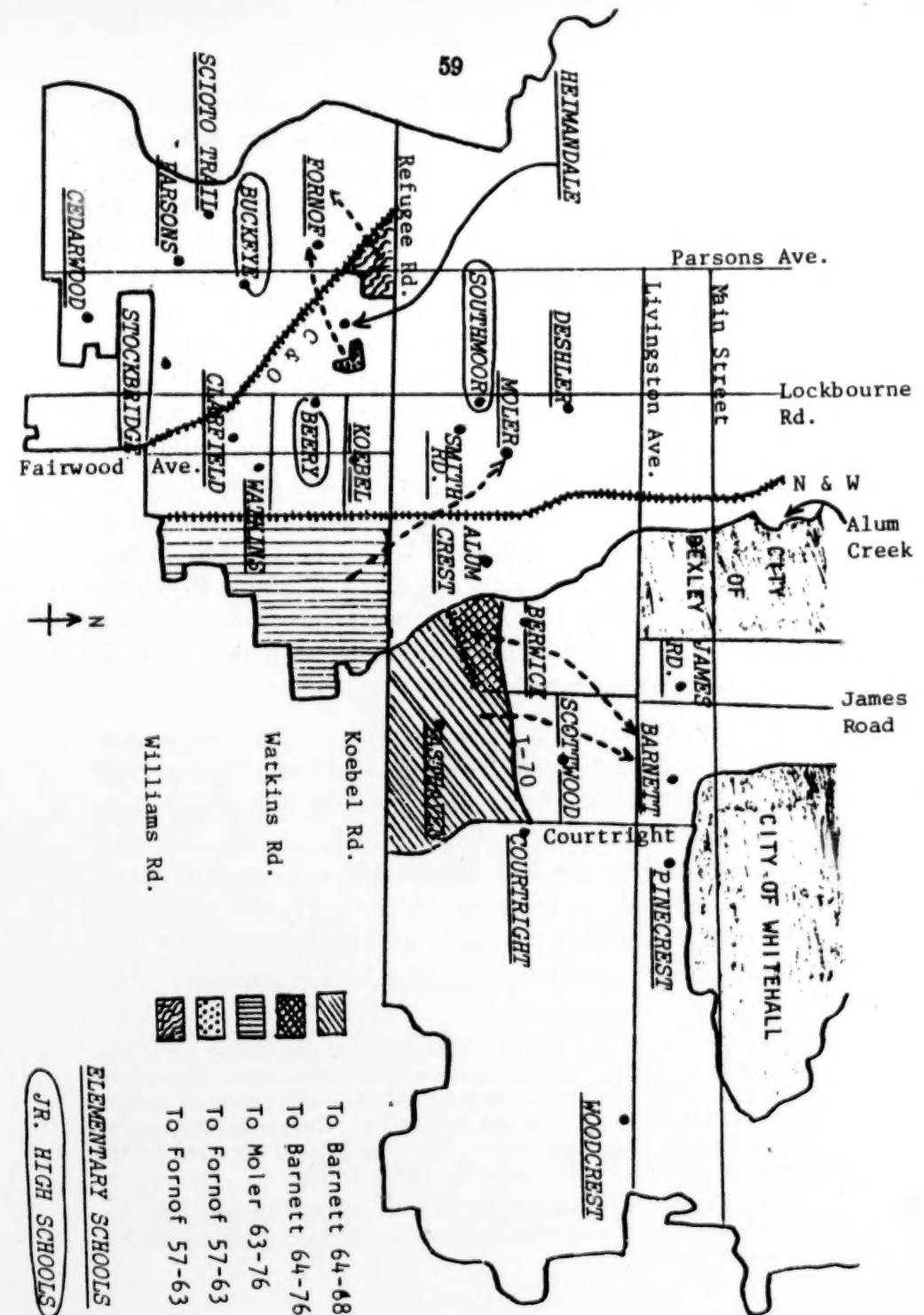
*** Pl. L. Ex. 63, L. Tr. 3882, at 40, 73.

† Pl. L. Ex. 384, L. Tr. 3909.

School	% Black Enrollment††			
	1964-65	1969-70	1974-75	1975-76
Central	27.0%	30.4%	33.5%	30.1%
North	7.2%	9.6%	14.1%	17.9%
Kingswood	11.0%	4.8%	5.5%	8.5%

†† A. 779, 785, L. Tr. 3909.

⁶⁸ The discussion of this optional area in the school board's brief is typical. Petitioners state that it "was not racially motivated" (Pet. Br. 28 n. 12) but cite in support of this assertion only two exhibits, each of which is a map showing the location of the option. They also say that the area was equidistant between the schools (in contrast to, for example, the Pilgrim-Fair option, see p. 45 *supra*); but they provide no administrative or educational justification, based on capacity or anything else, for its existence.



At the time of annexation, before Columbus built any schools or changed attendance boundaries, five elementary schools served the area: Scioto Trail, Fornof, Heimandale, Clarfield, and Smith Road (*see* Pl. L. Ex. 261, L. Tr. 3898; *compare* Fig. 2, Pl. L. Ex. 61, L. Tr. 3882, at 17). In 1950, few blacks lived in the annexed territory (*see* Pl. L. Ex. 250, L. Tr. 3897); by 1960 there were three areas with identifiable concentrations of black residence: along Alum Creek to the northeast of the railroad tracks—assigned to Smith Road; to the south of Watkins Road and west of Fairwood Avenue—assigned to Clarfield; and within the Heimandale zone.⁶⁹ Both the Clarfield and Smith Road attendance areas in 1957-58 included large, predominantly white areas (*see* Pl. L. Exs. 261, 251, L. Tr. 3897, 3898). For example, Clarfield extended along Williams Road, the southern border of the system, west across the railroad tracks (*id.*). However, black students were soon isolated into more compact zones.

In 1959, Columbus opened the Stockbridge Elementary School and drew its zone from Clarfield and Scioto Trail (Pl. L. Exs. 261, 263, L. Tr. 3898). White residential areas immediately to the south of the Heimandale zone (and including the area north of Williams Road, west of Lockbourne and east of Parsons which had previously been assigned to Clarfield) were now sent to Stockbridge.⁷⁰ The following year, additional capacity to accommodate white

⁶⁹ As previously noted (p. 48 *supra*), whites living on designated streets within the Heimandale area were zoned discontinuously to Fornof; Columbus maintained this discontinuous assignment for six years following the annexation. Heimandale's capacity was little more than half that of the other schools operated by the township. *See* Pl. L. Ex. 62, L. Tr. 3882, at 25-27.

⁷⁰ An alternative would have been to enlarge Heimandale (*see* note 69 *supra*) and send white students in newly developing residential areas there.

students living west of the railroad tracks which formed Stockbridge's eastern boundary was provided by the construction of the Parsons Elementary School, which took the southern portion of the Scioto Trail zone (Pl. L. Exs. 263, 284A, 251, L. Tr. 3897, 3898).

The Clarfield zone was also reduced on the east. In 1961-62, Watkins Elementary School was opened, substantially reducing the size of the Clarfield zone⁷¹ but leaving the blocks with the greatest black population density in 1969 in Clarfield (*see* Pl. L. Exs. 264, 251, L. Tr. 3897, 3898).^{72, 73} Rapid population growth in the Watkins zone required further changes in 1963-64. First, Watkins ceded a small area south of Watkins Road and east of Fairwood Avenue to Clarfield (*compare* Pl. L. Exs. 265-266, L. Tr. 3898). This area was that portion of the Watkins zone

⁷¹ Watkins was built as a larger school than Clarfield or Stockbridge. *See* Pl. L. Ex. 64, L. Tr. 3882, at 32-34.

⁷² The Watkins boundary ran north of Watkins Road to the west of Fairwood Avenue, and south of Watkins Road to the east of Fairwood Avenue. This boxed areas of black residential concentration west of Fairwood but south of Watkins into the Clarfield zone even though both attendance areas included within them territory which crossed both thoroughfares (Pl. L. Exs. 264, 251, L. Tr. 3897, 3898).

⁷³ Although Clarfield was overcrowded in 1959, Watkins' opening cut its enrollment to less than half its capacity during the next two years; however, white students from the now-overcrowded Stockbridge facility were not reassigned to Clarfield—instead, four additional classrooms were built at Stockbridge in 1961 (A. 511):

School	Capacity		Enrollment**			
	1959*	1964**	1959-60	1960-61	1961-62	1962-63
Clarfield	448	434	489	514	241	294
Watkins	—	527	—	—	405	558
Stockbridge	320	434	350	361	386	413

* Pl. L. Ex. 62, L. Tr. 3882, at 49, 54.

** Pl. L. Ex. 64, L. Tr. 3882, at 32-34.

immediately across from the black population concentration in 1960 (see Pl. L. Exs. 266, 251, L. Tr. 3897, 3898) and it had become predominantly black by 1970 (see Pl. L. Exs. 266, 252, L. Tr. 3897, 3898).⁷⁴ Second, the entire portion of the previous Watkins zone south of Refugee Road and east of the Norfolk and Western Railroad tracks was detached and assigned to Moler Elementary as a discontinuous zone.⁷⁵

The same year, 1963-64, significant changes affecting Heimandale and Fornof were also made. Prior to that time, the Fornof zone extended across the railroad tracks in its northeast corner to include a small square parcel south of Refugee Road, north of Frank Road and east of Parsons Road (see Pl. L. Exs. 261, 265, 251, L. Tr. 3897, 3898). In 1960 that parcel included significant black population (see Pl. L. Ex. 251, L. Tr. 3897). These black residences were removed from the Fornof zone in 1963 when a six-room addition to Heimandale was completed, and the boundary between the schools shifted west to the railroad tracks. Fornof was greatly under capacity after the zone shift while Heimandale remained crowded, even after con-

⁷⁴ This change boosted Clarfield's enrollment to 530 in 1963-64 (Pl. L. Ex. 64, L. Tr. 3882, at 32), making the assignment of white students living west of the railroad tracks to Clarfield impossible. See note 73 *supra*.

⁷⁵ This discontinuous area is discussed in the district court's opinion (Pet. App. 33-34) and is described in greater detail at pp. 64-67 *infra*. The Board errs in suggesting (Pet. Br. 32) that students in the discontinuous area were transported to Smith Road Elementary School until 1963. The exhibits cited by Petitioners all deal with annexations, not school assignments. On the other hand, the official boundary description sheets (Pl. L. Exs. 258C, 258D, L. Tr. 3897) and the overlays prepared from the directories (Pl. L. Exs. 264, 284A, L. Tr. 3898) show that these students were reassigned from Smith Road to Watkins when the latter opened in 1961.

struction of the addition;⁷⁶ in 1964-65, Fornof was 0.2% black and Heimandale 40% black (A. 778, L. Tr. 3909).⁷⁷

Further changes in elementary school attendance in the 1957 annexation area south of Refugee Road were made during the following three years. In 1964, what remained of the Watkins zone was halved from east to west along Koebel Road; the area north of Koebel Road and south of Refugee was assigned to the new Koebel Elementary School. The 1970 census indicates that this configuration placed an area of high black residential concentration south of Koebel Road in the Watkins zone while leaving Koebel predominantly white (see Pl. L. Exs. 267, 252, L. Tr. 3897, 3898); this was reflected in the enrollment disparity between the schools (A. 779, 782, L. Tr. 3909).⁷⁸ Elementary school capacity for white students west of the Heimandale zone was supplemented by the construction of additions to Parsons in 1964 (A. 512) and Scioto Trail in 1965 (A. 513); also in 1965 the Cedarwood Elementary School opened to serve the southern portion of the Parsons zone (see Pl. L. Ex. 267, L. Tr. 3898). Finally, in 1966 an addition was

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School	Capacity		Enrollment			
	1959*	1964**	1962-63**	1963-64**	1964-65†	1965-66†
Fornof	480	403	477	345	336	340
Heimandale	224	403	281	438	466	459

* Pl. L. Ex. 62, L. Tr. 3882, at 49.

** Pl. L. Ex. 64, L. Tr. 3882, at 32.

† Pl. L. Ex. 63, L. Tr. 3882, at 41-42.

⁷⁷ The Heimandale-Fornof discontinuous zone (see p. 48 *supra*) was also ended effective 1963-64.

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School	% Black*						
	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Watkins	24.0%	62.0%	64.0%	73.5%	75.1%	76.4%	77.1%
Koebel	—	—	—	11.3%	10.7%	34.5%	39.2%

* A. 779, 782, L. Tr. 3909.

constructed at Clarfield (A. 514) and a small black area shifted from Watkins to Clarfield (*see* Pl. L. Exs. 268, 252, L. Tr. 3897, 3898). Clarfield was made the largest elementary school in the entire area south of Refugee Road, with a capacity of 667 (Pl. L. Ex. 63, L. Tr. 3882, at 68), in order to house these black students even though Fornof remained underutilized⁷⁹ and white students living east of the N and W railroad were bused to overcrowded Moler.^{80, 81}

Plaintiffs' expert witness, Dr. Gordon Foster, described the 1959-66 activities in this portion of the district in some detail (A. 504-15). He concluded that alternative zoning configurations existed—especially in light of the crossing of physical barriers at various times in the past—and that the entire set of schools could have been integrated through simple pairing involving the territory west of the Chesapeake and Ohio railroad tracks (the Heimandale-Fornof boundary) and that to the east (A. 513-14); *see also*, A. 517).

⁷⁹ *See* note 76, *supra* and accompanying text.

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School	1964 Capacity*	Enrollment**			% Black***		
		1965-66	1966-67	1967-68	1965-66	1966-67	1967-68
Clarfield	434	545	690	668	70%	80%	84.9%
Watkins	538	670	480	467	62%	64%	73.5%
Moler	310	421	457	459	0.3%	2.5%	3.9%
Fornof	403	340	323	310	0.3%	—	1.2%

* Pl. L. Ex. 64, L. Tr. 3882, at 55-57.

** Pl. L. Ex. 63, L. Tr. 3882, at 41-43.

*** A. 775-82, L. Tr. 3909.

⁸¹ Thus, if a school had been constructed, perhaps east of the N & W railroad tracks and the Clarfield, Watkins and Koebel zones re-adjusted, the discontinuous transportation to Moler could have been eliminated and schools in the area integrated. In one of the desegregation proposals developed more than a decade later by the school system's staff, the attendance areas for Koebel and Watkins, and the Moler discontinuous area would have been clustered (R. Tr. 192). Another would have combined the Moler discontinuous area, Clarfield, and Stockbridge (R. Tr. 206).

Thus far, we have described (for elementary schools) the disposition, in the 1960's, of the portion of the 1957 Marion-Franklin annexation which lay south of Refugee Road. We now turn to the area north of Refugee Road; the two are connected by the Watkins-Moler discontinuous busing.

As we previously noted, by 1960 there was an identifiable grouping of black residences north of Refugee Road between the N&W railroad tracks and Alum Creek which was included in the Smith Road school attendance area (*see* Pl. L. Exs. 284A, 251, L. Tr. 3897, 3898). At the same time Watkins Elementary opened (*see* pp. 61-62 *supra*), Columbus also completed construction of a new facility in the Smith Road area. This school, Alum Crest Elementary, was zoned from north to south, all the way from Livingston Avenue to Refugee Road. It withdrew the grouping of black residences from the Smith Road school (*see* Pl. L. Exs. 264, 251, L. Tr. 3897, 3898).⁸² In 1963, another elementary school (Moler) was opened to the north; it drew its attendance zone from the southern portion of Deshler and the northern part of Smith Road, but it did not cross

⁸² Capacity figures indicate that Smith Road was overcrowded in 1960 (*see* note 83 *infra*); its enrollment was reduced by both the opening of Alum Crest and the movement of its southern boundary to Refugee Road in conjunction with the opening of Watkins (*see* Pl. L. Exs. 284A, 264, L. Tr. 3898). Of course, the zone line between Smith Road and Alum Crest need not have been fixed so as to separate white and black students. In 1964-65, Alum Crest was 50% black and Smith Road was all white, A. 776, 781, L. Tr. 3909. (It is clear that only the Alum Crest zoning removed minority population from Smith Road: the area south of Refugee Road went to Watkins in 1961; in 1963, the portion of that area east of the N&W tracks was transported to Moler, 0.2% black in 1964. The remainder was all-white in 1960, Pl. L. Ex. 251, L. Tr. 3897, and most of it was zoned to Koebel in 1964, at which time Koebel was all-white, A. 779, L. Tr. 3909. Another portion of the pre-1961 Smith Road zone was withdrawn to create Moler in 1963—but as noted, that school was 0.2% black in 1964.)

into the elongated Alum Crest zone (*compare* Pl. L. Exs. 265, 266, L. Tr. 3898). From the very day of its opening, Moler also received students from the Watkins discontinuous zone (*see* p. 62 *supra*) even though this overcrowded the building⁸³ and even though space was available at adjacent Alum Crest.^{84, 85} In 1964, Smith Road and Moler were all-white schools, while Alum Crest was 50% black (A. 776, 779-81, L. Tr. 3909). By 1970, the black community had expanded southward in the Alum Crest zone east of the N&W railroad while Smith Road and Moler, to the west, remained predominantly white (*see* Pl. L. Exs. 272, 252, L. Tr. 3897, 3898). Alum Crest school was 77% black,

School	Capacity		Enrollment						
	1959*	1964**	1960-61**	1961-62**	1962-63**	1963-64**	1964-65†	1965-66†	1966-67†
Smith Rd.	480	434	531	383	468	336	403	266	304
Watkins	—	527	—	405	558	538	615	670	480
Alum Crest	—	310	—	199	220	256	330	297	254
Moler	—	310	—	—	—	††	396	421	457

* Pl. L. Ex. 62, L. Tr. 3882, at 50.

** Pl. L. Ex. 64, L. Tr. 3882, at 32-34.

† Pl. L. Ex. 63, L. Tr. 3882, at 41-43.

†† Omitted from Pl. L. Ex. 64, L. Tr. 3882, at 33. Total enrollment 352 (Pl. L. Ex. 384, L. Tr. 3909); total capacity 310 plus 2 kindergarten rooms (Pl. L. Ex. 64, L. Tr. 3882, at 56).

⁸⁴ Rooms at Alum Crest were rented to an organization which provided instruction for retarded children rather than having white students assigned to them (A. 696). The 1959 Ohio State facilities study had recommended that the system help the Council for Retarded Children obtain a site between Broad Street and Livingston Avenue, south of Fort Hayes (Pl. L. Ex. 62, L. Tr. 3882, at 72).

⁸⁵ The school board suggests that Alum Crest was overcrowded in 1963 and 1967-68 (Pet. Br. 32-33). As to 1963, the reference is to grades K-6 enrollment and grades 1-6 capacity (*see* note 56 *supra*). *Compare* note 83 *supra*. As to the latter year, Petitioners seek to compare 1967-68 enrollment in grades K-6 to a reduced grades 1-6 capacity figure not established until 1969, in Pl. L. Ex. 63, L. Tr. 3882; *see* note 29 *supra*.

Moler was 12% black, and Smith Road 1.3% black in 1970 (A. 776, 779-81, L. Tr. 3909). Dr. Foster concluded that the discontinuous transportation to Moler was for racial purposes (A. 507-08, 517), as did the district court (Pet. App. 33-34).

The Alum Crest school was also affected by yet another discontinuous zone established in the 1960's. An area immediately to the east, across Alum Creek, was joined to the school system in 1959 in an annexation of territory to the south of Bexley and Whitehall (*compare* Pl. L. Exs. 262, 263, L. Tr. 3898). It is shown on the census maps for 1950, 1960 and 1970 as being less than 10% black (*see* Pl. L. Exs. 250, 251, 252, L. Tr. 3897), although it was not heavily populated when first annexed (L. Tr. 5384). It was shifted among the attendance areas of several schools prior to 1964-65.⁸⁶ Commencing in 1964 and continuing through 1967-68, the area was zoned discontinuously to Barnett Elementary, a school which had opened that year, located in a very small attendance zone between Pinecrest and James Road Elementary Schools (*see* Pl. L. Exs. 267-70, L. Tr. 3898). Barnett enrolled no black students prior to the 1969-70 school year (A. 776, L. Tr. 2909). In 1968, the

⁸⁶ In 1959-60, the boundaries for Berwick, Scottwood and Court-right were extended due south to encompass the area (*see* Pl. L. Ex. 263, L. Tr. 3898). The following year, the Berwick and Scottwood zones' southern boundaries were moved northward and the Court-right zone extended as far west as Alum Creek to take in much of the area (*see* Pl. L. Ex. 284A, L. Tr. 3898). In 1961-62, the Court-right zone was also reduced in size; the area in question found itself now split between Berwick and Woodcrest schools (the latter being at the eastern extremity of the school district, to the east of the City of Whitehall) (*see* Pl. L. Ex. 264, L. Tr. 3898). The next year (1962-63), the Berwick zone was further contracted to the north and the entire area assigned to Woodcrest (*see* Pl. L. Ex. 265, L. Tr. 3898). Finally, in 1963-64, the entire area was re-assigned to Court-right (*see* Pl. L. Ex. 266, L. Tr. 3898).

school system constructed and opened the Easthaven Elementary School, which absorbed most of the discontinuous area within its attendance zone; however, a remaining portion along Alum Creek just south of the Berwick zone continued to be sent to Barnett at the time of trial (see Pl. L. Exs. 271, 278, L. Tr. 3898). Throughout the period, space continued to be available at Alum Crest,⁸⁷ the predominantly black school just across the creek.^{88, 89} The school system official responsible for pupil assignments testified that students east of Alum Creek were bused to Barnett because it had space available (L. Tr. 5383-85). However, this was true only because Barnett's capacity was never used to relieve overcrowding at adjacent elementary

⁸⁷ See note 83 *supra* and Pl. L. Ex. 384, L. Tr. 3909, which shows a consistently declining enrollment at Alum Crest after 1968.

⁸⁸ The following figures are from A. 775-801, L. Tr. 3909:

Year	Alum Crest		Barnett		Easthaven	
	% Black Students	% Black Faculty	% Black Students	% Black Faculty	% Black Students	% Black Faculty
1964-65	50.0	33.3	—	—	—	—
1965-66	70.0	40.0	0	0	—	—
1966-67	80.0	40.0	0	0	—	—
1967-68	72.9	50.0	0	0	—	—
1968-69	67.3	42.9	0	0	0	0
1969-70	77.0	40.0	2.0	0	0	0
1970-71	78.6	46.2	1.9	0	0.6	6.7
1971-72	86.4	87.5	5.1	8.3	0.7	11.8
1972-73	78.5	77.8	3.4	0	3.0	10.0
1973-74	79.2	50.0	3.7	18.2	3.9	8.0
1974-75	78.7	25.0	4.1	20.0	4.9	13.0
1975-76	78.7	16.7	10.4	0	9.2	13.1

⁸⁹ At least from 1967 on, access to Alum Crest was very convenient via the Interstate 70 bridge across Alum Creek. See Fig. 8, Pl. L. Ex. 63, L. Tr. 3882, at 31. See also, A. 637-38. One of the desegregation plans developed by the staff in 1977 would have clustered the Easthaven, Alum Crest and Moler zones (R. Tr. 194A).

facilities⁹⁰ (compare Pet. Br. 31 n.17). This discontinuous zone, like that involving the Watkins area, represented an administrative choice to bus white children beyond the closest school where that school has a substantial black population.⁹¹

Thus, between 1959 and the time of trial, through a combination of new construction, selective additions to schools, movement of attendance zone boundary lines, creation of discontinuous areas and pupil transportation, elementary students within an enormous area in the south and south-eastern portions of the Columbus district were assigned to schools in which they were largely separated on the basis of race. Much the same thing occurred at the junior high level.

In 1957, the Beery (or Marion-Franklin, as it was called in some years) Junior High School served the entire 1957 annexation area, as far east as Alum Creek (see Pl. L. Ex.

School	1964 Capacity*	Enrollment				
		1963-64*	1964-65**	1965-66**	1966-67**	1967-68**
Barnett	341***	—	263	313	366	377
James Rd.	403	407	457	470	439	412
Pinecrest	620	688	906	835	781	712
Scottwood	589	596	737	789	656	602
Alum Crest	310	256	330	297	254	293

* Pl. L. Ex. 64, L. Tr. 3882, at 32-34, 55-57.

** Pl. L. Ex. 63, L. Tr. 3882, at 41-43.

*** Pl. L. Ex. 64, L. Tr. 3882, at 57, 60.

⁹¹ Obviously, Alum Crest could not have accommodated students from both the Watkins and Barnett discontinuous zones. However, we have previously suggested (note 81 *supra*) that the Watkins-Moler discontinuous area could have been part of an overall realignment to desegregate all of the schools south of Refugee, and west of the N&W tracks. Similarly, assignment of white students across Alum Creek instead of to Barnett, combined with realignment of the Alum Crest, Moler and Smith Road boundaries, see text at notes 83-84 *supra*, could have created stable desegregation north of Refugee Road.

281, L. Tr. 3898). Residential increase within this area made the provision of additional capacity necessary and another junior high school (Buckeye) was opened in 1963.⁹² Buckeye was located in a virtually all-white area near the Forno and Scioto Trail schools and its eastern boundary set along the Chesapeake and Ohio railroad tracks (see Pl. L. Exs. 287, 251, L. Tr. 3897, 3898). This had the effect of excluding from the new school all of the areas annexed from Marion-Franklin Township having any significant black population. In 1964-65, Beery was 22% black, while Buckeye was all white (A. 783, L. Tr. 3909).

Beery was over capacity at least from 1961-62 through 1964-65, while Buckeye was underutilized in 1963-64 and 1964-65 (see note 92 *supra*). Yet no adjustment of the boundaries was made. Instead, Beery received an addition, raising its capacity, in 1965 (Pl. L. Ex. 22, L. Tr. 3881) and actually picked up a small piece of territory (between Lockbourne Road and the C&O tracks) in the southeast corner of the Buckeye zone (see Pl. L. Exs. 251, 289, L. Tr. 3897, 3898). Both schools were operated below capacity in 1965-66 (note 92 *supra*). The following year, both facilities were about twenty students above capacity; an addition was placed at Buckeye which allowed it to remain underutilized in 1967-68. Although Beery was overcrowded in 1967-68, again there was no adjustment of the zone boundary with Buckeye (see Pl. L. Exs. 290, 291, L.

School	Capacity			Enrollment							
	1959*	1964**	1969†	61-2**	62-3**	63-4**	64-5†	65-6†	66-7†	67-8†	68-9†
Beery (Marion-Franklin)	600	***	900	800	846	767	831	848	921	995	806
Buckeye	—	700	900	—	—	528	573	652	722	742	823

* Pl. L. Ex. 62, L. Tr. 3882, at 25.

** Pl. L. Ex. 64, L. Tr. 3882, at 31.

*** Capacity figures given only for Marion-Franklin Jr.-Sr. High combined, see Pl. L. Ex. 64, L. Tr. 3882, at 31. Total capacity was 1900; total enrollment in 1962-63 was 1562; total enrollment in 1963-64 was 1654. *Id.* Beery had an addition in 1965 (Pl. L. Ex. 22, L. Tr. 3881).

† Pl. L. Ex. 63, L. Tr. 3882, at 40, 73.

Tr. 3898; Pl. L. Ex. 22, L. Tr. 3881; note 92 *supra*). That year, Beery was 40% black, Buckeye 0.1% black (A. 783, L. Tr. 3909).

In 1968, the effects of the siting and zoning of Buckeye were really felt. Beery's capacity problems were relieved by the opening of another junior high school, this time north of Refugee Road. This school—Southmoor Junior High—was held up as a model application of the school board's 1967 policy of considering race affirmatively in locating and zoning new schools to promote desegregation. Indeed, its zone included predominantly black areas assigned at the elementary level to Alum Crest, and predominantly white areas assigned to Smith Road (see Pl. L. Exs. 271, 292, 252, L. Tr. 3897, 3898), and its first enrollment was almost exactly one-third black, close to the system-wide proportion (A. 784, L. Tr. 3909). Less publicized was the fact that the change withdrew a large, predominantly white area from the Beery zone on its northeast; such areas to the southwest were already excluded by the Buckeye boundary along the C&O Railroad tracks. Between 1967-68 and 1968-69, Beery jumped from 40% black to 54% black, while Buckeye declined marginally from 0.1% black to 0.0% (A. 783-84, L. Tr. 3909). In 1971, Buckeye was 1.3% black; Beery, 67.2% black; and Southmoor, 41.5% black (*id.*). As Dr. Foster pointed out, Marion-Franklin High School still served the entire area, east and west of the C&O tracks, at the time of trial and an alternate boundary between Beery and Buckeye which crossed the tracks would have avoided the junior high segregation problem which still existed (A. 517). In 1975-76, Buckeye was 2% black; Beery was 70.3% black (A. 783, L. Tr. 3909). One of the staff-developed desegregation plans in 1977 proposed to assign to Beery students from the existing attendance areas for Watkins, Heimandale,

Fornof, Scioto Trail, Reeb, and Lincoln Park; and to assign to Buckeye students from the Moler discontinuous area, Clarfield, Koebel, Stockbridge, Parsons and Cedarwood (R. Tr. 197).

The pattern described in the south-southeastern portion of the district was replicated in the Linden area, another part of the district in which both white and black populations continued to grow in the 1960's.⁹³ Decisions about construction,⁹⁴ school zoning, grade structure and pupil transportation played important roles in shaping the racial composition of student enrollments. As the black population expanded northward from 5th to 11th, 11th to 17th Avenue, and 17th Avenue to Hudson Street (see A. 246), existing school zone boundaries moved northward, new black schools were built to the south, and new white schools to the north. (See map, p. 49 *supra*, in connection with this discussion.)

In 1961, the Board acted to deal with population increases southwest of the Ohio State Fairgrounds in a manner similar to that used in 1957 for Douglas Elementary—construction and zoning of an all-black primary school (see p. 56 and note 65 *supra*). Sixth Avenue Elementary School was opened for students in grades 1-3 with a zone drawn from north to south, taking in the easternmost portion of the Weinland Park Elementary School zone and the northeast corner of the Second Avenue zone (see Pl. L. Exs. 261, 264, L. Tr. 3898).⁹⁵ The area thus drawn for the Sixth Avenue facility had been predominantly black since 1950,

⁹³ The events of the 1950's in this part of the school district are set out at pp. 48-55 *supra*.

⁹⁴ The examples of segregative construction in the district court's opinion are from this geographic area (Pet. App. 21-24).

⁹⁵ Students in grades 4-6 within the area attended either Weinland Park or Second Avenue, depending on the old zone boundaries.

in contrast to most of the remainder of the Weinland Park and Second Avenue zones (see, e.g., Pl. L. Exs. 261, 250, 251, L. Tr. 3897, 3898). By the year for which enrollment figures are first available, 1964-65, Sixth Avenue was 91% black; Weinland Park and Second Avenue schools were 30% and 28% black, respectively (A. 781-82, L. Tr. 3909). This attendance configuration was continued through the 1973-74 school year, after the filing of this lawsuit. In that year, Sixth Avenue was 95% black, Weinland Park was 31% black, and Second Avenue was 17% black (*id.*). After Sixth Avenue was closed, the Weinland Park and Second Avenue zones were returned to the pre-1961 state (compare Pl. L. Exs. 263, 278, L. Tr. 3898). Weinland Park's enrollment was then 47% black; Second Avenue's did not change appreciably (A. 781-82, L. Tr. 3909). Thus for thirteen years, black students in grades 1-3 in this area were assigned to a heavily black school created by school officials through subdivision of existing "neighborhood school" attendance areas. Dr. Foster pointed out that this result could easily have been avoided by drawing attendance boundaries for Sixth Avenue in different directions,⁹⁶ but no explanation for the board's choice of the segregative alternative was ever suggested (Pet. App. 24).

As the black population of Columbus expanded northward to the east of Cleveland Avenue, the school system opened Brentnell Elementary School in 1962. Its attendance zone took in portions of the previous areas for Shepard, Arlington Park, Eleventh Avenue, Duxberry Park and Leonard Elementary Schools (see Pl. L. Exs. 264, 265,

⁹⁶ Of course there was no educational or logistical reason which compelled the elongated, north-to-south zoning of Sixth Avenue. Before 1961 and after 1973, students were assigned on an east-west basis to Weinland Park and Second Avenue in grades 1-3.

251, L. Tr. 3897, 3898).⁹⁷ In 1964, Brentnell was 75% black; Duxberry Park was 30% black; and Arlington Park was 0% black (A. 776-77, L. Tr. 3909). During the rest of the decade, the school district opened three small facilities south of Hudson Street as predominantly black schools, while continuing to add capacity in areas north of Hudson which were predominantly white (see Pl. L. Exs. 268-273, 251, 22, 399, L. Tr. 2135-36, 3881, 3897, 3898).

In 1965, Gladstone Elementary opened, located between Hamilton Elementary and Duxberry Park (see Pl. L. Ex. 268, L. Tr. 3898). It was a small school⁹⁸ with a small zone, and one which was predominantly black from the

⁹⁷ The Arlington Park area transferred to Brentnell was a tract (well to the south of Arlington Park itself), which had been annexed to the district in 1958-59 and assigned to the Arlington Park school (see Pl. L. Exs. 261, 262, L. Tr. 3898). The Leonard contribution was the former American Addition area, see note 15, and p. 50 *supra*. From Duxberry Park the new school received the area between Windsor Avenue on the south, 23rd Avenue on the north, Joyce Street on the west and Woodland Avenue on the east—the same area which had been discontinuously zoned to Linden from 1957-59, see p. 50 *supra*. The change moved Duxberry Park's southern bound (east of the railroad track) northward, away from advancing black residential settlement, from Windsor Avenue to 23rd Avenue; and it limited Arlington Park's zone to areas north of Hudson Street and Mock Road (compare Pl. L. Exs. 264, 251, L. Tr. 3897, 3898 with Pl. L. Exs. 265, 251, L. Tr. 3897, 3898). To the west of the Penn Central railroad in the Cleveland Avenue corridor, the Duxberry Park zone did dip below 23rd Avenue and take in predominantly black areas, but these were removed in 1965 when Gladstone Elementary opened (see text *infra*).

⁹⁸ The 1964 Ohio State facilities study had suggested construction of a school with ten classrooms and a kindergarten on a site which the school board had arranged to purchase. Pl. L. Ex. 64, L. Tr. 3882, at 65. However, even after an addition in 1968, Pl. L. Exs. 22, 399, L. Tr. 3882, Gladstone had only nine classrooms. see Pl. L. Ex. 63, L. Tr. 3882, at 69. It was one of the smallest elementary schools in the area (*id.*). See also A. 212-13. A larger facility could have opened less racially isolated.

start.⁹⁹ Gladstone's opening realigned the southern boundary of Duxberry Park northward in the area west of the Penn Central Railroad (see note 97 *supra*); its zone was fashioned entirely from the former Duxberry Park area (see Pl. L. Exs. 267, 268, L. Tr. 3898) and reduced the black student population in Duxberry Park.¹⁰⁰ Dr. Foster described Gladstone as a school built to "contain" the expanding black pupil population south of Hudson Street and noted that boundary shifts or pairing with schools north of Hudson Street¹⁰¹ (which were all-white at the time) could have resulted in integrating all of these schools (A. 522; see also, A. 214).¹⁰²

⁹⁹ In 1966-67, the first year for which figures are available, Gladstone was 78% black. After that school year, Gladstone was consistently above 90% black (A. 792, L. Tr. 3909; see note 104 *infra*). Prior to construction of the school, the chairman of the NAACP's Education Committee and others warned that it would be a segregated school, to no avail (A. 212-14).

¹⁰⁰ In 1965-66, Duxberry's student body was 40% black compared to 30% in 1964-65; it dropped to 33% in 1966-67 before rising again as Columbus' black population moved northward (A. 777, L. Tr. 3909). Clearly, Duxberry Park would have approached or exceeded majority-black status in 1965-66 had Gladstone not drawn away substantial numbers of black pupils.

¹⁰¹ Elementary school attendance areas had long crossed Hudson Street. For example, the Linden zone crossed Hudson in 1965 between Dresden Street and the Penn Central tracks, extending as far south as Duxberry Avenue—the northern boundary of Gladstone Elementary (see Pl. L. Exs. 268, 251, L. Tr. 3897, 3898). Ten years earlier, both the McGuffey and Linden zones crossed Hudson, with Linden's zone extending far to the south below Windsor Avenue (see Fig. 2, Pl. L. Ex. 61, L. Tr. 3882, at 17). In 1953, the Ohio State study recommended that crowding in Hamilton Elementary School be dealt with by involving the McGuffey and Linden schools north of Hudson (Pl. L. Ex. 60, L. Tr. 3882, at 65).

¹⁰² The district court opinion found that Gladstone could have been constructed nearer Hudson Street and zone lines drawn in a north-south fashion to achieve the same result (Pet. App. 22).

Instead of adopting such a course, Columbus constructed another very small school¹⁰³ in the vicinity and opened it in 1966 with a zone stretching in a thin band south of Hudson Street across the top of the Hamilton zone (see Pl. L. Exs. 268, 269, 251, L. Tr. 3897, 3898). The area was heavily black by 1970 (see Pl. L. Exs. 269, 252, L. Tr. 3897, 3898; A. 523-24). Hudson's opening relieved an over-capacity problem at Hamilton and ended the intact transportation of four classes from Hamilton to Arlington Park (A. 633)—assignments which would have been integrative had pupils from the sending and receiving schools been assigned to classes together (see note 21 *supra*): in 1966 Hamilton was 61% black, while Arlington Park was all white (A. 776, 778, L. Tr. 3909). Dr. Foster concluded that Hudson, like Gladstone, was constructed to contain the black population south of Hudson Street (A. 525-26; see also, A. 207).^{104, 105}

¹⁰³ In 1969, Hudson was the same size as Gladstone, see Pl. L. Ex. 63, L. Tr. 3882, at 69; see also note 98 *supra*.

¹⁰⁴ The following table is prepared from A. 775-82, L. Tr. 3909:

% Black Student Enrollment

School	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Linden	0	0	0.1	2.4	3.5	8.3	10.6
McGuffey	0	0	0.1	5.9*	6.7	12.4	20.4*
Como	0	0	0	0.3	0	0	0.2
Hudson	—	—	—	41.9	54.3	62.4	69.2
Hamilton	27.0	48.0	61.0	85.0	90.3	93.0	93.4
Gladstone	—	—	78.0	91.2	92.2	96.7	97.4
Duxberry Pk.	30.0	40.0	33.0	45.8	50.4	74.4	80.4

* Combined elementary-junior high enrollment.

¹⁰⁵ Not only Gladstone and Hudson, but also the white schools north of Hudson Street were overcrowded at this time (see table below). Instead of constructing small, segregated schools, the Columbus system could have built larger facilities to relieve ca-

Finally, the same year (1966-67) another small, all-black school having the same capacity as Hudson and Gladstone was built further to the south, drawing its attendance area from the Eleventh Avenue and Milo zones (see Pl. L. Exs. 268, 269, L. Tr. 3898). Lexington was 100% black in the 1967-68 school year, when the first statistics are available, and has been a virtually all-black school since that time (A. 779, L. Tr. 3909).

As was the case in the southern area of the school district, these developments at the elementary grade level were paralleled in the junior high schools. We have previously described how an attendance boundary was established in 1957 between Linmoor and Linden-McKinley junior high schools which ran from west to east along Hudson Street and north to south along the Penn Central tracks, separating black and white areas between 17th Avenue and Hudson Street (see p. 52 *supra*). In 1960, the Medina Junior High School opened north of Hudson Street with a zone encompassing all-white residential areas (see Pl. L. Exs. 283, 284, 251, L. Tr. 3897, 3898). Arlington Park junior high students were re-assigned to Linden-McKinley (see text following note 63, *supra*), which now served a smaller zone extending north

capacity needs on both sides of Hudson Street (see note 101 *supra*) in an integrative fashion.

School	Capacity		Enrollment**			
	1964*	1969**	1964-65	1965-66	1966-67	1967-68
Linden	837	812	947	958	1009	1045
McGuffey	744	696	878	877	855	864
Como	558	464	616	600	603	599
Hudson	—	261	—	—	359	369
Hamilton	837	841	1244	1274	1064	1068
Gladstone	—	261	—	312	365	352
Duxberry Park	434	406	784	506	410	398

* Pl. L. Ex. 64, L. Tr. 3882, at 55-56.

** Pl. L. Ex. 63, L. Tr. 3882, at 41-42, 69-70.

and south of Hudson Street (*see* Pl. L. Exs. 284, 251, L. Tr. 3897, 3898). In 1962-63, Columbus created another junior high north of Hudson Street by building an addition and extending the grade structure of McGuffey Elementary school from K-6 to K-9 for this purpose (*see* Pl. L. Exs. 22, 399, 286, 251, L. Tr. 2135-36, 3881, 3897, 3898). Medina's southern boundary was moved northward to Weber Road and Arlington Park junior high students assigned discontinuously to Medina (*see* pp. 54-55 *supra*). McGuffey was given a zone running south of Weber to Hudson Street plus the Duxberry Park elementary area east of the Penn Central tracks. Linmoor's attendance area expanded eastward and junior high grades at Linden-McKinley were eliminated (*see* Pl. L. Exs. 286, 287, 251, L. Tr. 3897, 3898).

The net effect of these changes from 1957 to 1963 was that white junior high students living north of Hudson Street were consistently provided with an alternative to attending classes with substantial numbers of black students. Although Linmoor was constructed to permit the entire Linden-McKinley facility to be used for senior high grades, and although it could, together with other adjacent facilities, have assumed all of Linden-McKinley's junior high enrollment when it opened (*see* note 59 *supra*), the school board retained Linden-McKinley junior high until two additional white junior high schools could be constructed north of Hudson Street.¹⁰⁶ Only then was Linmoor's zone expanded to take in the remainder of the Linden-McKinley zone.

¹⁰⁶ Indeed, there was so much junior high capacity built north of Hudson that in 1963-64, the eastern portion of Crestview junior high school's zone was made optional to McGuffey, and then added permanently to the McGuffey zone the following year (*see* Pl. L.

Substitution of Linmoor Junior High for Linden-McKinley in the area south of Hudson Street, at least as that area was enlarged through the addition of territory formerly assigned to Everett (*see* note 60 *supra* and accompanying text), was inadequate to house all junior high students. By 1962, Linmoor was overcrowded (*see* note 106 *supra*). This helped to justify the construction of Monroe Junior High school to the south, near Fort Hayes (*see* map, p. 13 *supra*) in 1964. Monroe was zoned to include areas formerly sent to Champion and also the portion of the Everett-Linmoor optional area with the greatest concentrations of black population (*see* Pl. L. Exs. 287, 288, 251, 252, L. Tr. 3897, 3898). This completed the series of events shaping the racial composition of junior high schools in the area in 1964-65, the first year for which figures are reported:

Exs. 287, 288, L. Tr. 3898). This occurred even though Linmoor, directly to the south of McGuffey, was overcrowded:

School	Capacity		Enrollment					
	1959*	1964**	1959-60**	1960-61**	1961-62**	1962-63**	1963-64**	1964-65†
Linmoor	1000	1050	1021	1011	1023	1083	1106	1098
McGuffey	—	700	—	—	607	610	660	694
Crestview	700	1100	738	788	882	913	990	1028
Indianola	950	950	824	828	888	894	895	819

* Pl. L. Ex. 62, L. Tr. 2882, at 52-53.

** Pl. L. Ex. 64, L. Tr. 3882, at 25.

† Pl. L. Ex. 63, L. Tr. 3882, at 40.

School	% Black, 1964-65	
	Students ¹⁰⁷	Faculty ¹⁰⁸
Medina	0	0
McGuffey	0	0
Linmoor	60.0 ¹⁰⁹	0 ¹¹⁰
Monroe	100.0	39.4 ¹¹¹
Champion	100.0	97.3
Everett	35.0 ¹¹²	7.1
Indianola	13.7 ¹¹²	0

The opening of Monroe under the circumstances described drew protests about segregation (A. 602-03), but as was the case with elementary schools, a combination of school siting, underutilization or overcrowding of existing

¹⁰⁷ A. 783-84, L. Tr. 3909.

¹⁰⁸ A. 798-99, L. Tr. 3909.

¹⁰⁹ Since the Monroe zoning removed many black students from the Linmoor zone to an all-black school, it is apparent that the disparity between Linmoor and McGuffey or Medina in 1964 would have been even greater than shown in this table following the closing of Linden-McKinley as a junior high school.

¹¹⁰ But see p. 30 *supra*.

¹¹¹ Figure shown is for 1965-66, first year reported.

¹¹² As described above, Monroe took the most heavily black portion of the area which had been assigned to Everett prior to 1957-58, and made optional between Everett and Linmoor from 1958-59 to 1963-64. (See text following note 60, *supra*.) Thus one of the long-term effects of retaining Linden-McKinley after 1957 was to remove a black area permanently from the Everett Junior High zone. (See note 60 *supra* and accompanying text.) Because a portion of the optional area was returned to Everett, Dr. Foster noted that the transfer had some integrative effect with respect to the school (A. 488-500).

¹¹³ See note 59 *supra*.

facilities,¹¹⁴ drawing boundaries along racial residential demarcation lines, and faculty assignment resulted in deliberately segregated black and white junior high schools throughout the east-central and northern areas of the Columbus school district in the 1960's. Dr. Foster reviewed the entire history and characterized the series of actions as being designed to contain the black population toward the central city and to protect white students from advancing black population movement to the north and northeast (A. 499-500).

Any consideration of the 1960's must also take into account the lack of response of the school board to the repeated requests from citizens' groups during this decade that the problems of school segregation be addressed and solved. See pp. 35-36 *supra*. This was in marked contrast to the inventiveness displayed by school officials in pursuit of segregation, as described above. Cf. A. 406.

f. *The 1970's.* By 1970 the period of greatest enrollment growth in the Columbus system had peaked. Few new schools were built after 1970 and few additions to existing facilities were constructed (see Pl. L. Ex. 399, L. Tr. 2135-36). The massive construction and zoning programs of the 1950's and 1960's had created or perpetuated racial separation in the district; now there was much less change of zone lines. However, on the occasions when significant opportunities for desegregation occurred, they were rejected. Enrollment declines began to result in the closing

School	Capacity		Enrollment				
	1964*	1969**	1963-64*	1964-65**	1965-66**	1966-67**	1967-68**
Monroe	700	600	—	586	749	757	610
Linmoor	1050	1250	1106	1098	1148†	1205	1343
Champion	800	800	949	628	615	623	669
Everett	1300	1100	1091	895	979	906	945
Indianola	950	950	895	819	915	827	890

* Pl. L. Ex. 64, L. Tr. 3882, at 25.

** Pl. L. Ex. 63, L. Tr. 3882, at 40, 73.

† Building addition in 1965.

of schools (for example, Sixth Avenue, Maryland Park, and Clearbrook), but there were still many instances of overcrowding at individual schools in the years immediately preceding the trial. Most of these were not handled by shifting boundaries. Rather, Columbus transported entire classes of students to schools with available space,¹¹⁵ or housed them in leased, non-school facilities. These practices reinforced segregation because of the manner in which they were carried out. As we have previously remarked (*see* note 21 *supra*), these occasions could have resulted in considerable desegregation if classes had been housed in schools which were predominantly of the opposite race (*see, e.g.,* A. 640-41) and if, once there, the students had been assigned to classes along with the students at the receiving schools rather than being kept separate. In addition, the enforced isolation of black students within separate rooms and classes at predominantly white schools made "integration," Columbus-style, a humiliating experience. We describe the evidence very briefly.

Dr. Foster identified numerous instances of intact school-to-school transportation in the late 1960's and early 1970's, and he pointed out that any potential for integration was frustrated by the failure to mix students from the sending and receiving schools in classes (L. Tr. 3601-27). The school system's witness identified some instances in which classes were transported to opposite race facilities, but admitted that they were taught all academic subjects on a separated basis (L. Tr. 5339-78). The result was that even when pupils of different races were sent to the same facility, the school district kept them in segregated classes. A rebuttal witness for the plaintiffs described one such example in 1973, when a predominantly black class from South Mifflin was sent to East Linden School and kept

¹¹⁵ *See* note 47 *supra*.

entirely separated from the predominantly white student body of the receiving school at recess and in the cafeteria as well as during the teaching of academic subjects (A. 701-14). Although Petitioners sought to characterize such practices as temporary expedients (A. 612), they admitted that the device was used for a considerable period of time in at least one instance when it had clearly segregative effects: From 1969-70 through 1973-74, classes were transported from the predominantly black Sullivant School and taught in separate rooms at the adjacent, predominantly white Bellows School in the western portion of the district.¹¹⁶ As Dr. Foster pointed out, a boundary change or pairing of the two schools would have resulted in desegregation as well as relief for overcrowding (A. 639-40).

With respect to rentals, Dr. Foster analyzed the use of leased facilities to house students assigned to seven overcrowded, predominantly black schools from 1970 to 1975: Kent, Sullivant, Highland, Hamilton, Cassady, South Mifflin Elementary, and Mifflin Jr.-Sr. High School (A. 437-69). In each instance, he identified predominantly white schools in the district which, according to the district's figures, had capacity to house these students (*id.*). In response, the district's witness pointed out that many of the rental facilities were close to the schools whose overcrowding they relieved, and also that some of the predominantly white schools identified by Dr. Foster as alternate assign-

¹¹⁶ During the years in question, the student and faculty characteristics at these schools were as follows (A. 776, 781, 790, 795, L. Tr. 3909):

Year	Sullivant % Black		Bellows % Black	
	Students	Faculty	Students	Faculty
1969-70	61.4	44.0	4.1	6.7
1970-71	60.1	41.7	5.5	8.3
1971-72	60.7	41.7	6.9	9.1
1972-73	65.5	39.1	9.4	8.3
1973-74	70.2	33.3	9.5	16.7

ments were themselves participating in intact transportation of classes from other, predominantly white, schools (A. 608-12; *see* A. 775-82, L. Tr. 3909). In effect, the district intentionally selected that combination of techniques to deal with overcrowding (intact class busing, transportation of children, and use of rental facilities) which resulted in the continuation of racial segregation.

The school board's knowledgeable selection of segregative pupil assignments was expressed, in typical fashion, in 1975 shortly before the trial of this case, when several new facilities were built. In 1971 the Mifflin school district, encompassing a large plot of territory in the northeast, adjacent to the Linden area, was annexed to the Columbus district along with the East Linden, Cassady and South Mifflin Elementary Schools and the Mifflin Jr.-Sr. High School (A. 363). The former Mifflin Township boundaries for these schools were maintained until 1975 (L. Tr. 762-63),¹¹⁷ while overcrowding in these buildings was accommodated through the use of rented space (*see* A. 437-45). In 1975 construction of the new Innis Elementary School, to the north and west of Cassady in a predominantly white area (*see* Pl. L. Exs. 278, 252, L. Tr. 3897, 3898) was completed. The board was given a choice of two options for assignment of pupils to the school, both of which were endorsed as educationally sound by the Super-

¹¹⁷ The East Linden zone was just to the north of Arlington Park; the South Mifflin zone was between Arlington Park and Brentnell. Cassady received students from a large geographic area to the east of all these zones (*see* Pl. L. Ex. 277, L. Tr. 3898). The racial composition of these schools between 1971 and 1974 was as follows (A. 775-82, L. Tr. 3909):

Year	% Black Students		
	<i>E. Linden</i>	<i>S. Mifflin</i>	<i>Cassady</i>
1971-72	3.8	74.3	31.8
1972-73	6.0	79.9	43.9
1973-74	10.7	83.4	47.9
1974-75	15.3	85.5	55.5

intendent and the staff (A. 234-37; L. Tr. 2314): pair Innis and Cassady, using one school for the primary grades and the other for grades 4-6, or establish a zone line between them, using each as a K-6 school. The Cassady PTA and community groups endorsed the pairing concept to maintain integration (*see* A. 250) and the Columbus system had used primary grade centers in the past at Clearbrook, Sixth Avenue, Hudson and Colerian (A. 319-20, 323-25, 633, L. Tr. 2885; *see* pp. 56 n. 65, 72-73, 76, *supra*). Either alternative would involve pupil transportation because of the distances (L. Tr. 759).

The board selected the straight zoning alternative (*See* Pl. L. Exs. 277, 278, L. Tr. 3898) with the result that in 1975-76, Innis was 27.3% black but Cassady was 89.3% black (A. 776, 779, L. Tr. 3909).¹¹⁸ The district court found the construction, siting and zoning of Innis "ironic" in light of the Board's public posture in connection with a 1971 bond issue which raised the money for that construction (Pet. App. 38-42); in the "Promises Made" document utilized to explain the bond issue, the board promised that

New buildings will be located whenever possible to favor integration. In such areas, school attendance

¹¹⁸ Petitioners seek to defend this choice on the ground that it preserved the "neighborhood school" concept (Pet. Br. 25-26). This claim illustrates the slippery nature of the concept and the board's selective use of the term to rationalize segregative decisions. "Neighborhood" attendance zones vary widely in size, depending on population density and the prior decisions of school authorities with respect to siting and size of school facilities (*see* pp. 33-34, 43-44 *supra*). Grade structure can also be varied, as Columbus claimed it did with respect to the Sixth Avenue School in order to preserve "walk-in" availability for students (*see* Pet. Br. 22-23). While it was a part of the Mifflin Township school system and from 1971 to 1975, Cassady Elementary functioned as a "neighborhood" school for the entire area which the board subdivided in 1975 (*see* Pl. L. Ex. 277, L. Tr. 3898). Whatever other justifications for the board's decision there might be, conformity to the "neighborhood school" concept is simply not a plausible one on this record.

boundary lines or organizational changes will be made to improve the opportunity for schools to be integrated without resorting to unreasonable gerrymandering.

(Pl. L. Ex. 49, L. Tr. 3882 [emphasis in original].) But it was not surprising; in 1972 the school board rejected a motion to establish a school site advisory committee (Pl. L. Ex. 44, L. Tr. 3881; A. 646-48; see pp. 36-37 *supra*) and the following year it declined to seek the assistance of the Ohio State Board of Education in achieving desegregation (Pl. L. Ex. 45, L. Tr. 3881; A. 357-58). At the same meeting in which the Innis-Cassady decision was reached, the board rejected the more integrative zoning alternative presented for the new Independence High School (A. 235-36).

g. *Summary.* As this rather extensive description of the major evidence before the district court indicates, Columbus followed a course of conduct after *Brown v. Board of Education* which was consistent only in its maintenance of segregated public schooling. Throughout all of the time period and in every geographic area of the district, the school board and administration maintained racially segregated faculties and schools in spite of requests from the community that segregation be ended. Every conceivable administrative or operational tool was pressed into service in the cause of segregation; but the school board drew a firm line against using the same techniques to eliminate the racial isolation of Columbus students. There was both overall population growth and relocation of blacks and whites within the Columbus district for most of the period following *Brown*. It is difficult to determine precisely how the Columbus school system might have responded to these changes in a "neutral" fashion. The history of the administration of the Columbus schools since the founding of the district shows that virtually no

such "neutrality" ever prevailed. What is clear is that the board and staff actively intervened through every means at their command to maintain racially separate schools wherever possible, and for however long a period possible, in the face of this residential movement.

Based on this evidence and after evaluating all relevant facts, the trial court found that the Columbus Board was motivated by segregative intent in its overall operation of the Columbus public schools (Pet. App. 61). The racially neutral "neighborhood school" may have been the occasional motto and the primary defense of the board at trial; however, it proved only a superficial mask for an unrelenting policy of segregation practiced in all aspects of the administration of the district (*id.* at 60-61).

C. Impact on Current Segregation of Schools

The district court ruled that the school system's policy and practices of segregation, as demonstrated by the evidence, had a pervasive, systemwide and current impact on the racial composition of the Columbus schools (Pet. App. 60-61, 68, 94-95, 100, 102). This conclusion was well supported by the record.

First, as we have summarized above, the school authorities in Columbus had engaged in a consistent, multifaceted course of conduct creating, perpetuating or aggravating racial segregation in literally scores of schools, from at least the early 1900's down to the date of the trial. Viewing that conduct as a whole, plaintiffs' expert witness was of the opinion that it revealed a consistent attempt to contain black students in largely separate schools:

Q. . . . Dr. Foster, from your examination of the records, in particular the exhibits in the cause, the examination of depositions, the maps and overlays, the demographic data which you have studied, the racial

enrollments furnished by the school district, school construction, assignment of principals to schools, the changing of boundaries, setting of boundaries, optional attendance areas, all of the matters in that respect that you have examined, many of which you have testified to here today, and I believe the second part of the question was considering the concentrations of minority population in the Columbus School District, . . . [have] the actions and policies of the Columbus Board of Education contributed in any substantial way to the maintenance of racial separation in black and white in the Columbus School System over the years?

. . .

A. My answer is: In my opinion they have, and I would add to the actions, the inactions or the lack of action.

Q. Can you describe in some general way how this has worked with respect to the various concentrations of black population in the city as they expanded?

A. I think I have done this off and on in my testimony in treating various aspects that I made analyses of, but in the western part of the Columbus District, within the Highland's area, in my opinion the blacks in that area have been compacted and the white areas maintained because of actions or lack of action by the Board.

In the south portion of the Columbus District about which I testified earlier this afternoon, my opinion is that the actions and inactions or lack of action by the Board definitely has kept the blacks, the black community, helped to keep the black community, particularly the schools is what I am referring to, northeast of the Chesapeake Railway and the whites in isolation to the southwest of that dividing line.

As the black residential areas moved south from the center of Columbus, and north and northeast, in my opinion actions and inactions of the Board have contributed in various ways to allowing whites, while that transition was taking place, to remove themselves to whiter schools and has generally had the effect of compacting the black pupils and schools as the movement went along toward the center of the city in both instances.

(A. 526-27.)

Second, as we have noted in the recitation of the facts, many of the segregative actions taken over the years can be directly shown to have had continuing effects on the racial composition of affected schools as of the time of trial (*see, e.g., pp. 31-32, 48, 53, 55, 71, 73, 79-80 supra; see also, Pet. App. 68*).

Third, there was substantial agreement among the witnesses on both sides that school site selection and attendance zoning have a considerable impact on the residential composition of a school district; as one witness said, when the boundary has been determined, "[t]hat would then become the—the school neighborhood, the school community" (A. 323). If some schools are constructed or zoned to be predominantly black while other schools are constructed or zoned to be predominantly white, residential movement is likely to be prompted (*see A. 240-41*). The Columbus system also purchased school sites for future use well in advance of residential development, irrespective of the commonly known existence of discrimination against black persons seeking to buy or rent housing in such areas—and even though the "neighborhood school" policy meant that schools in such areas would be racially isolated (A. 197-202, 250-51, 562, 602; *see A. 243-47*). The impact of school construction and zoning was not limited to the existing

population; as plaintiffs' expert witnesses testified, persons relocating to an area for the first time use school boundaries as defining points for neighborhoods, and consider predominantly black schools as indicators of areas to be avoided (A. 294-96, 310-11, 328-19, 341-42, 346, 255-56). As the district court stated (Pet. App. 58):

The Court has received considerable evidence that the nature of the schools in an important consideration in real estate transactions, and the Court finds that the defendants were aware of this fact. The defendants argue, and the Court finds, that the school authorities do not *control* the housing segregation in Columbus, but the Court also finds that the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what the Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required. (emphasis in original.)

Petitioners attack this finding of the district court by challenging the probative value of one witness' testimony (Pet. Br. 16-17, 76-77)¹¹⁹ and misrepresenting another's (Pet. Br. 15-16, 76). Plaintiffs' claims that school system segregative practices had an impact upon residential patterns did not rest solely on the testimony of Mr. Sloane (*compare* Pet. Br. 16, 76). Moreover, Petitioners' sug-

¹¹⁹ The questions of a witness' credibility and the probative value of his testimony are matters for the trial court. Petitioners failed to overturn the district court's finding in the Court of Appeals and apparently now seek to upset it before this Court by arguing about credibility and qualifications. Surely, if the "two-court" rule has any meaning, it is applicable here. See note 3 *supra*.

gestion that Mr. Sloane's views were inconsistent with those of another witness for plaintiffs (Pet. Br. 76) rests upon a misrepresentation of Dr. Taeuber's testimony. Petitioners' counsel interrogated Dr. Taeuber on cross-examination about the causes of racial residential segregation (A. 300-07)¹²⁰ and referred to a law review article written by the witness. Counsel for Petitioners asked numerous questions about a listing of discriminatory housing practices contained in the article, but Dr. Taeuber never stated that the list included "all of the discriminatory practices he considered responsible for residential segregation" (Pet. Br. 16). Indeed, in response to an inquiry which is as close as counsel ever came to asking whether the listing was inclusive in that sense, Dr. Taeuber stated:

Unity, I intended to refer not primarily to any focus on residential segregation, but *the common linkage between the economic discrimination and housing discrimination and educational discrimination, labor market discrimination, social discrimination.*

(A. 300) (emphasis supplied.) At trial, although not in the Brief, counsel for Petitioners responded, "that's what I meant to say, too" (*id.*).

The article about which Dr. Taeuber was questioned did include a discussion of the contribution to residential segregation made by segregative school system actions and decisions, as counsel for plaintiffs showed on Dr. Taeuber's redirect examination; Dr. Taeuber's views were the same as Mr. Sloane's (A. 310-11). Petitioners also do not address the testimony of Dr. Green (A. 355), reporting

¹²⁰ In his very first response on this subject, Dr. Taeuber substituted "racial discrimination" for "discrimination in housing" as one among the "three general categories of causes" of residential segregation (A. 300).

research which supports the conclusions of Dr. Taeuber and Mr. Sloane. Nor did they introduce any evidence of their own on the subject.¹²¹

Furthermore, this Court recognized the relationship between school and housing segregation in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971), and refused to excuse school authorities *who are found to have engaged in intentional segregation* from the obligation of "actual desegregation" even though residential patterns may require the use of pairing or pupil transportation (*compare* Pet. Br. 78-79). Hence, there was ample basis for the district court's conclusion on this record that acts of Columbus school officials which it found to be intentionally segregative influenced the development of segregated residential patterns.

Fourth, the Columbus school authorities practiced segregation in faculty assignments on a systemwide basis until 1973, when they were required by a conciliation agreement with the Ohio Civil Rights Commission to modify that

¹²¹ In their Brief Petitioners refer to a recent article which they claim refutes any notion that school segregation influences housing patterns (Pet. Br. 77 n.41). Yet they made no effort to establish this proposition before the trial court. It is simply inconceivable that this case is to be decided, and the carefully considered teachings of *Swann* and *Keyes* discarded, on the basis of the SUPREME COURT REVIEW rather than the record evidence in this case. Whatever Dr. Wolf's article says, it is hardly representative of prevailing opinion among sociologists and demographers, *see* Appendix, *infra*.

Nor is the board's argument about Southmoor Junior High School (Pet. Br. 77-78) compelling. Plaintiffs have never contended that school segregation is alone responsible for housing segregation. Elimination of school segregation on a systemwide basis (much less for a single school) thus could not be expected to change long-entrenched, segregated residential patterns dramatically; it would simply remove the contributing factor of school officials' discriminatory practices, exactly as Dr. Taeuber stated (A. 311).

policy (*see* p. 31 *supra*); and systemwide segregation in the assignment of school site administrative personnel continued through the time of trial (*id.*). The Court of Appeals' observation on this score is trenchant (Pet. App. 174):

Obviously it was no "neutral" neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974.

The school board's claim that it used a neutral neighborhood school policy, and housing segregation unrelated to its own actions caused the current pattern of racial imbalance in the district was simply belied by the evidence of massive manipulation of pupil assignment devices and racial assignment of staff over the years. Based on all of the evidence, the district court came to the eminently sound conclusion that:

... The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which *presently* have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards.

(Pet. App. 73) (emphasis added.)¹²² Reviewing the evidence and its findings again in light of this Court's ruling in *Dayton Bd. of Educ. v. Brinkman*, *supra*, the court reiterated this conclusion:

¹²² *See* note 7 *supra*.

Systemwide liability is the law of this case pending review by the appellate courts. 429 F. Supp. at 266. Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility. This they did not do, 429 F. Supp. at 260.

(Pet. App. 95.)

D. The Remedy Proceedings.

Having found systemwide liability, the trial court directed the board to submit a remedial plan "to eradicate unlawful segregation from the Columbus school system root and branch" (Pet. App. 73), cautioning, however, that not every school need be brought within a particular statistical pattern, and might remain virtually one-race if "defendant school authorities . . . satisfy the Court that their racial composition is not the result of present or past discriminatory action or omissions of defendant public officials or their predecessors in office" (Pet. App. 75). On June 10, 1977 Petitioners filed a proposed plan (Pet. App. 2) and hearings were scheduled to commence July 11 (Pet. App. 95 n. 1). On July 1, following this Court's ruling in *Dayton Bd. of Educ. v. Brinkman*, *supra*, Petitioners moved for leave to file an amended plan, which was submitted on July 8 pursuant to approval of the district court (Pet. App. 96). Both these plans, as well as one submitted by the State defendants (*see note 7 supra*) were the subject of testimony and evidence at the July hearings. The trial court also heard evidence concerning another proposal prepared by the Board of Education staff which was not submitted formally by the board (*see Pet. App. 104-05*).

Because the court concluded that *Dayton* did not require modification of its prior systemwide liability findings (Pet. App. 90-96),¹²³ the various submissions were evaluated in light of their practicality and according to the standards enunciated by this Court in *Swann*, *supra*. The "amended plan" filed on July 8 by the Petitioners was designed to alter the racial composition only of those predominantly black schools identified by name in the district court's liability opinion (A. 742); the plan was rejected by the court because it "falls far short of providing a reasonable means of remedying the systemwide ills" (Pet. App. 100) and because "the Columbus defendants did not shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present or past discriminatory action on their part as required by *Swann*, *supra*, 402 U.S. at 26. The pupil reassignment component of the July 8 amended plan, then, is constitutionally unacceptable." (Pet. App. 102.) The State board's plan was found to be constitutional, although the court noted some reservations about its feasibility for implementation (Pet. App. 106-07). The June 10 plan submitted by Petitioners proposed the retention of 22 heavily white schools as to which the trial court found "there ha[d] been no showing by defendants that the reasons for this aspect of this plan are genuinely non-discriminatory" (Pet. App. 105).¹²⁴ In comparison to the alternative staff proposal which was also placed in evidence, the June 10 plan left potential areas of "white flight" from desegregation within the system (*see A. 214*), and it called for transportation of more pupils (Pet. App.

¹²³ This determination is discussed in Argument III, *infra*.

¹²⁴ Indeed, no evidence whatsoever on this subject was introduced by Petitioners at the remedy hearings, which consisted largely of descriptions of the mechanics of the various plans before the court.

105). The district court concluded from a comparison of the two that "the June 10 plan's proposed omission of 22 identifiably white elementary schools from the remedy is not required by sound logistical or educational concerns. The pupil reassignment component of the original June 10 plan is constitutionally unacceptable" (*id.*).

The court did not, however, order the staff-prepared alternative plan into effect, because it "seemingly has not been thoroughly considered and documented by the total planning group. Although its numerical face is satisfactory, its feasibility is not a matter about which the Court can be certain" (Pet. App. 107). Instead, the Petitioners were afforded yet another opportunity to devise a plan meeting constitutional standards (Pet. App. 111-12). Their subsequent proposal was approved by the district court on October 4, 1977 (Pet. App. 125-37).

Summary of Argument

As we have earlier reiterated, Petitioners controvert both the conclusion of the courts below that they practiced segregation throughout the Columbus school district (systemwide liability) and the appropriateness of the remedy ordered to correct that constitutional violation (systemwide desegregation). We address these broad contentions in sequence.

I

The district court correctly concluded from the evidence that Columbus school authorities followed a virtually unswerving course of segregation throughout the school district, both before and after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and the Court of Appeals properly affirmed that judgment.

A. The trial court did not need, and did not rely upon, evidentiary presumptions in reaching its judgment. Rather, the court viewed and weighed all of the evidence presented at the lengthy hearings, and determined that it "clearly and convincingly" portrayed an unbroken history of intentionally segregative conduct by Columbus school officials continuing through the time of trial. That evidence was overwhelming; it was limited neither by time nor by geography.

B. The trial judge gave appropriate consideration to the school board's repeated claim that it had done nothing but adhere to a racially neutral "neighborhood school" policy. He found that the claim could not be squared with the numerous and substantially segregative exceptions to the "neighborhood school" principles which were espoused by Petitioners. He also concluded that on those occasions when the school board did choose to adhere to what it termed "neighborhood schools," the clearly foreseeable and often known or acknowledged result was racial segregation. Furthermore, the board's decisions were made in the context of an historical background of deliberate segregation. Hence, the court concluded that the board's knowing choice in these circumstances could properly be considered an element supporting an inference that the segregation was intentional. This reasoning is sound and consistent with *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), each of which involved a finding of *effect only*, without any history of departure from usual practice, or of a series of discriminatory actions, or of any other evidentiary factors identified in *Arlington Heights*.

C. The judgments below are also supported by the principles enunciated in *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973). Although the evidence did not concern

every school in the system, unlike *Keyes* this case was not tried in separate geographical components and there has never been a contention that any area of the system is "a separate, identifiable and unrelated unit," *id.* at 205. Hence, the district court correctly proceeded from its finding of continuous segregative conduct based upon the evidence before it to a determination that this conduct rendered Columbus a "dual school system," *id.* at 213. Petitioners' contention that this case somehow involves an impermissibly "retroactive" application of *Keyes* is devoid of any merit; not only did Columbus do nothing after 1954 to alleviate the results of its prior intentional segregation, but thereafter the school system engaged in precisely the same sort of segregative conduct which in *Keyes* was held to justify an evidentiary presumption of responsibility for all segregation in the district.

II

Having reached the conclusion that Columbus practiced systemwide segregation, the courts below properly required a systemwide remedy.

A. Under *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968) and companion cases; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); and *Keyes, supra*, the courts below properly considered the continued existence of segregated schools created by official action to be an important indication that there was still a dual school system. The district court correctly put the burden on Petitioners to prove that schools which their remedial plans did not propose to desegregate were not affected by the segregative actions which the court had found. Petitioners made no attempt to meet that burden except to assert without evidentiary foundation that the racial composition of all schools resulted only from the

"neighborhood school" system—a claim properly rejected on this record.

B. The district court did not require racial balance; rather, it rejected remedy plans proposing the continued existence of substantial numbers of one-race schools by faithfully applying the standards of *Green* and *Swann*.

III

None of the legal principles upon which the trial court earlier relied was explicitly altered by *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) or the cases remanded for reconsideration in light of that decision.

A. The holding of *Dayton I* does not indicate any modification of the judgments below because the evidence reveals (and the courts below properly found) a dual school system in Columbus, unless *Dayton I* overruled *Keyes sub silentio*. But even putting the dual school system finding to one side, plaintiffs were entitled to the relief ordered by the district court because Petitioners failed to rebut the *prima facie* case of systemwide segregation established by plaintiffs' affirmative evidence.

B. The evidentiary principles which support *Keyes'* *prima facie* case construction are logical and consistent with the Fourteenth Amendment; and they do not hold school authorities responsible for the discriminatory acts of others. *Keyes* and *Dayton I* should be reaffirmed and the judgments below sustained.

C. As a matter of equity and effectiveness, the remedy in a school desegregation case where the existence of a dual system has been proved must go beyond mere tinkering. It must also do more than just remove schools from the "virtually one-race" category. This was the basis for this Court's recognition in *Swann* that the racial composition of the system as a whole is a useful starting point, and in

Wright v. Council of the City of Emporia, 407 U.S. 451, 464-65 (1972) and *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489-90 (1972) that district courts may consider, among other factors, the likelihood that plans of "desegregation" will lead to "resegregation." The rigid reading of some language in *Dayton I* proposed by Petitioners is inconsistent with these equitable principles.

ARGUMENT

I.

The Evidence Overwhelmingly Supports the District Court's Conclusion of Systemwide Constitutional Violations by Columbus School Authorities.

A. Plaintiffs Proved a Pattern and Practice of Segregation by Columbus Defendants and Their Predecessors in Office Which Fully Justified the Trial Court's Holding of Systemwide Liability, Irrespective of Any Evidentiary Presumptions Operating in Plaintiffs' Favor.

The recitation of the facts of this case is lengthy and complex, reflective of the multiplicity of acts and decisions which accompany the administration of a large school system. What clearly emerges from that recitation, however, is a pattern of deliberately segregative actions unlimited in its scope by considerations of time, geography or pedagogy. Before 1954, these actions were more flagrant and notorious (for example, the outright gerrymandering of zone lines for Pilgrim and Fair Elementary Schools and the sequential replacement of entire school faculties), though violative of state law. In the decades which followed *Brown*, zone lines may have been drawn in a less irregular fashion, but segregation was consistently entrenched through devices such as optional and discontinuous attendance areas, construction of new facilities and

additions to existing schools, and continuation of the pattern of faculty and administrative staff assignments which marked schools as "black" or "white." The district court appreciated the significance of the long chain of events revealed by the proof; it judged the evidence *as a whole*, and concluded that it "clearly and convincingly weighs in favor of the plaintiffs" (Pet. App. 2).

Petitioners' attack upon the basic conclusion of the trial judge (which was affirmed by the Court of Appeals)—that there was systemwide segregation in Columbus—is almost a pathetic one. Primarily, Petitioners argue that the courts below found, and could only have found, "remote and isolated" constitutional violations (*e.g.*, Pet. Br. 40-41, 62-66). This description of the lower court's decisions simply blinks reality. Both the district court and the Court of Appeals were confronted with the problem of organizing their findings about the mass of evidence in a systematic, lucid fashion. The district judge chose to separate events occurring before and after 1954, and for the latter period to describe the evidence largely according to functional areas of school system administration which plaintiffs claimed had been carried out in a segregative fashion, indicating broadly those areas as to which the court felt the proof was significant and those in which it was not. (*See* note 36 *supra*.) To avoid an unduly lengthy and detailed opinion, the district court also chose merely to describe *examples*, rather than every occurrence, of segregative activity by the school board and school employees (*see* pp. 28-29 *supra*). Its ultimate findings related to the intentionally segregative administration of the entire system (Pet. App. 61, 73).

But any doubt about the breadth of the trial court's holding was laid to rest in its July 7, 1977 Memorandum and Order (Pet. App. 90, 94) in which the court stated:

Viewing the Court's March 8 findings *in their totality*, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. (emphasis supplied.)

Incredibly, Petitioners continue to insist that the "findings" of the district court do not go beyond the schools identified by name in its March 8, 1977 opinion.¹²⁵ This claim disregards the explicit language of the district court, and it is ludicrous in the light of the extensive record supporting the ultimate conclusions of the trial judge. The circumstance that the district court's opinion was not as literally exhaustive as the recitation of facts, *supra*, or that the Court of Appeals chose to rely heavily on the district court's opinion after finding it to be supported by the record, should not distract attention from the adequacy of the evidence to sustain the judgments in this case.

We emphasize again the extensive period of time over which numerous and repeated moves toward segregation were made by Columbus school officials, and the evidence that in whatever sector of the Columbus system black school children appeared in significant numbers, they were subjected to discriminatory practices which confined them to specific, racially identified school facilities. Plaintiffs showed much more than simply a collection of discrete and unrelated incidents; they demonstrated a repetitive course of conduct by school authorities which compelled the con-

¹²⁵ See A.742, where the current (then Acting) Superintendent of Schools described the school board's amended plan as one designed "to eliminate all racially identifiable black schools cited as instances of guilt in the [district] Court's opinion and order." (emphasis supplied.)

clusion that systemwide segregation had been and was being practiced.

The district court's ruling to this effect is similar to those of other courts which have evaluated the evidence in school desegregation cases. For example, in *Davis v. School Dist. of Pontiac*, 309 F. Supp. 734, 741 (E.D. Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971), the court noted:

If this Court's attention were directed and limited solely to the location of the Bethune School without being confronted by or concerned with the total pattern which was, at the time, developing in the construction of new schools in the system, the School Board may have succeeded in providing a persuasive argument here, as it did earlier, that the location of the Bethune School could be justified on the grounds of the existing criteria, namely nearness, capacity and safety of access routes. However, this Court's consideration is not limited or directed solely to the location of the Bethune School, but has been broadened to take into consideration the composition of the entire Pontiac School System.

In affirming that ruling, the Court of Appeals agreed with the approach taken by the lower court: "Although, as the District Court stated, each decision considered alone might not compel the conclusion that the Board of Education intended to foster segregation, taken together, they support the conclusion that a purposeful pattern of racial discrimination has existed in the Pontiac school system for at least 15 years." 443 F.2d 573, 576 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). See also, *e.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410, 479 (D. Mass.), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Oliver v. Kalamazoo Bd. of Educ.*, 368

F. Supp. 143, 174 (W.D. Mich. 1973), *aff'd sub nom. Oliver v. Michigan State Bd. of Educ.*, 408 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).¹²⁶ Although Petitioners point to occasional actions which they claim were not segregative (Pet. Br. 18, 27 n.12, 78, 89 n.47) the judgment of the courts below obviously was that these few acts did not invalidate nor offset the conclusion of overall, system-wide segregation.¹²⁷ Petitioners ignore the point that the courts below were not required to find, nor have plaintiffs maintained, that every action of the Columbus school authorities was violative of plaintiffs' rights.

Petitioners' next line of attack upon the findings below is a series of assertions that the district court was wrong in finding segregation even with respect to the occurrences it described in detail in its opinion (*e.g.*, Pet. Br. 23-29, 62-66). There are several responses to these contentions. First, Petitioners generally do *not* discuss the other evidence of occurrences similar to those detailed in the trial judge's opinion which reinforces the soundness of the conclusions therein.¹²⁸ Second, we again point out that the factual findings, including the inferences to be drawn from

¹²⁶ And see *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 21 (1971): "In ascertaining the existence of legally imposed school segregation, the existence of a *pattern* of school construction and abandonment is thus a factor of great weight." (emphasis supplied.)

¹²⁷ These incidents generally involved small numbers of black students; while most whites in Columbus were consistently "protected" from having to attend schools enrolling large numbers of blacks, most blacks were intentionally confined to black schools (*see, e.g.*, pp. 46-47, 52-55 *supra*).

¹²⁸ But see, Pet. Br. 27 n. 12 (optional zones: Franklin-Roosevelt, "Downtown" option, Central-North and East-Linden-McKinley, compare pp. 45-46, 57-58 *supra*); Pet. Br. 31 n. 17 (Barnett discontinuous area, compare pp. 67-69 *supra*); Pet. Br. 32 n. 17 (Arlington Park junior high students, compare pp. 54-55 *supra*).

the evidence,¹²⁹ were approved by the Court of Appeals and hence ought not be overturned here even if some members of the Court feel that they would not have drawn exactly the same conclusions if sitting as a trier of fact. *United States v. Commercial Credit Co.*, 286 U.S. 63 (1932); *Brainard v. Buck*, *supra*. Finally, Petitioners' sporadic quarrels over particular details represent little more than an attempt to relitigate the case in its entirety before this Court, an attempt which is particularly inappropriate given Petitioners' approach to this case at trial. The board made little effort to disprove plaintiffs' evidence of segregative activity and its effects, instead offering unconvincing general rationalizations—but not justifications—for cited practices (*see, e.g.*, p. 55, notes 68 and 121 *supra*). They then argued that plaintiffs had failed to establish a case for relief—again refusing to introduce proof of their own to demonstrate that their actions did not lead to segregation (Pet. App. 102-03). Petitioners continue to take that approach in their Brief, trying to create doubt about plaintiffs' proofs but not controverting the events. We set out just one example of this tactic in the note.¹³⁰ See also

¹²⁹ We here refer to such inferences as the racial population characteristics of an area between 1960 and 1970, based upon census reports for those years and testimony as to "common knowledge" (L. Tr. 1513) about the residential location of the black population in Columbus, compare, *e.g.*, Pet. Br. 30 n.15, 87. We deal separately with Petitioners' contentions that the courts below improperly inferred "segregative intent" solely from their claimed adherence to a "neighborhood school" policy or solely from evidence that segregation was the foreseeable impact of their decisions (*see pp. 109-18 infra*).

¹³⁰ Petitioners criticize Dr. Foster's use of census data to make judgments about the racial composition of an area (Pet. Br. 30 n. 15). However, his conclusions were supported by other evidence such as: the testimony of black realtors about the areas of the city in which blacks were permitted to reside (*see p. 26 supra*), the resultant school enrollments (in years after 1963, when figures were available) (as in the case of Gladstone Elementary School

note 5, *supra*. If this case is thus to be decided on the basis of the adequacy of plaintiffs' proof to survive a Rule 41(b), FED. R. Civ. P. motion for dismissal, there can be little doubt about the outcome.

It is also significant, we think, that the practices to which the district court referred have been identified and recognized in many other school cases as segregative devices. This judicial precedent supports the determination of the courts below that their longstanding and multiple use in this case was the mark of a systemwide policy of segregation. For example, creation of optional areas between schools of differing racial composition was found significant in, among other cases, *United States v. Board of School Comm'rs*, 332 F. Supp. 655, 666, 668 (S.D. Ind. 1971), *aff'd* 474 F.2d 81 (7th Cir. 1973); *Oliver v. Kalamazoo Bd. of Educ.*, *supra*, 368 F. Supp. at 167; *Booker v. Special School Dist. No. 1*, 351 F. Supp. 799, 804 (D. Minn. 1972); *Bradley v. Miliken*, 338 F. Supp. 582, 587-88 (E.D.

and Buckeye Junior High School, for example (*see* A. 778, 783, L. Tr. 3909)), contemporaneous expressions of concern about segregation from the black community (as in the case of Gladstone and Monroe, for example, *see* p. 35 *supra*). Significantly, Petitioners have never contended (either in the district court or in their Brief here) that Dr. Foster erred in describing the racial character of an area at the time an optional or discontinuous zone was created, a school constructed, or a boundary changed. Nor have they suggested that the evidence presented by plaintiffs was not the "best evidence" available as to the facts at issue, except in one instance when they produced better evidence from records and files within their custody and control. *See* note 5 *supra*. Moreover, Petitioners conveniently omit to mention that in the case of the Highland-West Broad option to which their footnote criticism is appended (Pet. Br. 29-30), they provided absolutely no capacity data or other educational justification for creation of the option; Dr. Foster, who was qualified as an expert witness in the areas of segregation and desegregation (L. Tr. 3383-84), concluded that lacking such justification the option was racial in nature (A. 475, 478). The trial court acted quite properly in deciding to credit Dr. Foster's testimony in light of *all* of the evidence.

Mich. 1971), *appeal dismissed*, 468 F.2d 902 (6th Cir.), *cert. denied*, 409 U.S. 844 (1972), *aff'd* 484 F.2d 215 (6th Cir. 1973) (*en banc*), *aff'd in pertinent part*, 418 U.S. 717 (1974); *see also*, *Taylor v. Board of Educ. of New Rochelle*, *supra*, 191 F. Supp. at 185 (whites allowed to transfer out of predominantly black school though living within "zone"); *United States v. School Dist. No. 151*, 286 F. Supp. 786, 795 (N.D. Ill. 1967), *aff'd* 404 F.2d 1125 (7th Cir. 1968) (same); *Spangler v. Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 508 (C.D. Cal. 1970) (optional or "neutral" area maintained until 1954, then assigned to predominantly white schools, *cf.* Pet. App. 30-31).¹³¹ Discontiguous assignments also played roles in many of these cases, *e.g.*, *United States v. Board of School Comm'rs*, *supra*, 332 F. Supp. at 667-68; *Spangler v. Pasadena City Bd. of Educ.*, *supra*, 311 F. Supp. at 508; *United States v. School Dist. No. 151*, *supra*, 286 F. Supp. at 793-94; *Clemons v. Board of Educ. of Hillsboro*, 228 F.2d 853, 855, 857 (6th

¹³¹ Petitioners' refrain that not every optional area created in the system was a racial one (Pet. Br. 26-27) is beside the point. Plaintiffs never attacked the use of optional areas, discontinuous zones, or any other method of school system administration as *per se* discriminatory. As we recognize in the statement of facts, *supra*, and as this Court itself recognized in *Swann*, *e.g.*, 402 U.S. at 20, school officials must take into account a wide variety of circumstances and employ many different techniques in operating the system. All that is proscribed by the Constitution is the use of devices or techniques for the purpose of segregating. The optional and discontinuous zones which plaintiffs demonstrated to have racial implications were instances in which no educational justification for their use could be proved.

The board's general defense that it was a growing system and had problems of overcrowding certainly could not justify decisions to solve those problems in a racially segregative way. *See United States v. Board of School Comm'rs*, *supra*, 332 F. Supp. at 666-67; *Spangler v. Pasadena City Bd. of Educ.*, *supra*, 311 F. Supp. at 518-19; *NAACP v. Lansing Bd. of Educ.*, 429 F. Supp. 583, 593 (W.D. Mich. 1976), *aff'd* 559 F.2d 1042 (6th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978) (all "growing" systems with "capacity" problems).

Cir. 1956). The construction of small schools which served limited, one-race areas or large facilities which "contained" increasing student populations of one race have been noted, in, e.g., *Bradley v. Milliken*, *supra*, 338 F. Supp. at 589; *United States v. Board of School Comm'rs*, *supra*, 332 F. Supp. at 667; *Booker v. Special School Dist. No. 1*, *supra*, 351 F. Supp. at 803-04; *Davis v. School Dist. of Pontiac*, *supra*, 309 F. Supp. at 741. Selective or inconsistent application of the "neighborhood school" policy on a racial basis signified intentional segregation to the courts in *Morgan v. Hennigan*, *supra*, 379 F. Supp. at 473; *United States v. Board of School Comm'rs*, *supra*, 332 F. Supp. at 665; *Oliver v. Kalamazoo Bd. of Educ.*, *supra*, 368 F. Supp. at 164-66; and *Kelly v. Guinn*, 456 F.2d 100, 108 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973), among others. Finally, continued faculty segregation has been identified as a telling characteristic of systemwide discrimination in many, many rulings. E.g., *Kelly v. Guinn*, *supra*, 456 F.2d at 107; *Davis v. School Dist. of Pontiac*, *supra*, 309 F. Supp. at 742-45; *Morgan v. Hennigan*, *supra*, 379 F. Supp. at 456-61.

The record in this case, then, shows both a longstanding pattern and practice of intentionally segregative acts by Columbus school authorities and also the repeated use of a substantial variety of discriminatory techniques each of which has received frequent judicial recognition and identification as one of the tools of segregation. It was more than adequate to justify the district court's finding of systemwide violation.

B. The District Court's Consideration of Petitioners' Claimed Adherence to a "Neighborhood School" Policy, and of the Degree to Which Segregative Results of Their Actions Were Known or Foreseeable, in Reaching the Ultimate Conclusion That There Was a Systemwide Policy of Segregation in Columbus Was Not Inconsistent With *Washington v. Davis* or *Arlington Heights*.

As an independent ground for reversing the judgments below, Petitioners argue that in this case, the district court found intentional segregation "solely from evidence that the disproportionate impact of official action was foreseeable" (Pet. Br. 81) and solely "from adherence to a neighborhood school policy in a district with racially imbalanced residential patterns" (Pet. Br. 91). Such holdings, according to Petitioners, are inconsistent with *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) because they were the equivalent of dispensing with the constitutional requirement of intentional discrimination.

The situation in this case is far different from that in *Washington v. Davis*¹³² or *Arlington Heights*.¹³³ No judg-

¹³² *Washington v. Davis* reached this Court as a challenge to a single action by the defendant police department: "The validity of Test 21 was the sole issue before the court on the motions for summary judgment." 426 U.S. at 235. The test had a disproportionate racial impact, which the trial court accepted as one indication that its adoption and use was unconstitutionally discriminatory; however, the court found this factor to be outweighed by other circumstances. *Id.* at 235-36. On appeal, the "disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was held sufficient to establish a constitutional violation [unless analogous Title VII standards were met]." *Id.* at 237. This Court reversed, emphasizing that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is [not] unconstitutional solely because it has a racially disproportionate impact." *Id.* at 238 (emphasis in original).

¹³³ *Arlington Heights* similarly involved a single act, in this case the denial of an application for rezoning of a specific parcel. 429 U.S. at 255-57. After a trial, the district court specifically held that

ment was reached *solely* based on disproportionate impact. The district court found every kind of circumstance described by Mr. Justice Powell's opinion in *Arlington Heights*:¹³⁴ a pattern unexplainable on grounds other than

the Village Board members "were not motivated by racial discrimination" and that there was no racially discriminatory effect from the denial. *Id.* at 259. The Court of Appeals found such an effect, however, and ruled that because of that effect, the decision could be upheld only if the non-racial justifications for the action amounted to compelling state interests. *Id.* at 260. Since the Court of Appeals also specifically ratified the trial court's finding that the decision was not racially motivated, this Court reversed under *Washington v. Davis*, *supra*:

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.

Id. at 270-71 (footnote omitted).

¹³⁴ In his opinion for the Court, Mr. Justice Powell offered several examples of evidence which *would* be probative of discriminatory intent:

The impact of the official action — whether it "bears more heavily on one race than another," [citation omitted] may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. [citations omitted] The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, *particularly if it reveals a series of official actions taken for invidious purposes*. [citations omitted] The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. [citations omitted] . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the de-

race (*e.g.*, "The Court can discern no other explanation than a racial one . . ." [Pet. App. 34]); a series of official actions taken for invidious purposes (*e.g.*, "the Court discussed in detail a variety of post-1954 Board decisions and practices . . ." [Pet. App. 94]); departures from normal procedures (*e.g.*, "Students living on three streets (Wilson, Bellview and Eagle Avenues) located near the center of the Heimandale attendance area were assigned to attend For-nof instead of Heimandale" [Pet. App. 35]); and substantive departures (*e.g.*, "The Court concludes that the Highland-West Broad optional zone was not created to alleviate overcrowding or because of a geographic barrier" [Pet. App. 30]).

In addition, the "foreseeable consequences" test approved by the Courts of Appeals is not a "sole effects" standard, no matter how many times Petitioners repeat that characterization; nor has the test been expressly disapproved in any opinion of this Court. Petitioners admit that the requirement of knowledge or foreseeability is something beyond mere effect (Pet. Br. 84); and they recognize that *Washington v. Davis* specifically disallowed a finding of unconstitutionality based *solely* on effect (*id.*). They insist, however, that the "foreseeable consequences" test has been rejected by this Court in *Austin Independent School Dist. v. United States*, 429 U.S. 990 (1976) and *Arlington Heights*, *supra*. *Austin* was a *per curiam* remand for reconsideration in light of *Washington v. Davis*; the opinion of the Court does not speak to the "foreseeable consequences" test. And Petitioners fail to note (Pet. Br. 85)

cisionmaker strongly favor a decision contrary to the one reached.

Id. at 267-68 (emphasis supplied; footnotes omitted). *See also*, *Washington v. Davis*, *supra*, 426 U.S. at 253-54 (Stevens, J., concurring); *Dayton Bd. of Educ. v. Brinkman*, *supra*, 433 U.S. at 421 (Stevens, J., concurring).

that Mr. Justice Powell's concurring opinion (joined by the Chief Justice and Mr. Justice Rehnquist) explicitly expressed concern only about *sole* reliance on the test in circumstances where there was no other evidence of discrimination:

Although in an earlier stage in this case other findings were made which evidenced segregative intent, *see, e.g., United States v. Texas Education Agency*, 467 F.2d 848, 864-869 (CA5 1972) (actions by school authorities contributing to segregation of Mexican-American students), the opinion below apparently gave controlling effect to the use of neighborhood schools:

....

429 U.S. at 991 n.1. Petitioners also seek support from *Arlington Heights* (Pet. Br. 85-86); but as noted, that case held only that where there was an explicit finding of no racial motivation, discriminatory effect alone would not justify a finding of unconstitutional discrimination. We believe that the evidence produced in this case fits within the categories identified in Mr. Justice Powell's opinion (*see* note 121 *supra*); to the extent that it does not, we observe that the opinion did not "purpor[t] to be exhaustive [in listing] subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U.S. at 268. *Compare* Pet. Br. 85.

Further, as we have previously emphasized, the judgments of the lower courts in this case do not rest upon a single segregative occurrence or a few isolated incidents; the proof showed a continuous, repeated pattern of such actions. Unquestionably, a finding of intentional discrimination may more easily be made when the court is confronted with a consistent series of decisions with predictable and avoidable segregative effects than from a single

such event. For example, in *Keyes v. School Dist. No. 1*, 303 F. Supp. 279, 286; 303 F. Supp. 289, 294 (D. Colo. 1969), the district court said:

We do not find that the purpose here included malicious or odious intent. At the same time, it was action which was taken with knowledge of the consequences, and the consequences were not merely possible, they were substantially certain. Under such conditions, the action is unquestionably wilful.

...

Between 1960 and 1969 the Board's policies with respect to these northeast Denver schools show an un-deviating purpose to isolate Negro students. . . .

These findings were relied upon in this Court's opinion, *Keyes v. School Dist. No. 1*, *supra*, 413 U.S. at 199, and that opinion in turn was favorably cited in *Washington v. Davis*, *supra*, 426 U.S. at 240, 243-44. *See also, Arlington Heights*, *supra*, 429 U.S. at 267.

Petitioners' claim that the teaching of *Washington v. Davis* and *Arlington Heights* was violated in this case rests ultimately on their assertions (Pet. Br. 87-88) that the decisions found segregative by the courts below "had no racial significance" and met "neutral criteria" (*id.* at 88). Petitioners simply fail to provide convincing argument, however, that the district court's contrary conclusions were clearly erroneous, or that (for example) their own capacity-enrollment figures, upon which the court relied and which showed no educational justification for optional zones and discontinuous areas between schools of differing racial composition, were wrong. Contrary to their assertions, the finding of systemwide segregation made by the district court and affirmed by the Court of Appeals does not rest "*solely*" on disproportionate impact; rather, the probative

value of each incident was confirmed and magnified by the systematic pattern which unfolded.¹³⁵

Petitioners' "neighborhood school" argument rests upon no sounder footing. The district judge declared that the school system's determination to make racially homogeneous "neighborhoods"—which the system would itself define by setting boundaries (A. 323)¹³⁶—the basis for pupil assignments, despite its *knowledge* that segregation would result, "is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn" (Pet. App. 49) (emphasis supplied). There is a quantum leap between that statement and the assertion of Petitioners that "under the

¹³⁵ Indeed, the reason why a number of the Courts of Appeals have specifically recognized, in school desegregation cases, that showing a pattern of foreseeably segregative consequences of board actions establishes part of plaintiffs' *prima facie* case of segregative intent, is that such cases almost invariably involve a long chain of segregative events affecting the racial composition of schools. Moreover, the "foreseeable consequences" test is designed only to assist in determining whether or not segregative intent was a motivating factor in such a pattern of segregative conduct, and usually plays no part even in shifting the burden of going forward with evidence on the issue of segregative intent (see note 141 *infra*). Under the "foreseeable consequences" test for determining segregative intent, school authorities are given every opportunity to explain by proof that such a pattern of segregative conduct is, in fact, motivated by nonracial factors. *E.g.*, *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3224 (Oct. 2, 1978); *United States v. School Dist. of Omaha*, 565 F.2d 127 (8th Cir.) (*en banc*), *cert. denied*, 434 U.S. 1064 (1977). In marked contrast, the Seventh Circuit in *Arlington Heights* and the D.C. Circuit in *Washington v. Davis* required the defendants to demonstrate that compelling governmental interests or business necessity, respectively, justified a single act with a disproportionate racial impact—without regard to whether or not race was a motivating factor in the decision. See notes 132 and 133 *supra*.

¹³⁶ See note 162 *infra* and pp. 43-44, 89-92 *supra*.

foreseeable effect test, the mere continuance of the neighborhood school policy in Columbus . . . became *the basis* of a finding of unlawful segregation by the school board" (Pet. Br. 91) (emphasis supplied). The difference is more than merely a semantic one, as indicated by the Court's discussion in *Arlington Heights*, *supra*, indicating that impact alone, while it could not be determinative, was probative, especially where supported by other evidence. See note 134 *supra*.¹³⁷

Petitioners also gloss over the differences between what the record in this case reveals to have been their practice, on the one hand, and the concerns for the educational values of true "neighborhood schools" which are reflected in the opinions of this Court and of individual Justices, on the other hand.¹³⁸ In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*, 402 U.S. at 28, this Court recognized that:

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.

Similarly, and citing that language, the Court in *Keyes* wrote (413 U.S. at 212):

. . . we hold that the mere assertion of such a [neighborhood school] policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful

¹³⁷ See also *Austin Independent School Dist. v. United States*, *supra*, 429 U.S. at 991 n.1 (Powell, Rehnquist, JJ. and Burger, C.J., concurring), objecting to the "apparently . . . controlling effect" given the use of "neighborhood schools" by the Fifth Circuit in that case.

¹³⁸ The same concerns were recognized by the district judge. See Pet. App. 55.

portion of the school system *by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation.*

(emphasis supplied.) In the very passage upon which Petitioners rely (Pet. Br. 92), from a concurring and dissenting opinion in *Keyes, supra*, Mr. Justice Powell speaks of the worthwhile values of "Neighborhood school systems, neutrally administered . . ." 413 U.S. at 246 (emphasis supplied).

These excerpts suggest the reason why the approach of the lower courts in this and other school desegregation cases is a correct one, with respect both to the foreseeability test and also to its application to the "neighborhood school" principle. As the Sixth Circuit formulated the applicable test in *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975):

A presumption of segregative purpose arises when plaintiffs establish that the natural, probable and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. This presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

(See Pet. App. 48 n. 3.) Even as applied to school authorities' use of "neighborhood school" assignments, this approach is consistent with the subsequent decisions of this Court in *Washington v. Davis* and *Arlington Heights*. If the "neighborhood school" concept is not shown to have been "neutrally administered," then its selective use and manipulation becomes corroborative evidence of segregative intent, beyond mere effect or even foreseeability. See,

e.g., Morgan v. Hennigan, supra, 379 F. Supp. at 470, 473. If, on the other hand, no such inconsistencies are revealed, then any conclusion of intentional segregation must rest on other bases. Thus, even accepting Petitioners' contention that the "foreseeability" test is an effects-only standard, the Sixth Circuit's version of that test is consistent with this Court's rulings. *A fortiori*, the ruling below, based as it is not just on foreseeability but upon actual knowledge as well as upon a persistent pattern of segregative departures from "neighborhood school" principles, is proper.

This record is replete with evidence that Columbus created wholesale exceptions to the "neighborhood school" principles which it claimed to follow¹³⁹ (see, *e.g.*, pp. 17-18, 37-44, 54-55, 63-64, 81-82 *supra*). This case does not involve a "neutrally administered" "neighborhood school" policy; hence, it does not raise the specific issue reserved in both *Swann*, 402 U.S. at 23, and *Keyes*, 413 U.S. at 212, and to which Petitioners so strenuously cling (Pet. Br. 91-95). The district court was faced with a system which freely abandoned "neighborhood school" postulates to bring about segregation, and just as readily embraced them when substantial racial mixing in the schools would not result.¹⁴⁰ In such circumstances, the trial judge was emi-

¹³⁹ It should also be noted that Columbus has never sought to use the "neighborhood school" system sanctioned by 20 U.S.C. §1701 (see Pet. Br. 92)—assignment of all students to the closest school facility. Compare *Ellis v. Board of Public Instruction*, 423 F.2d 203 (5th Cir. 1970). Instead, like most districts, it has preferred to retain discretion to make other assignments so as to take into account a multiplicity of factors, including special programs, safety hazards, and the like (see pp. 32-34 *supra*)—and then it has exercised that discretion so as to entrench and exacerbate segregation.

¹⁴⁰ Another district court which made like findings in a school desegregation action concluded that the "neighborhood school" claim was "meaningless." *United States v. Board of School Comm'rs, supra*, 332 F. Supp. at 670 n. 71.

nently justified under this Court's prior rulings in considering the deliberate manipulation of pupil assignment, carried on behind a "neighborhood school" facade, as a factor relevant to the ultimate determination of an intentional segregation policy.

C. The Systemwide Violation Finding Also Is Consistent With the Procedures and Evidentiary Presumption Established by This Court in *Keyes*.

We have argued above that the proof in this case fully justified a finding of systemwide intentional segregation by the district judge without the use of any evidentiary presumptions, since it was so extensive in terms both of time and geography.¹⁴¹ As this Court stated in *Keyes*, its earlier rulings "never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system." 413 U.S. at 200. *Keyes* establishes the correct use of presumptions in a school case, and we show below that the result reached here is precisely that which is authorized under the procedure enunciated in that ruling.

Preliminarily, we note that *Keyes* confirms the propriety of the district court's action. The proof of segregation in that case (as found by the trial court) concerned

¹⁴¹ While the Sixth Circuit's standard for determining whether to infer intent has been stated as a presumption, *Oliver v. Michigan State Bd. of Educ.*, *supra*, the terminology is without significance in most school desegregation cases, including this one. Plaintiffs here affirmatively presented evidence to demonstrate the absence of a "neutrally administered" "neighborhood school" system in Columbus; they did not rely upon absence of contrary evidence from the board, or upon any expected failure of the board to come forward with evidence. Hence, the issue was joined without any reliance on presumptions and the district court's function was simply to determine what the preponderance of the evidence introduced by the parties showed.

schools in the Park Hill area of Denver, not every school in the system. In the instant proceeding, proof of segregative faculty and administrative assignments was systemwide; proof of manipulation of pupil assignment devices for segregative purposes was not limited to any particular geographic sector(s) of the district, but as in *Keyes* not every school in the system was covered in detail.¹⁴² In these circumstances, *Keyes* teaches that absent a viable claim "that a finding of state-imposed segregation can be viewed in isolation from the rest of the district," 413 U.S. at 200, "there exists a predicate for a finding of the existence of a dual school system." *Id.* at 201. As the Court explained in that case, the intentional assignment of minority students to designated schools has an obvious, and often far-reaching, impact on the composition of other facilities in a system. *Id.* at 201-03. The proposition is particularly evident in a case such as the present one, in which school authorities through a variety of techniques moved to confine Negro children to largely separate schools in every area of the district. Absent "a determination [that "the geographical structure of, or the natural boundaries within" the Columbus "district may have the effect of dividing the district into separate, identifiable and unrelated units"], proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." *Id.* at 203.

In *Keyes*, the Court remanded with instructions to make the factual determination respecting geographic separate-

¹⁴² There was evidence, for example, of some predominantly minority schools situated adjacent to predominantly white schools in addition to those about which Dr. Foster testified (*e.g.*, Pl. L. Ex. 477, L. Tr. 3917). And the boundaries for such schools over nearly a twenty-year period were in evidence, permitting an appraisal of their regularity and "neutrality" (Pl. L. Exs. 261-320, L. Tr. 3898).

ness, and the legal determination respecting a dual school system, since neither question had been explicitly answered in the trial court's prior rulings (*id.* at 204-05). Here, there has never been (nor could there be) a contention that any of the areas in which the district judge found intentional segregation are "separate, identifiable and unrelated units."¹⁴³ And the district court *did* hold that Columbus practiced systemwide segregation (Pet. App. 73, 94-95; *see also*, pp. 87-94 *supra*)—the legal equivalent of the statutory dual system, *see* 413 U.S. at 203. That determination justified the court's Order requiring that the board "desegregate the entire system 'root and branch.'" 413 U.S. at 213.

Even if this were not the case, plaintiffs were also entitled to the benefit of the evidentiary presumption elucidated in *Keyes*: that the proof of very substantial segregative activity at many Columbus schools which was credited by the trial judge¹⁴⁴ "create[d] a presumption that other segregated schooling within the system is not adventitious." 413 U.S. at 208.

[W]here an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent.

¹⁴³ *Cf.*, *e.g.*, notes 50, 52, 101 *supra*.

¹⁴⁴ *See* note 36 *supra*.

Id. at 208-09. Moreover, we need not speculate about whether Petitioners could meet that burden. At the conclusion of the liability phase of the case, the district judge noted that while the system would be required to formulate a plan to desegregate "root and branch" (Pet. App. 73), not all of the system's school facilities would have to be affected—or affected similarly—by an acceptable plan if "their racial composition is not the result of present or past discriminatory action" by school authorities (Pet. App. 74-75, quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*, 402 U.S. at 26), facts which it was the board's burden to establish.¹⁴⁵ Since the Petitioners proposed plans which would have left numerous virtually all-black and virtually all-white schools (*see, e.g.*, Pet. App. 100-01), their evidentiary burden with respect to such schools was to make a showing virtually identical to that which would have been required at the liability stage in the absence of the dual system finding. The district court explicitly held that Petitioners had utterly failed to carry this burden (Pet. App. 102-03, 105); and it is thus clear that the evidentiary presumption created by *Keyes* compels the same result.

Petitioners argue, however, that *Keyes* is inapplicable to this case because it cannot be applied "retroactively" (Pet. Br. 67-74). We confess to no small amount of difficulty in discerning how that term is being used. It is cer-

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... in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. . . . [School authorities] have the burden of showing that such school assignments are genuinely nondiscriminatory.

402 U.S. at 26.

tainly true that the original "enclave" of black schools in Columbus did not, by the time of trial, enroll as substantial a proportion of Columbus' black students as it had in 1954 (*see* p. 19 *supra*). Yet the presumption of discrimination is strengthened by the fact that segregative techniques utilized prior to 1954, as well as other discriminatory devices, were used after that time to contain black students in black schools as the black population expanded into other areas of the system. The case for application of the evidentiary presumption would seem to be even stronger here than in *Keyes*, since in that case the presumption was held to flow backward from the Park Hill events of the 1960's to the earlier segregation of core city schools. Unlike the instant case, the segregation which Denver claimed was adventitious existed prior to the time of the Park Hill acts of deliberate segregation.

Petitioners' basic thrust appears to be a contention that since Columbus was residentially segregated at the time of trial, none of their own segregative conduct could form the basis for any evidentiary presumption or any finding of segregation. But this argument would prove too much. It would not only eliminate the possibility of using the *Keyes* presumption in the Columbus case, but in all cases (including *Keyes* itself). There, it was the eastward residential movement of blacks from the core city area into the Park Hill area, toward and eventually across Colorado Boulevard, which set the stage for the segregative decisions of the 1960's. *See* 303 F. Supp. at 290. This fact did not remove the predicate for a finding of a dual school system, 413 U.S. at 204, for reasons which to us seem fairly evident: lacking control over residential patterns (though substantially affecting them), and prevented by the Fourteenth Amendment from directly imposing segregation, school authorities following a policy of intentional

segregation may be expected consistently to respond to shifts in racial residential patterns in ways which maintain substantial racial separation in the schools, both during and after the residential transition of an area. (Both Park Hill in Denver and the Linden, or the southeastern, areas of Columbus illustrate the point well.) Against this background, the existence of residential racial segregation at any particular point in time no more relieves school authorities in such a system of their obligation to dismantle the dual structure than did residential segregation in Charlotte or Mobile relieve those school systems of the duty to terminate effectively and completely their dual school structures which had remained essentially intact over the years after this Court struck down compulsory segregation in *Brown*. *Swann, supra*, 402 U.S. at 14, 25-26; *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971).¹⁴⁶

Consistently since *Brown*, through its decisions in *Keyes* and *Dayton Bd. of Educ. v. Brinkman, supra*, this Court has held to the principle that school authorities may not escape liability for their actions which create or contribute to a condition of segregation by asserting that ostensibly "neutral" factors (segregated residential patterns and "neighborhood schools") would have caused the same result—unless they have previously implemented an adequate remedy, *Pasadena City Bd. of Educ. v. Spangler*,

¹⁴⁶ Indeed, if Petitioners' argument is meritorious, then it could be applied as well to systems whose segregation was originally required by statute and has continued in unaltered form since the 1890s. Rather than a landmark in our constitutional history, *Brown* would be transmuted into an empty declaration that state actors may not directly segregate, but are free to achieve this result by indirect means. Compare *Cooper v. Aaron*, 358 U.S. 1 (1958); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

427 U.S. 424 (1976).¹⁴⁷ It should decline Petitioners' invitation to depart from that principle here.

II.

The District Court Acted Correctly in Requiring a Comprehensive, Systemwide Desegregation Plan Which Promised to "Achieve The Greatest Possible Degree Of Actual Desegregation, Taking Into Account The Practicalities Of The Situation."¹⁴⁸

Once having concluded that the Petitioners' constitutional violations were systemwide in nature and scope, the trial judge proceeded in the remedy phase of the litigation on the same basis as if Columbus had been a statutory dual system. Since this approach was not barred by *Dayton Bd. of Educ. v. Brinkman*, *supra* (see Argument III below), this was unquestionably correct. *Keyes v. School Dist. No. 1*, *supra*, 413 U.S. at 213.

A. There Was No Error in Putting the Burden on Petitioners to Demonstrate That the Racial Composition of Schools Omitted From Their Proposed Remedial Plans Was Unaffected by Their Constitutional Violations.

Where there has been a finding of systemwide segregation, this Court's decisions attach critical significance, in weighing proposed remedies, to the extent of actual desegregation which results. Thus in *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), the Court rejected a claim that prior dualism was eliminated by a

¹⁴⁷ See also, *South Park Independent School Dist. v. United States*, 47 U.S.L.W. 3385 (December 4, 1978) (Rehnquist and Powell, JJ., dissenting from denial of certiorari and relying upon implementation of remedies originally approved as adequate by lower courts).

¹⁴⁸ *Davis v. Board of School Comm'rs*, *supra*, 402 U.S. at 37.

pupil assignment scheme which depended upon individual choice, and which resulted in a "white" school and a "Negro" school" (*id.* at 442). See also, *Raney v. Board of Educ. of Gould*, 391 U.S. 443 (1968); *Monroe v. Board of Comm'rs of Jackson*, 391 U.S. 450 (1968). Three years later, in *Swann*, *supra*, the Court emphasized that in urban school systems,

... with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition.

402 U.S. at 26. For purposes of remedying the constitutional violation of intentional pupil segregation, this Court said, "an assignment plan is not acceptable simply because it appears to be neutral." *Id.* at 28.

The trial judge in this case was faithful to the precepts embodied in these rulings. Although he had found systemwide segregation in 1954 (Pet. App. 10-11)¹⁴⁹ and continu-

¹⁴⁹ Despite the conclusory treatment of the pre-1954 period in their brief (Pet. Br. 39, 67-70), Petitioners cannot simply wish away either the conduct of their predecessors in office or its legal significance. See pp. 5-6, 19-22 *supra*. From May 17, 1954 onward, Petitioners' legal obligation was to undo the intentional segregation to which they had contributed. *Green*, *supra*, 391 U.S. at 437-38; *Swann*, *supra*, 402 U.S. at 15. Since Petitioners have never acknowledged the history of official, intentional segregation in the Columbus public school system, it is hardly surprising that they have never affirmatively undertaken to perform the obligation which became theirs once *Brown* was decided. Their "free choice" plan adopted in 1973 was not designed to satisfy that responsibility and has not achieved results which would pass muster under *Green*. See text *infra*. Hence, the continuing one-race character of schools established as "black" and "white" facilities before 1954 signifies something more than mere "foreseeable" effect. The importance of assessing Petitioners' conduct as

ing thereafter up to the eve of trial (Pet. App. 35-42, 61), the district judge nevertheless considered carefully Petitioners' claim that their "free-choice" type voluntary integration plan, the "Columbus Plan," had real promise of overcoming the board's segregative actions (Pet. App. 59-60). The lack of any significant change in the enrollments of Columbus' virtually all-black schools since 1973, when the "Columbus Plan" was adopted (see A. 776-86, L. Tr. 3909) fully supports the court's conclusion that it "fall[s] far short of providing the Court a basis to find that the defendants are solving the constitutional problems the evidence reveals" (Pet. App. 59-60).

Just as the continuing existence of one-race schools demonstrated the insufficiency of the "Columbus Plan,"¹⁵⁰ so

of the time of *Brown* and the standards for evaluating subsequent events are discussed in greater detail in the Brief for Respondents in No. 78-627, *Dayton Bd. of Educ. v. Brinkman*, so we do not elaborate upon them here. Since the evidence clearly established a continuing systemwide policy of segregation, the same obligation devolved upon Petitioners no matter at what particular moment after 1954 their conduct is measured.

¹⁵⁰ Petitioners graciously assert that they "are not asking this Court to authorize a retreat from the constitutional principle that equal educational opportunity may not be denied on the basis of race. . . . Rather, we are asking that decisions concerning the manner in which these goals are to be accomplished should be left to elected local school officials and to their constituents . . ." (Pet. Br. 51). In the context of this school desegregation action, the statement is disingenuous at best. There are some aspects of "equal educational opportunity" which this Court has held to be beyond the scope of the adjudicative process. *E.g.*, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). However, since *Brown* this Court has never "deviated in the slightest degree" from the principle that denials of equal educational opportunity through intentional racial segregation are remediable in federal court, and are not left to the electorate. *Swann*, *supra*, 402 U.S. at 11; *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971); see *Milliken v. Bradley*, *supra*, 418 U.S. at 737-38; *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *aff'd* 402 U.S. 935 (1971). Respondents and the

it also properly formed the basis of a judgment that the effects of Petitioners' segregatory practices persisted in the Columbus public schools. See *Green*, *supra*; *Wright v. Council of the City of Emporia*, 407 U.S. 451, 471, 472-73 (1972) (Burger, C.J., dissenting); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489-90 (1972); *id.* at 491, 492 (Burger, C.J., concurring in the result); see also, *e.g.*, *Brewer v. School Bd. of Norfolk*, 397 F.2d 37 (4th Cir. 1968); *Henry v. Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); *Monroe v. Board of Comm'rs*, 427 F.2d 1005 (6th Cir. 1970); *Clark v. Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971). Under *Green* and *Swann*, in order to establish otherwise, it is the Petitioners' obligation to show that the current racial composition of these one-race schools is unrelated to the prior history of unconstitutional action. *Accord*, *Keyes*, *supra*, 413 U.S. at 211 and n. 17.

This burden can hardly be said to be met by mere reference to testimony about discriminatory housing practices of public agencies, testimony not tied specifically to individual schools in Columbus (see Pet. Br. 16-17). Petitioners cannot have it both ways. If the testimony of plaintiffs' witnesses could not be credited by the district court to establish the proposition that intentional school segregation by public officials in Columbus was likely (based on scholarly research and expert opinion) to have contributed to residential segregation, then it certainly could not form the evidentiary predicate for Petitioners' claim that intervening forces had eradicated all vestiges of segregation originally created by school authorities' acts. On the other

class they represent know precisely what to expect after pleas for equal educational opportunity from Petitioners. See pp. 35-36 *supra*.

hand, there is no inconsistency between plaintiffs' position that school officials' intentional segregation *contributed* to the exacerbation of residential segregation and the testimony of plaintiffs' expert witnesses that other forms of discrimination—but very little “free choice” or economic restriction—also *contributed* to racial residential segregation.

Nevertheless, the board's basic claim remains that because of residential segregation, there would have been the same one-race schools even in the absence of the board's intentionally discriminatory actions designed to bring about those conditions (*e.g.*, Pet. Br. 63). That claim was rightly refused below, both as a ground for finding less than systemwide liability (*see* Argument I. B. *supra*) and as a justification for failing to require the remedial steps necessary to bring about “actual desegregation.” Some of the schools which Petitioners now claim “would still be overwhelmingly black today . . . [e]ven if a single act of discrimination on the part of school officials had never occurred” (Pet. Br. 63) might never even have been constructed but for the desire to maintain segregation. Champion Junior High School, for example, was intentionally built as an elementary school to contain black students living between two (then) predominantly white facilities (*see* pp. 14-15 *supra*). Monroe Junior High School might well not have been constructed had Linden-McKinley Junior High not been continued in operation for white students living north of Hudson Street after the opening in 1957 of Linmoor Junior High School (*see* pp. 52-54, 77-80, *supra*). Certainly the constantly changing, highly fluid “neighborhood school” concept purportedly followed by Petitioners (*see* note 29; pp. 32-44 *supra*) provides no reliable guide for determining when, where and to what size schools might have been built, or how pupils might

have been assigned (especially since Petitioners have always transported a large number of students, *see* note 20 *supra*) had segregation not been a motivating factor.

In any event, it was *Petitioners'* burden, and Petitioners sought to meet it by attempting to establish that they “consistent[ly] and resolute[ly] appli[ed] racially neutral [neighborhood school] policies.” *Oliver v. Michigan State Bd. of Educ.*, *supra*, 508 F.2d at 182. They failed, because the record of their actions showed their unhesitating willingness to give up “neighborhood schools” for segregated schools. So they were rightly not excused from the obligation to desegregate.

B. The District Court's Rejection of the Board's June 10 and July 8 Plans Was Compelled by *Green* and *Swann*.

The preceding discussion also serves to establish the vacuity of the Petitioners' claim (Pet. Br. 79-81) that their June 10 and July 8 plans were improperly rejected because the district judge desired, as a matter of substantive principle, to mandate racial balancing of the Columbus school system. Petitioners' liability defense was a broad one. Residential patterns, not school authorities' actions, they argued, were responsible for the segregated nature of public schooling in Columbus. Or, to the extent that their “remote” predecessors in office may have committed constitutional violations, the significance of these acts was negated by superseding residential shifts unrelated to them. The defense failed, because the proof showed, and the district court found, that persistent, consistent segregative conduct was a dominant characteristic of the Columbus public school system. In his opinion, however, the district judge indicated with precision the kind of proof by which the board could justify the continued operation of one-race schools in any plan it might propose:

System-wide statistical remedies have been implemented and approved by many courts, perhaps because of a concern that all schools, parents, children and neighborhoods should be required equally to bear the burdens of desegregation. The fact that such plans have been used in the past does not necessarily mean that they are the only legal alternatives available. In *Swann*, 402 U.S. at 26, the Supreme Court stated:

Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

...

If a limited number of racially imbalanced, predominantly white schools remains under a plan or plans submitted for the Court's approval, those schools would receive close scrutiny under the *Swann* test, and the defendant school authorities would be required to satisfy the Court that their racial composition is not the result of present or past discriminatory actions or omissions of defendant public officials or their predecessors in office. As is noted earlier, it would be extremely difficult to attempt to roll back the clock at this point and determine what the school system would look like now had the wrongful acts and omissions discussed earlier in this opinion never occurred. Officials striving to satisfy the Court that a number of white schools are to remain such because of racially

neutral circumstances would have a difficult, but perhaps not an impossible, task.

(Pet. App. 74-75.) Petitioners never accepted the invitation proffered, in accordance with *Swann*, by the district court. They submitted two plans: one which left most Columbus schools, black and white, unaffected (July 8); and one which left 22 virtually all-white schools unaffected (June 10).¹⁵¹ Yet no proof about these particular schools' racial composition was presented at the remedy hearings. The feasibility of including all schools in a remedial plan was demonstrated by the staff-prepared "32%" alternative and the plan drafted by a team employed by the Ohio State Board of Education (Pet. App. 104-07). In these circumstances the district court could neither say that the "greatest amount of actual desegregation, taking into account the practicalities of the situation" would be achieved by the board's plans, nor that remaining schools predominately of one race were unaffected by the system-wide violation which it had found. Hence the court was compelled to reject the two board plans because of the absence of any evidentiary justification for their results (Pet. App. 102, 103, 105).

The district court's use of "32.5% \pm 15%" as a reference point (Pet. Br. 79-81; but see Pet. App. 78-79) does not establish that the court "impose[d] the *exact result* criticized in *Swann* . . ." (Pet. Br. 81). Indeed, it is only

¹⁵¹ The June 10 plan was not rejected, as Petitioners misleadingly suggest (Pet. Br. 79 n.43) because it left "some" schools which were racially identifiable in the sense that they fell slightly outside the " \pm 15%" measure. These were "22 one-race schools" (Pet. App. 100): 18 elementary schools, three junior high schools and one senior high school with enrollments projected to be more than 90% white (see Def. R. Ex. G, R. Tr. 103, at 49-63, 83, 89-90, 93). The far more modest July 8 plan left a much greater number of "one-race" schools.

Petitioners' tactical trial decisions which create the potential appearance, at first blush, that this might even arguably be the case.

In the first place, neither the district court's initial opinion nor the order and judgment to prepare and submit plans even referred to a " $\pm 15\%$ " guideline (*see* Pet. App. 72-75, 76-77, 87-89). And, as discussed above, the court indicated its willingness to examine proposals which left one-race schools in accordance with the *Swann* principles. Although the court used the range as one device for categorizing the results of the plans submitted (Pet. App. 99-106), again in its July 29 opinion and order it did not mandate a plan under which all schools would come within the " $\pm 15\%$ " range, despite the fact that the staff's "32%" plan and the State Board submission indicated that such results were feasible. Instead, the court required only that "[t]he plan must be capable of desegregating the entire Columbus school system" and suggested that the "32%" or State Board plans could be used as a "starting point" for preparation of an acceptable remedy (Pet. App. 111). *Cf. Pate v. Dade County School Bd.*, 434 F.2d 1151 (5th Cir. 1970).

Moreover, the measure itself, contemplating a variance between 17.5% and 47.5% among the schools, hardly could be said to require exact racial balancing of enrollments had it been mandated. In *Swann*, where the district-wide proportion was used as a starting point, school enrollments ranged from 9% to 38% black. 402 U.S. at 9-10. There is no indication that the district court would have been less than receptive to a plan under which, due to practical difficulties, some schools fell outside the $\pm 15\%$ range. Nothing in the court's orders and opinions, certainly, can be interpreted to require that the Petitioners propose a

plan calling for *even less* variance, which they elected to do (*see* A. 74-94, 109-10, 120).

The fact that, faced with the necessity of desegregating the system, the staff and board determined upon a plan "providing a [relatively] uniform racial balance . . . as a matter of policy" is not an indication that despite explicit opinion language to the contrary, "it [was judicially] mandated." *Wright v. Council of the City of Emporia, supra*, 407 U.S. at 474.

The bald truth is that Petitioners spurned the district court's repeated offers to accept a plan leaving one-race schools, or providing for significant variation in the racial composition of schools, so long as adequate constitutional justification were provided. They cannot now be heard to contend that the trial court forced them into doing what they did voluntarily.

III.

Dayton Board of Education v. Brinkman Did Not, and Should Not Be Interpreted to, Change the Foregoing Principles; and the Interpretation of That Decision Urged by Petitioners Unduly Limits the Remedial Discretion of Federal Courts.

Petitioners' major contention here is that the rulings below are inconsistent with *Dayton Bd. of Educ. v. Brinkman, supra* and must be reversed on that account. Not only is this reading of the *Dayton I* decision not required by the Court's language in that opinion, but it would emasculate the historic equitable remedial powers of the federal courts to vindicate constitutional rights. The burden which Petitioners would place on plaintiffs in school desegregation cases is so great that continued implementation of *Brown* would be virtually halted except in those instances where

school authorities admit to a policy of pervasive segregation. That was neither the holding nor the intent of *Dayton I*.

A. *Dayton I* Did Not Overrule *Keyes* or the Other Decisions Upon Which Plaintiffs Rely; Since the Courts Below Properly Applied the Principles of *Swann* and *Keyes* to the Proof and Findings in the Record, No Modification of Their Judgments Is Indicated by *Dayton I*.

This is not a case like *Dayton I*. There the district court had decided the liability issue on February 7, 1973, prior to issuance of this Court's ruling in *Keyes*. See 433 U.S. at 408 n.1. It had found, in this Court's words, "three separate although relatively isolated instances of unconstitutional action" which, combined with rescission of a voluntarily adopted desegregation resolution of the school board, it held "cumulatively in violation of the Equal Protection Clause." *Id.* at 413. The district court neither evaluated the existing segregation of the Dayton public schools by taking into account the probative value of the constitutional violations which it found (*Keyes, supra*, 413 U.S. at 206) nor required a systemwide remedy. On appeal, the Sixth Circuit did not hold the trial judge's failure to make additional findings of segregation clearly erroneous. It recognized that the appellant plaintiffs relied on *Keyes* to support a finding of systemwide violation, but the court expressed no clear agreement with that argument. Instead, it "simply h[e]ld that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations." *Brinkman v. Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974). The Court of Appeals remanded with instructions to approve a plan which would "eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Id.* at 704, quoting *Keyes, supra*, 413 U.S. at 200. But the appellate panel

never flatly stated that state-imposed school segregation in Dayton had been systemwide in scope and effect.¹⁵²

Dayton I held improper the requirement of a systemwide remedy in a case in which there was no sufficient "predicate for a finding of the existence of a dual school system," *Keyes, supra*, 413 U.S. at 201. The opinion stressed the importance of the case "for the issues it raises as to the proper allocation of functions between the district courts and the courts of appeals within the federal judicial system," 433 U.S. at 409, and pointedly noted the Court of Appeals' failure to hold the district court's limited findings to be clearly erroneous or inadequate, *id.* at 416-18. This Court was careful *not to say*, however, that a systemwide remedy in Dayton might not in fact be required to correct constitutional violations committed by the school authorities. It remanded the case to the district court for new hearings and more specific findings, based upon which an appropriately tailored remedy could be fashioned. *Id.* at 419-20.

It is a paragraph at the end of the *Dayton I* opinion, sketching the proceedings which this Court anticipated would follow its remand, which is the basis of Petitioners' claims in this case:

¹⁵² The Court of Appeals thus did not negate the possibility that a remedy which was less than systemwide, but more comprehensive than that originally ordered by the district court, would accord with its view of the case. However, on a subsequent appeal, the Sixth Circuit said that "the meaning of [its first decision] is that the Dayton school system has been and is guilty of de jure segregation practices. See *Keyes v. School District No. 1* [citation omitted]." 518 F.2d 853, 854 (6th Cir. 1975). It remanded "with directions to modify the plan . . . so as to improve the racial balance . . . in as many of the remaining racially identifiable schools in the Dayton system as feasible." *Id.* at 857. This was not the equivalent of holding clearly erroneous the lower court's failure to find systemwide liability. See 433 U.S. at 418.

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact discriminate against minority pupils, teachers, or staff. *Washington v. Davis*, *supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S. at 213.

433 U.S. at 420. The paragraph has spawned new theories among the commentators,¹⁵³ but its meaning is unclear. The most critical issue is whether the "incremental segregative effect" inquiry described in the third sentence displaces the *Keyes* holding that the district court could conclude that there was a dual school system in Denver based on his Park Hill findings (*see pp. 118-19 supra*), or whether it is merely an alternative statement of that holding which emphasizes, in light of the peculiar posture of *Dayton I*, the necessity for a lower court *finding* of systemwide impact in order to justify a systemwide remedy. Nothing in the

¹⁵³ *E.g.*, S. Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U.L. REV. 382 (1978).

remainder of the opinion indicates disapproval of *Keyes* in whole or in part, *see, e.g.*, 433 U.S. at 410. Indeed, the very paragraph quoted above cites *Keyes*' recognition that the plaintiffs there would be entitled to a systemwide remedy only if the district court concluded, based on the legal principles enunciated by this Court, that there had been a systemwide violation. *Id.* at 420. Had some part of the *Keyes* jurisprudence been intended to be altered, it is reasonable to expect that there would have been some discussion of burdens of proof, for example. The absence of such a discussion from the paragraph suggests that it was a reformulation rather than a replacement of the *Keyes* principles. *See id.* at 421-24 (Brennan, J., concurring in judgment).¹⁵⁴

Hence, we conclude, *Dayton I* left the vitality of the *Swann* and *Keyes* principles intact. That being the case, *Dayton I* has no independent substantive significance for the instant matter since, as we have argued above, the district court properly made a finding of systemwide segregation in accordance with the *Keyes* standards. *See* Argument §I.C. *supra*. The district court's finding, affirmed by

¹⁵⁴ Petitioners argue that these questions were settled two days after *Dayton I* by the remands in *School Dist. of Omaha v. United States*, 433 U.S. 667 (1977) and *Brennan v. Armstrong*, 433 U.S. 672 (1977). (See Pet. Br. 58.) We cannot agree. In both those cases, the Courts of Appeals' findings of systemwide liability had been made before the decision in *Arlington Heights*, *supra*, and both remands directed reconsideration in light of that decision. In *Omaha* the Court of Appeals had itself created and applied, after the trial of the case, a presumption of liability, 433 U.S. at 667-68; and in *Brennan* "there was 'an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent' resolved by the Court of Appeals' use of a presumption of consistency, 433 U.S. at 672. Since the findings of liability were due to be reconsidered, this Court noted that the *Dayton I* inquiry should also be addressed, and included reconsideration in light of *Dayton I* in its remand directions. There is no discussion, much less an overruling, of *Keyes* in the majority's *per curiam* opinions.

the Court of Appeals, takes this case out of the *Dayton I* "limited violations" category. Even if the Court had not made the finding, under *Keyes* the same result was indicated since the Petitioners failed to show that their actions were not the cause of segregation in the Columbus public schools. §I.C. *supra*.

For these reasons, the district court was exactly right in refusing Petitioners' motion to reopen the proof and make new findings which would have been unnecessary under *Keyes*. The trial judge reconsidered his findings in light of *Dayton I* and concluded:

Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. These were not the facts of the *Dayton* case.

(Pet. App. 94.) This determination is unexceptionable as an interpretation of the *Dayton I*, *Omaha* and *Brennan* opinions, as we have shown. The decisions below cannot be overturned on the basis of settled precedent; the Court will have to accept the invitation of Petitioners and various *amici* to extend *Dayton I* and to overrule *Keyes*, *Swann* and *Green*. It is to the enduring justice of the principles enunciated in these cases to which we turn.

B. *Dayton I* Should Not Be Extended to Displace the Evidentiary Rules Announced in *Keyes*; the Record Here Confirms the Wisdom of *Keyes*' *Prima Facie* Case Approach to the Determination of the Nature and Extent of the Constitutional Violation in School Desegregation Cases.

We have suggested above that the decision in *Dayton I* did not displace the evidentiary and constitutional principles announced and applied by this Court in *Keyes*. Rather, in our view, *Dayton I* gave content to the requirement in *Keyes* that there be proof of "intentionally segregative school board actions in a *meaningful* portion of a school system" in order to establish "a *prima facie* case of unlawful segregative design on the part of school authorities" which "shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions," 413 U.S. at 208 (emphasis supplied), and to *Keyes*' holding that proof of "a systematic program of segregation affecting a *substantial* portion of the students, schools, teachers, and facilities within the school system" furnishes "a predicate for a finding of the existence of a dual school system," 413 U.S. at 201 (emphasis supplied).

In *Dayton I* this Court explicitly held that "... the District Court's findings of constitutional violations did not, *under our cases*, suffice to justify the remedy imposed." 433 U.S. at 414 (emphasis supplied). Clearly that statement is a determination that the extent of the constitutional violations found by the district court, and neither held clearly erroneous nor supplemented by the Court of Appeals, did not show "a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system." As such, the opinion furnished guidance to the district judge in the instant matter (who reconsidered his initial findings after

Dayton I was handed down and found the records in the two cases to be significantly different, Pet. App. 94) and to other federal courts involved in school segregation litigation. Further, inasmuch as the Sixth Circuit had never explicitly disapproved plaintiffs' contention that a systemwide remedy was required by application of the *Keyes* presumption to the district court's findings (see pp. 134-35 and n.151 *supra*), *Dayton I* must also be read, we concede, to hold that the constitutional violations found by the district court in that case did not extend to "a meaningful portion" of the Dayton school system.¹⁵⁵ This also served to provide important guidance to federal trial and appellate courts. We do not concede, however, that *Dayton I* must by its terms or its result be read any more broadly; and we strenuously insist that a reading of *Dayton I* which displaces, rather than informs, application of *Keyes* flies in the face of the explicit statements throughout the opinion that the judgment which the Court reversed was inconsistent with prior holdings, including *Keyes*. See 433 U.S. at 410, 413, 414, 420.

Petitioners (and various *amici*) contend that *Dayton I* should be extended to require a school-by-school, incident-by-incident determination (and apparently on a mathematical basis) of the amount of desegregation which would have resulted had each segregative step not been taken, or each segregative decision not been made. This should be, they say, a mandatory inquiry for federal trial courts irrespective of *Keyes*' authorization for a dual system conclusion, and irrespective of *Keyes*' prima facie case and burden-shifting principles. Thus, although the district

¹⁵⁵ Thus the Court was not required to announce any new rule in order to reverse the judgment in *Dayton I*, nor to question the principles of previous decisions which it *explicitly said* were not complied with by the lower courts in that case.

court here was faithful to the Court's admonition in *Dayton I* that "only if there has been a systemwide impact may there be a systemwide remedy," 433 U.S. at 420 (see Pet. App. 95), in Petitioners' view this case must at the least be returned to the trial court for the formality of entering findings using the words "incremental segregative effect."

This position finds little support in the language of the Court's opinion, even apart from its inconsistency with the approving citation of *Swann*, *Wright* and *Keyes* in that decision. For not only in the paragraph quoted at page 136 *supra*, but throughout the *Dayton I* opinion, the Court refers only to the effect of the "violations":

... If such *violations* are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these *violations* had on the racial distribution of the Dayton school population, as presently constituted, when that distribution is compared to what it would have been in the absence of *such constitutional violations*. The remedy must be designed to redress *that difference*, and only if there has been a systemwide impact may there be a systemwide remedy . . . (433 U.S. at 420) (emphasis supplied).

The Court did not refer to a determination of the effect of "each violation," nor call for a remedy to redress "each impact." It obviously recognized the futility and waste of judicial energy which would be involved in requiring that district courts parse even an overwhelmingly systemwide violation into individual components which must each be separately identified and reflected in a voluminous opinion prior to summing them to a systemwide total. See also,

433 U.S. at 414, 417, 419.¹⁵⁶ The same conclusion was drawn by the Court of Appeals.¹⁵⁷

The new interpretation urged by Petitioners is a considerably oversimplified approach to the issue of causation discussed in *Keyes* and in their Brief. It assumes that segregative acts by school officials have effects which are limited to the short term only; that such acts' bearing on the attitudes and perceptions of schoolchildren and their parents are of no concern to courts enforcing the Fourteenth Amendment; and that actions which effectively continue the legacy of past discrimination are not proscribed unless they assume exactly the same form as earlier, overt manifestations of unlawful conduct. In the area of school desegregation, at least, Petitioners would ignore Justice Frankfurter's profound comment that the Constitution "nullifies sophisticated, as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

These points are exemplified by Petitioners' attitude toward their pre-1954 conduct. Although they voice, some-

¹⁵⁶ The stay opinion of Mr. Justice Rehnquist refers to the absence of "specific findings mandated by *Dayton* on the impact discrete segregative acts had on the racial composition of individual schools within the system" (Pet. App. 212). Although Mr. Justice Rehnquist was the author of the Court's *Dayton I* opinion, the italicized phrase does not appear in that opinion so we cannot know whether this meaning was intended by the entire Court. Cf. Pet. App. 213, 214. We urge the Court to reject such an interpretation of *Dayton I* and not to announce such a requirement for school desegregation cases here or in No. 78-627, *Dayton Bd. of Educ. v. Brinkman*.

¹⁵⁷ This is the meaning, we think, of the Court of Appeals' statement that

Dayton does not, however, require each of fifty separate segregative practices or episodes to be judged solely upon its separate impact on the system. The question posed concerns the impact of the total amount of segregation found—after each separate practice or episode has added its "increment" to the whole . . . (Pet. App. 197) (emphasis in original.)

what halfheartedly, the notion that plaintiffs' evidence of pre-*Brown* practices was "subjective," "hearsay," or unreliable (Pet. Br. 39, 69), there is really little dispute about the events. They are unimportant, according to Petitioners, because their effects were short-term ones, at best:

Although intentionally discriminatory actions by predecessor boards of education during the period 1909-1943 may have had the immediate impact of causing the student bodies of five schools to be predominantly black, the racial composition of those schools at the time of trial cannot be logically attributed to the lingering effects of school board actions which occurred during that period [footnote omitted] (Pet. Br. 63).

Petitioners studiously avoid any recognition of the context within which the segregative actions of their predecessors took place. The creation of all-black schools, staffed with all-black faculties, and having attendance zone boundaries enforced for black, but not for white, pupils, represented as certain and effective a signal to the community about areas within which blacks were allowed and expected to reside as the racial zoning ordinances struck down by this Court in *Buchanan v. Warley*, 245 U.S. 60 (1917). See also, *City of Richmond v. Deans*, 281 U.S. 704 (1930).

Whatever may have been the case, for example, before the Champion Elementary School was located and constructed between the 23rd Street and Eastwood facilities, there was no possibility that anyone would mistake the Board of Education's message when it opened: black children are to be separately educated in accordance with the public policy of Columbus; this separate education will take place in the Champion Elementary School, which has certain specified attendance zone boundaries; white parents

who desire that their children attend white schools should not choose to reside within such zone. Not surprisingly, neither the area of the Champion School—nor that of *any other* school created and identified as a black school by board acts—has ever thereafter changed significantly in its racial composition from black to white.¹⁵⁸ In a very real sense, and to a very considerable degree, continued residential segregation around Columbus' officially created and identified black schools "flow[s] from a longstanding segregated [school] system," *Milliken v. Bradley*, 433 U.S. 267, 283 (1977) [hereinafter cited as *Milliken II*].^{159, 160}

¹⁵⁸ There are no exceptions to this statement in Columbus (see A. 776-86, L. Tr. 3909). Although Petitioners point to a slight decrease in the non-white population at Highland Elementary (Pet. Br. 31), the change is insignificant, is within the range of normal fluctuation which has characterized the school since 1964, and does not alter Highland's identity as a substantially blacker school than its neighbors: West Mound (13.9% black), Burroughs (11.1% black) and West Broad (1.9% black). (See A. 776, 782, L. Tr. 3909.)

¹⁵⁹ Petitioners seek comfort (Pet. Br. 64 n. 32) in the statement of Mr. Justice Stewart, concurring in *Milliken v. Bradley*, *supra*, 418 U.S. at 756 n. 2 that the "fact of a predominantly Negro school population in Detroit—[was] caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears" However, they fail to read the statement in its full context. In the footnote, Mr. Justice Stewart was responding to a statement by Mr. Justice Marshall that "Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools." *Id.* Mr. Justice Stewart was of the view that "[t]his conclusion is simply not substantiated by the record presented in this case." We do not read the *Milliken* concurring opinion as a declaration that the causes of *all* residential and school racial concentration are "unknown and unknowable." What is at issue in this case is the responsibility of Columbus school officials for patterns of black concentration around schools officially designated and identified as "black" schools. Prior to 1954, the board's acts were of the grossest nature, involving zone lines which were rigid for black students but permeable for whites, and the replacement of white

(Footnote 159 continues and Footnote 160 is found on next page)

Petitioners would have the Court overrule the remedial holdings in *Swann* and *Keyes*, *supra*, which squarely put the burden on school authorities who are found to have engaged in segregation to demonstrate that the racial composition of individual facilities was caused exclusively by other factors. In *Swann*, the Court's allocation of the burden of proof reflected the long experience of the lower federal courts in dealing with school desegregation cases. 402 U.S. at 6, 14, 21.¹⁶¹ The "need for remedial criteria of

(Footnotes continued from preceding page)

with black faculties. After *Brown*, the pattern was continued somewhat more subtly, by the assignment of predominantly black faculties only to predominantly black schools, by school construction and boundary setting determinations, by the creation of optional attendance areas and discontinuous zones, and by a varied series of acts such as segregative class relocation which served to reinforce the stereotype of black students and black classes as undesirable. This record shows an increase in black population, as in Detroit; but it does not show that segregation was its inevitable concomitant in the absence of intentionally discriminatory school system decisions.

¹⁶⁰ The central, enduring role of school system practices influencing housing choices and patterns was fully explicated on this record by plaintiffs' expert witnesses. No effective rebuttal to this testimony was presented by Petitioners, and the validity of the phenomenon as described in the district court's opinion (Pet. App. 57-58) is confirmed by the facts of record. See text at nn. 155, 156, and pp. 87-94 *supra*; see also, note 121 *supra*. We do not ask, therefore, that this Court give "legally presumptive weight" to any abstract conception of the relationship between school and housing segregation, or hold that "school officials are responsible for residential patterns as a matter of law" (Pet. Br. 78). We ask simply that courts' inquiry into such matters on the records made before them not be hobbled by a mechanical insistence upon a showing at each and every school facility in the system, as if events at each site were divorced from *any* relationship to either the system as a whole or to events at other sites.

¹⁶¹ As long ago as 1966, Judge Wisdom wrote that "the only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration." *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 869 (5th Cir. 1966), *aff'd on rehearing en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Caddo*

sufficient specificity to assure a school authority's compliance with its constitutional duty" flowed directly from the diverse and enduring consequences of school authorities' discriminatory actions. *See, e.g., id.* at 13-14, 19-21, 28.¹⁶² In *Keyes*, this Court noted that "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." 413 U.S. at 203. This fact furnishes the predicate for a "dual system" finding where a substantial portion of a school district has been shown to have been intentionally segregated, *id.* at 201.

Parish School Bd. v. United States, 389 U.S. 840 (1967) (emphasis omitted). Here the policy has been covert, but the district court found it to be system-wide. Surely the Constitution does not require less of school authorities who dissembled than of those who frankly admitted their segregationist design.

¹⁶² This Court's exposition in *Swann*, 402 U.S. at 20-21, of the interlocking character of school and residential segregation, and the "far-reaching" consequences of individual school decisions, is supported by the analysis of leading demographers and sociologists, some of whom testified for plaintiffs below. *See* K. Taeuber, *Demographic Perspective on Housing and School Segregation*, 21 WAYNE L. REV. 833 (1975); A. Campbell and P. Meranto, *The Metropolitan Educational Dilemma*, in *THE MANIPULATED CITY* 305, 310 (S. Gale and E. Moore, eds., 1975); R. Green, *Northern School Desegregation: Educational, Legal and Political Issues*, in *USES OF THE SOCIOLOGY OF EDUCATION* 251 (1974); M. Weinberg, *DESEGREGATION RESEARCH* 311-13 (1970); *cf.* K. Vandell and B. Harrison, *RACIAL TRANSITION IN NEIGHBORHOODS* 13 (1976) (school factors important in housing selection); American Institute of Public Opinion, *THE GALLUP OPINION INDEX* 13 (1976) (opinion surveys show preference for integrated neighborhoods); O. Duncan, *SOCIAL CHANGE IN A METROPOLITAN COMMUNITY* 108 (1973) (same). That the great majority of people, both black and white, do not intentionally seek out segregated housing and schools further reinforces the conclusion in *Swann* that it is the actions of public officials, such as the discriminatory practices found below, that play the most significant role in shaping the segregated character of communities. In the words of *Swann*, such actions present courts with a "loaded game board" that calls for affirmative remedies.

The *Keyes* Court considered and rejected the very arguments now urged by Petitioners:

... Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent.

Id. at 208-09.

No adequate justification for overruling *Swann* and *Keyes* has been presented by Petitioners or any of the amici who support them. There is no disagreement with the general evidentiary principles which undergird those decisions. *Compare, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-41 (1943). Nor is it disputed that school authorities are in a far better position than plaintiffs to document their own actions and to delineate their effects. *Cf.* note 5 *supra*. Finally, *Keyes* has not resulted in any manifest injustice; the ultimate outcome of school desegregation litigation in the lower federal courts (including the Sixth Circuit) still turns on the proof presented, not on any reflexive application of presumptions. *See, e.g., Higgins v. Board of Educ. of Grand*

Rapids, 508 F.2d 779 (6th Cir. 1974); *Reed v. Cleveland Bd. of Educ.*, 581 F.2d 570, 571 (6th Cir. 1978) (discussing unreported remand order). Certainly this case is a poor vehicle for such a momentous decision, since Petitioners made no attempt whatsoever to introduce competent evidence which would suggest, contrary to the assumptions underlying *Swann* and *Keyes*, that school authorities' intentionally segregative acts do not contribute to the creation of intractable school segregation by exacerbating residential segregation.

The course urged by Petitioners also departs from the consistent thrust of this Court's decisions since *Brown I* because it overemphasizes the contemporaneous, narrowly demographic impact of school authorities' segregative acts to the total exclusion of other, equally destructive effects of conduct which puts an official stamp of approval upon racial discrimination. "In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination." *Milliken II*, *supra*, 433 U.S. at 283. Unquestionably, in order to justify particular measures in addition to nondiscriminatory pupil assignment, "it must always be shown that the constitutional violation caused the condition for which remedial programs are mandated." *Id.* at 286 n.17. But the breadth of the equity court's remedial power in school desegregation cases is tied directly to the recognition in *Brown I* that "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495. See *Milliken II*, *supra*, 433 U.S. at 282.

Brown repudiated with finality the notion that officially enforced racial separation connotes anything other than the inferiority of the Negro race.¹⁶³ Of necessity, the federal

¹⁶³ See C. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 and n. 25 (1960); E. Cahn, *Jurisprudence*,

courts have had to take race into account in formulating remedies adequate to overcome the effects of officially sanctioned racial discrimination. *Swann*, *supra*, 402 U.S. at 19; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *North Carolina State Bd. of Educ. v. Swann*, *supra*, 402 U.S. at 45. The goal is "to eliminate from the public schools all vestiges of state-imposed segregation," *Swann*, 402 U.S. at 15, "to convert to a system without . . . 'white' school[s] and . . . 'Negro' school[s], but just schools," *Green v. County School Bd. of New Kent County*, *supra*, 391 U.S. at 443. This effort has required a sensitivity—especially on the part of district courts, see, e.g., *Milliken II*, 433 U.S. at 287 n.18—to attitudes and perceptions about the racial identity of schools, because of the invidious signification of identifiably black schools created and maintained through deliberate official action. E.g., *Wright v. Council of the City of Emporia*, *supra*, 407 U.S. at 465-66; *Kemp v. Beasley*, 423 F.2d 851, 856-58 (8th Cir. 1970).¹⁶⁴

30 N.Y.U.L. Rev. 150, 158 (1955); L. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 28 (1960); *United States v. Jefferson County Bd. of Educ.*, *supra*, 372 F.2d at 872 (Wisdom, J.); *Brunson v. Board of Trustees*, 429 F.2d 820, 826 (4th Cir. 1970) (Sobeloff, J.); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968).

¹⁶⁴ Petitioners' approach is completely unresponsive to these factors, which are incapable of being included in a simple calculus which determines the effect of segregation only by counting bodies in certain residential locations. For example, this Court has long recognized that racial faculty assignments serve to identify schools as "black" or "white" and make more difficult the process of desegregation. *Swann*, *supra*, 402 U.S. at 18-19; *Bradley v. School Bd. of Richmond*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965); see also, *Bradley v. School Bd. of Richmond*, 345 F.2d 310, 324 (4th Cir. 1956) (Sobeloff and Bell, JJ., dissenting in part). Longstanding and pervasive faculty segregation is a prominent feature of this case and its companion. The application of accepted statistical methods to determine the correlation between the percentage of black student enrollment and the proportion of black faculty at each Columbus school for which data are

These intangible but crucial concerns of the Fourteenth Amendment bolster the propriety of requiring desegregation "root and branch," *Green, supra*, 391 U.S. at 438; *Keyes, supra*, 413 U.S. at 213. They underscore the soundness of the evidentiary presumptions created in *Keyes*, for only by requiring an effective remedy which eradicates all vestiges of state-imposed segregation can we be certain that the future composition of schools will not continue to be affected by past discrimination. See *Swann, supra*, 402 U.S. at 32; *Pasadena City Bd. of Educ. v. Spangler, supra*.

Finally, Petitioners' argument is flawed because it fails to take into account nonperformance of their constitutional obligation to dismantle the dual school structure which they created. Petitioners assert that even if they concede responsibility for specific segregative acts at specific segregated schools, their subsequent alleged adherence to a "racially neutral" "neighborhood school" principle which merely reflects residential patterns discharges any constitutional duty they may have (*e.g.*, Pet. Br. 63-65). This

available in 1964, 1968 and 1972 yields the following coefficients of correlation and determination:

	1964	1968	1972
Coefficient of correlation (R)	.82	.84	.88
Coefficient of determination (R ²)	.67	.71	.77

(Calculations prepared from Pl. L. Exs. 387, 389, 391, 393, 395 and 397, L. Tr. 3910, the source of the percentages shown in Pl. L. Exs. 383 and 385, L. Tr. 3909, reprinted at A. 776-801). These figures mean that statistically, the racial composition of the student bodies at Columbus' schools in the years given accounted for between two-thirds and three-quarters of the variation in faculty racial composition. See J. Freund, *MODERN ELEMENTARY STATISTICS* 421-22 (4th ed. 1973).

Such patterns unquestionably influenced the perception of schools and surrounding residential areas, but Petitioners' mechanical approach to desegregation cases takes no account of them. In the companion *Dayton* case, No. 78-627, an even more dramatic demonstration of the phenomenon is provided by the assignment of an all-black faculty to Dunbar High School, which in theory served the entire city; no white students chose to attend.

argument was rightly rejected in *Swann*, 402 U.S. at 28. Cf. *Brewer v. School Bd. of Norfolk, supra*. Limiting the reach of the principles declared in *Brown* to the type of classically dual systems operated by the school districts there before the Court, as Petitioners implicitly urge, would amount to little short of overruling that decision.

In sum, the theme of effective remedy which has characterized this Court's rulings from *Brown II*, 349 U.S. 294 (1955) to *Milliken II* is right and just. *Dayton I* should be reaffirmed as indicating that systemwide remedies may not rest upon inadequate proof of systemwide violations. But the Court should again reject the school-by-school, mechanical approach and also reaffirm the applicability of the *Keyes* presumptions in school desegregation cases.

C. The Formula Advanced by Petitioners Would Deprive Federal District Courts Sitting as Equity Tribunals in School Desegregation Cases of the Discretion and Breadth of Remedial Authority Which This Court Has Consistently Upheld as Necessary to Effective Implementation of the Constitutional Provisions Here at Issue.

In addition to its other defects, Petitioners' argument would, if adopted, strip federal district courts of the flexibility they need, and have traditionally had, in exercising equity jurisdiction, to devise sensible remedies that fairly reconcile the interests of all concerned. The insistence upon a single mechanical rule in which the relief granted would depend entirely on the ability of plaintiffs to establish a tight chain of causality between adjudicated wrongdoing and the current segregated conditions that exist at particular schools is fundamentally unsound. Equitable relief "is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is 'necessary and appropriate in the public interest to eliminate the effects'" of

the evil that required equity's intervention. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972) (emphasis in original). It goes without saying that, if the litigation is protracted and the evil takes new forms, equity has ample power to pursue it.¹⁶⁵ Indeed, it is the "duty of the court to modify . . . [a] decree so as to assure the complete extirpation of the illegal" conduct. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968).

These principles are applicable in full force to cases involving constitutional rights,¹⁶⁶ and in particular to school desegregation cases. From the outset, the Court has regarded considerations of practicality and flexibility as touchstones in shaping school desegregation remedies:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.

Brown v. Board of Educ., 349 U.S. 294, 300 (1955). In *Swann*, this Court attempted to "suggest the nature of limitations without frustrating the appropriate scope of equity," 402 U.S. at 31, which it had earlier described:

. . . Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

402 U.S. at 15. *Accord*, *Milliken II*, *supra*, 433 U.S. at 281.

¹⁶⁵ See *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (*dictum*).

¹⁶⁶ *E.g.*, *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

The focus of Petitioners' proposals is inconsistent with these principles. Desegregation decrees are designed to end segregation, not merely its methods and causes. As this Court has only recently emphasized, "the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" *Milliken I*, *supra* at 738," *Milliken II*, *supra*, 433 U.S. at 282. The same guidelines have been enunciated and applied again and again in anti-trust cases.¹⁶⁷

Where there has been a finding of systemwide segregation, approaching the task of defining the remedy on a school-by-school basis, dependent upon prognostications about the exact racial composition of that facility absent discrete segregative decisions, not only trivializes the constitutional principles but invites the adoption of remedies which are certain to fail of their objective. Where school authorities' intentionally segregative acts marked facilities as "black" and began the process of racial turnover, limiting the remedy to only the directly traceable impact of the initial violation may constitute little more than tinkering which fails to alter that deliberately fostered racial identifiability. Moreover, the experience of the federal courts since *Brown* indicates that plans which involve a greater

¹⁶⁷ *E.g.*, *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950):

A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with the acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited.

In addition to the cases cited in *Gypsum*, see, *e.g.*, *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189-90 (1944); *United States v. Loew's, Inc.*, 371 U.S. 38, 53 (1962).

number of schools may be more stable and acceptable to the community than more limited plans, because they distribute responsibility for participating in the remedy more evenly and do not leave racially identifiable schools as ready havens for flight. *See, e.g., Kelley v. Metropolitan County Bd. of Educ.*, Civ. No. 2094 (M.D. Tenn., July 15, 1971), *aff'd* 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972) ("In order to prevent certain schools from becoming vehicles of resegregation, the schools which have less than 15 per cent black pupils after the implementation of this court-adopted plan shall not be enlarged either by construction or portables, and shall not be renovated without prior court approval"); *Harrington v. Colquitt County Bd. of Educ.*, 460 F.2d 193 (5th Cir.), *cert. denied*, 409 U.S. 915 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 362 F. Supp. 1223 (W.D.N.C. 1973), *appeal dismissed*, 489 F.2d 966 (4th Cir. 1974), *subsequent proceedings*, 379 F. Supp. 1098 (W.D.N.C. 1974).¹⁶⁸ This Court explicitly endorsed the consideration of such factors at the remedy stage in *Wright v. Council of the City of Emporia*, 407 U.S. 451, 464-65 (1972) and *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 489-90 (1972). *Milliken v.*

¹⁶⁸ The likelihood of conflict and resistance to desegregation is increased when plans are partial and people believe, correctly or not, that they have been unfairly singled out to bear a disproportionate part of the burden of remedy. "Opposition diminished when the plans were made more inclusive," U.S. Commission on Civil Rights, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* 156 (1967); G. Orfield, "Minimum Busing and Maximum Trouble," in *MUST WE BUS* 143-48 (1978). *See also*, J. Egerton, *SCHOOL DESEGREGATION: A REPORT CARD FROM THE SOUTH* 18-19, 22, 30, 41-45 (1976); M. Giles et al., "Desegregation and the Private School Alternative" in *SYMPOSIUM ON SCHOOL DESEGREGATION AND WHITE FLIGHT* (1975); M. Giles, D. Gatlin, and E. Cataldo, *DETERMINANTS OF RESEGREGATION: COMPLIANCE/REJECTION BEHAVIOR AND POLICY ALTERNATIVES* (National Science Foundation, 1976); G. Orfield, *If Wishes Were Houses Then Busing Could Stop: Demographic Trends and Desegregation Policy*, *URBAN REVIEW* 117-18 (Summer, 1978).

Bradley, supra, is not to the contrary. *See Milliken II, supra*, 433 U.S. at 281-82.¹⁶⁹

Petitioners would foreclose federal courts from taking into account these and other practical elements in devising remedies in school desegregation cases. Though couched in the form of a mere change in evidentiary rules, their position, if adopted, would mark a sharp reversal in the course of history under *Brown*. The mandate to district courts would no longer be to shape remedy in a flexible manner, taking into account practicalities and the need to reconcile public and private needs, but rather to engage in a mechanistic application of artificial rules, whatever the consequences. The goal would no longer be to convert to systems "in which racial discrimination would be eliminated root and branch," *Green, supra*, 391 U.S. at 438, but to prune only the most prominent branches, leaving the roots intact and permitting discrimination to flourish again.

¹⁶⁹ In *Milliken II* this Court approved specific educational remedial measures not upon the basis of evidence tracing the impact of segregation upon children school-by-school or student-by-student, but of testimony reflecting the informed judgment of educators about how "discriminatory student assignment policies can themselves manifest and breed other inequalities. . . ." 433 U.S. at 283. The Court's practical approach to remedy was reflected in its view that

. . . Children who have been thus educationally and culturally set apart from the larger community will *inevitably* acquire habits of speech, conduct and attitudes reflecting their cultural isolation. They are *likely* to acquire speech habits, for example, which vary from the environment in which they must ultimately function and compete, if they are to enter and be a part of that community. . . .

. . . The *root condition* shown by this record must be treated directly by special training at the hands of teachers prepared for that task. This is what the District Judge in the case drew from the record before him as to the consequences of Detroit's de jure system, and we cannot conclude that the remedies decreed exceeded the scope of the violations found.

433 U.S. at 287-88 (emphasis supplied).

Little can be imagined that would be more destructive of the nation's long struggle, supported by the Court, to eliminate official racism from our society than to strip of its *practical* meaning the equal protection guarantee of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

School Segregation and Residential Segregation: A Social Science Statement

The problem of school segregation and residential segregation in large cities is one of the major issues facing American society today. Courts, legislatures, public administrators, and concerned citizens have struggled to understand the origins of the problem, to assess legal and moral responsibility, and to devise appropriate and effective legal, legislative, and administrative responses. Although public acceptance of the principle of desegregation is at its highest point in our history,¹ there is remarkable dissensus and confusion about the legitimacy and effectiveness of many of the methods being used or considered to

¹ "Over the past 25 years, the only period for which we have even moderately good data on public attitudes, there has been a consistent trend toward greater white acceptance of equality for Negroes, including greater acceptance of residential integration" (Bradburn, *et al.*, *Racial Integration in American Neighborhoods* (Chicago: National Opinion Research Center Report #111-B, 1970)). In 1978, 13% of whites said they would move if a black family moved next door, compared to 35% in 1967 and 45% in 1963 (American Institute of Public Opinion, *The Gallup Opinion Index*, Princeton, November, 1978). Among northern white parents in 1963, 67% reported they would not object to sending their children to schools where half of the students were black. This figure increased to 76% of the parents polled in 1970 and remained about the same through 1975 (American Institute of Public Opinion, *The Gallup Opinion Index*, Princeton, February, 1976). An even higher proportion of white parents report no objections to sending their children to schools where "some" or "a few" of the pupils are black. See also Taylor, *et al.*, "Attitudes Toward Desegregation," *Scientific American*, June, 1978. In the South, where the most school desegregation has occurred, the percentage of white parents saying they object to sending their children to schools where half of the students were black fell from 83% (1959) to 38% sixteen years later (Ordfield, *Must We Buss?*, Washington: Brookings Institution, 1978, p. 109).

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combat segregation. The issues are complex. Legal, factual, and political questions have become intertwined in the public debate. It is the purpose of this statement to identify certain of the factual issues that have been studied by social scientists, to summarize the knowledge that has resulted from these studies and been reported in scholarly journals and books, and to comment on the limits of social science knowledge.

This statement does not consider basic legal principles or goals for the nation. The signers of this statement cannot speak with any special authority on moral and legal issues. Some of the key issues, however, are factual issues subject to social science analysis. Many aspects of the nature of urban development and the segregation of minority groups have been studied with care by numbers of independent social scientists. Much has been learned about urban history, urban politics, changing public attitudes, the changing character of race relations, the operation of urban housing markets, and the formation and spread of racial segregation in urban areas. Section I of this statement is a summary of the current state of knowledge on some of these issues. Section II describes the kinds of conclusions that social science can and cannot supply concerning causes and effects of specific policies and actions. Section III presents a brief review of accumulated social science knowledge on the probable stability and effectiveness of several types of remedy that have been tried in school desegregation efforts. This statement emphasizes findings on which there is broad scholarly agreement, and avoids issues about which the evidence to date does not permit reasonably clear conclusions to be drawn.²

² Although this statement was prepared initially at the request of attorneys connected with litigation concerning the Dayton and

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I.

The Causes of School and Residential Segregation and the Relations Among Them

Residential segregation between white and black Americans and other racial and ethnic minorities prevails in all large cities in the United States.³ This segregation is attributable in important measure to the actions of public officials, including school authorities.

Although ethnic enclaves are a long-established feature of urban residential and commercial organization, the recent experience of blacks and Hispanic minorities in American cities has been far different than the historical experiences of persons of European descent. Some first and second generation European immigrants were dis-

Columbus school systems, the evidence and conclusions herein stated refer to American urban areas generally. Some of the studies cited include Dayton and Columbus in their data base and some do not. Not all the signers of this statement purport to have studied either city.

³ Taeuber and Taeuber, *Negroes in Cities* (Chicago: Aldine, 1965). An index of residential segregation calculated from census data on the numbers of white and nonwhite households on each city block has a theoretical range from zero (no segregation) to 100 (complete segregation). Indexes for 109 large American cities varied from 64 (Sacramento) to 98 (Miami) in 1960, and averaged about 86. Other minority groups were also residentially segregated. Updates based on the 1970 Census show a continuation of the pattern, with an average white-nonwhite segregation index for the same 109 cities of 81 (Sorensen, *et al.*, "Indexes of Racial Residential Segregation for 109 Cities in the United States, 1940-1970," *Sociological Focus*, 8 (1975), 125-142). Viewed from a metropolitan rather than central city perspective, racial segregation increased in many urban areas during the 1960's (van Valey, Roof, and Wilcox, "Trends in Residential Segregation: 1960-1970," *American Journal of Sociology* 82 (Jan., 1977), 826-844).

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criminated against and were subject to restrictions on the housing they could obtain. Nevertheless their degree of residential segregation declined rapidly from the peak levels attained during periods of rapid immigration, and those peak levels were never as high as the levels typical for blacks and Hispanic minorities today.⁴ The ethnic enclave for whites was temporary and, to a large extent, optional,⁵ while for blacks, Puerto Ricans, and other Hispanics, "segregation has been enduring and can, for the most part, be considered as involuntary."⁶

Every major study of the housing of blacks and whites in urban America has identified racial discrimination as a major explanation of the observed segregation.⁷ A recent review listed many forms of racial discrimination practiced by governmental and private agencies and individuals within the housing industry.⁸

Nearly a decade after federal legislation outlawing many such practices and a Supreme Court decision rendering

⁴ Lieberman, *Ethnic Patterns in American Cities* (New York: Free Press, 1963), p. 120-132; Taeuber, "Demographic Perspectives on Housing and School Segregation," 21 *Wayne Law Review* 833-40.

⁵ Erbe, "Race and Socioeconomic Segregation," *American Sociological Review* 40 (December, 1975), p. 801-812.

⁶ Butler, *The Urban Crisis: Problems and Prospects in America* (Santa Monica: Goodyear Publishing, 1977), p. 50.

⁷ DuBois, *The Philadelphia Negro* (Philadelphia: University of Pennsylvania, 1899); Myrdal, *An American Dilemma* (New York: Harper, 1944); Weaver, *The Negro Ghetto* (New York: Harcourt, Brace, 1948); Commission on Race and Housing, *Where Shall We Live?* (Berkeley, University of California, 1958); U.S. Commission on Civil Rights, 1961 *Report*, VI, *Housing*; National Advisory Commission on Civil Disorders, *Report* (1968); etc.

⁸ Taeuber, "Demographic Perspectives on Housing and School Segregation," *Wayne Law Review* 21:March 1975, 840-841.

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them all illegal, a government study revealed that such practices continued but often in more subtle and covert form.⁹

Policies and practices of the federal government have been particularly important since the beginnings of major federal housing programs during the Depression.¹⁰ The ghetto pattern that was created by deliberate policy has become far harder to alter than it was to create. The ghettos grew along with simultaneous pervasive discrimination and segregation in education, government employment, and provision of many government services. These became such fundamental features of American life that they were often taken for granted, viewed as "natural" forms of social organization.

A simple example will suggest the inertial resistance to change that has resulted from the history of racial discrimination in housing. Governmentally insured home mortgages spurred the widespread practice of low down payments and long repayment terms. This brought home ownership within the reach of young middle-income families, and was an underlying facilitator of rapid white sub-

⁹ U. S. Department of Housing and Urban Development, "Preliminary Findings of the 1977 Housing Market Practices Survey of Forty Cities," presented at the Tenth Anniversary Conference of Title VIII of the Civil Rights Act, Washington, D.C., April 17 and 18, 1978; Pearce, *Black, White, and Many Shades of Gray: Real Estate Brokers and Their Racial Practices*, unpublished Ph.D. dissertation, University of Michigan, 1976.

¹⁰ Tens of millions of housing units have been built and occupied under federal government subsidy and insurance programs. The mass movement of white population to outlying urban and suburban developments and the growth of central area minority ghettos occurred during this period, guided by the explicit policies of discrimination written into government regulations and administrative practice. See Frieden and Morris, *Urban Planning and Social Policy*, pp. 127-131, and works cited in footnote 1.

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urbanization during the last three decades. Most blacks were excluded from the FHA and VA mortgage insurance programs, based upon, among other things, the assertion that: "If the children of people living in . . . an area are compelled to attend school with a majority or a considerable number of pupils representing a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist."¹¹ In the current period of persistent inflation, a much higher proportion of white families than of black families has a growing equity in home ownership. Whatever gains blacks may make relative to whites in obtaining jobs and reasonable incomes, they will long lag far behind in wealth.¹² Thus will past discriminatory practices of the FHA and other housing agencies continue for decades yet to come to exert an influence on the racial structure of the nation's metropolitan areas.

Not all of the governmental discrimination that fostered residential segregation was practiced by housing agencies. Employment discrimination affected the earnings of blacks and influenced their workplaces, and both of these effects constrained housing opportunities. Discrimination in the provision of public services, such as paved roads, frequent trash collection, and new schools, was standard practice in southern cities and common in northern cities. Thus were

¹¹ F.H.A., *Underwriting Manual*, 1935 Edition.

¹² Orfield, "If Wishes Were Houses Then Busing Could Stop: Demographic Trends and Desegregation Policy," *School Desegregation in Metropolitan Areas: Choices and Prospects* (A National Conference), National Institute of Education, Washington, D.C., October, 1977; Kain and Quigley, "Housing Market Discrimination, Home Ownership, and Savings Behavior," *American Economic Review* (June, 1972).

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residential areas for blacks further demarcated and stigmatized. Racial discrimination was institutionalized throughout American society, and the resulting patterns of segregation in housing, schooling, employment, social life, and even political activity had many causes.¹³ Discriminatory practices and racial segregation in each aspect of life contributes to the maintenance and reinforcement of similar practices and segregatory outcomes in other aspects.

Education is a pervasive governmentally organized activity that reaches into every community. The institutionalization of racially discriminatory practices throughout the public school system is a substantial cause as well as effect of society's other racial practices. Society's major institution for socializing the young, aside from the family, is the public school system. Most children are greatly influenced by their school experiences, not simply in formal academic learning but in developing a sense of self and knowledge and feelings about social life and behavior.

There is an interdependent relationship between school segregation and neighborhood segregation. Each reinforces the other. Policies that encourage development and continuation of overwhelmingly racially identifiable schools foster residential segregation. This residential segregation in turn fosters increased school segregation. The role of many governmental practices in the development and continuation of residential segregation has been documented repeatedly and summarized above. Several specific ways in which school policies and practices contribute to residential segregation may be delineated.

The racial composition of a school and its staff tends to stamp that identity on the surrounding neighborhood. In

¹³ Myrdal, *op. cit.*

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many urban areas, the attendance zone of a school defines the only effective boundary between "neighborhoods."¹⁴ Homebuyers use school attendance zones as a guide in their selection of a residence. Realtors take particular pains to "sell" the school as they sell the home;¹⁵ the school zone is listed in many newspaper classified advertisements for homes and often serves to identify the racial character of the "neighborhood."

In many American cities during the last 30 to 60 years, residential areas of predominant minority occupancy have greatly expanded. Often an increasing black or Hispanic population has moved into housing formerly occupied by (Anglo) whites. This process of "racial succession" or "ghettoization" has been perceived as a relentless "natural" force, yet it is in fact governed by institutional policies and practices and is not at all inevitable.¹⁶ The process is a textbook example of a self-fulfilling prophecy. The expectation by whites that an area will become black leads them to take individual and collective actions that ensure the outcome. Housing market barriers against sale or rental to blacks are reduced, panic selling tactics often stimulate white residents to leave, and potential white in-

¹⁴ "No other boundary system within the city is as crucial to residential behavior as the system of attendance zones delineated by school authorities." Taeuber, "Housing, Schools, and Incremental Segregative Effects," *Annals of the American Academy of Political and Social Science*, v. 441 (Jan., 1979), p. 164.

¹⁵ Helper, *Racial Politics and Practices of Real Estate Brokers* (Minneapolis: 1969) reports that school image and racial composition play the key role in labelling neighborhoods as undesirable: "People fear that the schools will become undesirable—this, say respondents, is the main reason why white people do not want Negroes to come into their area" (p. 80).

¹⁶ Taeuber and Taeuber, *op. cit.*, Part 2.

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migrants from other parts of the city are steered away from the neighborhood because it is "turning" or "going."

Change in the racial identifiability of a school can influence the pace of change in racial composition in a "changing" residential area.¹⁷ In contrast, a school with a stable racial mix connotes to nearby residents and potential in-movers that they will not be forsaken by school authorities. School policies can serve to "coalesce a neighborhood and generate confidence in its continued stability."¹⁸

Even childless households are affected by the school and neighborhood racial labelling process. Residential location is a major factor in determining social status in America.¹⁹ Many whites who contemplate remaining in or entering an area where the school has an unusually large or increasing proportion of minority pupils or staff expect that such a school will be discriminated against by school officials. "As the proportion of disadvantaged students in the central cities has increased, there has been a simulta-

¹⁷ Wolf, "The Tipping-Point in Racially Changing Neighborhoods," *Journal of the American Institute of Planners*, v. 29 (1963), 217-222, esp. 220-1.

¹⁸ Vandell and Harrison, *Racial Transition in Neighborhoods* (Cambridge: Joint Center for Urban Studies, 1976), 13.

¹⁹ Warner, *Social Class in America* (Chicago: Science Research Associates, 1949), 151. Cf. Roof, "Race and Residence," *Annals*, v. 441 (Jan., 1979), p. 7; Marston and van Valey, "The Role of Residential Segregation in the Assimilation Process," *Annals*, v. 441 (Jan., 1979), pp. 22-25; Berry, *et al.*, "Attitudes Toward Integration: The Role of Status in Community Response to Racial Change," in Schwartz, ed., *The Changing Face of the Suburbs* (Chicago: University of Chicago Press, 1976), 221-264; Guest and Weed, "Ethnic Residential Segregation," *American Journal of Sociology*, v. 81 (March, 1976), 1088-1111, esp. 1092; Sennett, "The Brutality of Modern Families," *Transaction* (Sept., 1970), 29037; Loewen, *The Mississippi Chinese: Between Black and White* (Cambridge: Harvard University Press, 1971), 102-119.

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neous increase in what are known in the community as 'undesirable' schools, schools to which parents would prefer not to send their children."²⁰ These parents know what all citizens know: that black Americans have less social status and power with which to persuade or coerce school authorities to meet their needs. This perception, that black schools will be allowed to deteriorate, has historical justification.²¹ Whatever the objective circumstances, parents expect that children in schools perceived to be for minority children will receive inferior education. Many white parents are able to move or place their children in other schools.²² Most black parents are unable to avoid using identifiably black schools. If all schools were interracial, whites could not link racial composition to school quality, nor could school authorities.

All discriminatory acts by school authorities that contribute to the racial identifiability of schools promote racially identifiable neighborhoods. Sometimes the effect is direct and obvious, as when the selection of school construction sites, the drawing of school boundaries, and/or the construction of additions are carefully undertaken to establish and preserve "white schools" and "black schools." Sometimes the effect is less direct. In most school districts minority teachers have until very recently rarely been

²⁰ Campbell and Meranto, "The Metropolitan Educational Dilemma," in Gale and Moore, eds., *The Manipulated City*, 305-318, p. 310 (Chicago: Maaroufa Press, 1975). Cf. Surgeon, et al., *Race Relations in Chicago: Second Survey, 1975*. (Chicago: University of Chicago Family and Community Study Center, 1976, p. 158).

²¹ Campbell and Meranto, *op. cit.*, p. 313; Baron, "Race and Status in School Spending," in Gale and Moore, eds., *The Manipulated City*, 339-347.

²² Vandell and Harrison, *op. cit.*

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assigned to schools with no minority pupils, and in many large urban school districts few minority teachers were employed. Had white pupils and parents regularly encountered blacks in responsible professional positions, and had minority pupils and parents seen white and black professionals equally treated, the perpetuation of stereotypical attitudes and prejudicial habits of thought would have been significantly challenged.²³

A pervasive effect of this and certain other types of discriminatory school actions is upon the attitudes of the students who grow up experiencing such a system for a thousand hours a year. Participation in segregated institutions foment the development of prejudicial attitudes.²⁴ Participation in desegregated institutions, under benign conditions, can be a powerful force for breaking down prejudice.²⁵ "If in their own schooling they [parents] had been taught tolerance rather than intolerance many more of them would now be willing and even eager to seek out racially mixed rather than racially isolated residential areas."²⁶

Racially discriminatory pupil assignment policies tend to increase residential segregation in several ways. An open transfer policy is often manipulated by school authorities to encourage or permit whites to flee schools that

²³ Taeuber, "Housing, Schools, and Incremental Segregative Effects," *The Annals of the American Academy of Political and Social Science*, (Jan., 1979), 161.

²⁴ Crain and Weisman, *Discrimination, Personality and Achievement* (New York: Seminar Press, 1972).

²⁵ Festinger, *A Theory of Cognitive Dissonance* (Evanston: 1957); Allport, *The Nature of Prejudice* (Garden City: Anchor, 1958).

²⁶ Taeuber, *op. cit.*, p. 162.

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are becoming biracial, and to attend overwhelmingly white schools some distance away. The effect on residential patterns would appear to be to permit white families to remain in a biracial residential area. The larger effects are, however, segregative. First, because the children who transfer lose many of their neighborhood ties, the family finds it easier to move to the neighborhood around their new school or to a more remote white enclave. Second, because the sending school is now identified as "black" or "changing," white families who might otherwise have moved into the area will be steered elsewhere and the area will become increasingly minority.²⁷

When the elected officials and appointed professional leaders of a major societal institution (the public schools) establish or condone the operation of optional attendance zones in a discriminatory manner, this tells the users of the institution (students and their parents) and the general public that it is correct to view racial contact as a problem and to utilize institutional practices and policies in ways that avoid the problem. The effect on attitudes has both short-run and life-long effects that may affect so-called "private" choices in housing and other areas of life.²⁸ "The NORC study found that desegregated whites were more likely to have had a close black friend, to have had black friends visit their homes, and to be living in multiracial neighborhoods. It is believed that having had a close black

²⁷ Molotch, *Managed Integration* (Berkeley and Los Angeles: University of California Press, 1972); Bradburn *et al.*, *Racial Integration in American Neighborhoods* (Chicago: National Opinion Research Center, 1970); Orfield, *op. cit.*, 97; Milgram, *Good Neighborhood: The Challenge of Open Housing* (New York: Norton, 1977).

²⁸ Taeuber, *op. cit.*, 162-4.

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friend relates directly to choice of residence in a multi-racial area. This is also true for blacks."²⁹

The actions of school officials are part of a set of discriminatory actions by government agencies, and other institutions. This web of institutional discrimination is the basic cause of school and residential segregation. Economic factors and personal choice are often considered as additional causes.³⁰

The assertion sometimes made that residential segregation results from racial differences in economic status rather than from racial discrimination is a curious one. Racial discrimination in employment and earnings is a major cause of racial differences in economic status, and racial discrimination in access to homeownership was cited above as a cause of racial differences in wealth. Racial discrimination in education in prior years is of course one of the causes of poorer job market outcomes for black adults. It is not necessary to elaborate on these interlocking causes. The fact is that current racial economic differences have little effect on racial residential segregation. If economic variables alone determined where people lived, the rich of both races would live near one another and poor blacks and poor whites would be close neighbors. Such is not the case. Well-to-do blacks live in very different

²⁹ Green, "Northern School Desegregation: Educational, Legal and Political Issues," Chapter 10 of Gordon, ed., *Uses of the Sociology of Education* (Chicago: 1974), 251. "NORC" is the National Opinion Research Center. See also Meyer Weinberg, *Desegregation Research* (Phi Delta Kappa, 1970), pages 311-313, citing Pettigrew and NORC studies. Regarding black choices, see Crain, "School Integration and the Academic Achievement of Negroes," *Sociology of Education*, v. 44 (1971), p. 19. See also Bulloch, "Social Psychological Barriers to Housing Desegregation," UCLA Graduate School of Business Administration, Special Report 2, 1969, processed.

³⁰ Myrdal, *op. cit.*

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areas than well-to-do whites and poor whites generally do not share their residential areas with poor blacks.³¹ Nor can economic factors explain the general absence of blacks from the suburbs. Studies of census data reveal that in most metropolitan areas the suburbs are open to whites in all economic categories but are generally closed to blacks, be they wealthy or impoverished.³² If people were residentially distributed according to their income rather than their skin color, most urban neighborhoods would contain racially mixed populations.

Despite the civil rights legislation of the 1960s and numerous court orders that prohibit discriminatory employment practices, the incomes of blacks continue to lag far behind those of whites.³³ Improvements in the economic status of blacks would allow more blacks to upgrade their housing but increased spending on housing would do little to alleviate racial residential segregation.³⁴

³¹ Taeuber and Taeuber, *op cit.*, chapter 4; Taeuber "The Effects of Income Redistribution on Racial Residential Segregation," *Urban Affairs Quarterly*, Vol. 4, No. 1, September 1968, pp. 5-14.

³² Hermalin and Farley, "The Potential for Residential Segregation in Cities and Suburbs: Implications for the Bussing Controversy," *American Sociological Review*, Vol. 38, No. 5, October, pp. 595-610; Farley, Bianchi, and Colasanto, "Barriers to the Racial Integration of Neighborhoods: The Detroit Case," *The Annals of the American Academy of Political and Social Science*, Vol. 441, January 1979, pp. 97-113.

³³ In 1977 black men who worked full time for the entire year reported earnings about 69% as great as those of comparable white men. The average income of black families was 57% as great as that of white families. U.S. Bureau of the Census, Current Population Report Series P-60, No. 116, July 1978, Tables 1 and 7.

³⁴ Straszheim, "Racial Discrimination in the Urban Housing Market and its Effect on Black Housing Consumption," in von Furstenberg, Harrison, and Horowitz (eds.), *Patterns of Racial Discrimination, Volume 1, Housing*. Lexington, Mass: Lexington Books 1974; Taeuber, *op. cit.*

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The personal choices of individuals must be considered in any explanation of racial residential segregation. In national and local survey studies, most blacks express a preference for racially mixed neighborhoods for themselves and racially integrated schools for their children. For example, in a national study conducted in 1969, three-fourths of black respondents wished to live in integrated neighborhoods while one in six expressed a preference for an all-black area.³⁵ In Detroit, the proportion of blacks who said they preferred racially mixed areas rose from 56 percent in 1968 to 83 percent in 1976.³⁶ These preferences cannot be used to predict where black families actually live, for they have had lifelong experience with discriminatory housing markets that offer little actual freedom of choice.³⁷

In the late nineteenth and early twentieth centuries, economic factors and personal preferences may have been important determinants of residential location of blacks and European immigrants.³⁸ As the number of blacks

³⁵ Pettigrew, "Attitudes on Race and Housing: A Social-psychological View," in Hawley and Rock (eds.), *Segregation in Residential Areas* (Washington: National Academy of Sciences, 1973), 21-48.

³⁶ Farley, *et al.*, "Chocolate City, Vanilla Suburbs: Will the Trends Toward Racially Separate Communities Continue?" *Social Science Research*, Vol. 7, No. 4, December 1978, 319-344.

³⁷ Colasanto, "The Prospects for Racial Integration in Neighborhoods: An Analysis of Preferences in the Detroit Metropolitan Area," Ph.D. Dissertation, University of Michigan, 1978.

³⁸ Hershberg, *et al.*, "A Tale of Three Cities: Blacks and Immigrants in Philadelphia, 1850-1880, 1930 and 1970," *Annals of the American Academy of Political and Social Science*, Vol. 441, January 1979, 55-81; Lieberson, *Ethnic Patterns in American Cities* (New York: Free Press of Glencoe, 1963); Spear, *Black Chicago: The Making of a Negro Ghetto, 1890-1920* (Chicago: University of Chicago Press, 1967).

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increased, institutionalized Jim Crow practices developed and for more than half a century the black residential patterns have diverged from those of the ethnic groups. The conclusions of a historical study of the development of the Negro ghetto in Chicago are exemplary of other historical studies:³⁹ "The most striking feature of Negro housing . . . was not the existence of slum conditions, but the difficulty of escaping the slum. European immigrants needed only to prosper to be able to move to a more desirable neighborhood. Negroes, on the other hand, suffered from both economic deprivation and systematic racial discrimination. . . . The development of a physical ghetto in Chicago . . . was not the result chiefly of poverty, nor did Negroes cluster out of choice. The ghetto was primarily the product of white hostility."

Neither economic factors nor the preferences of blacks for having some black neighbors can be interpreted as current causes of residential segregation separate and distinct from discrimination. Neither income differences nor personal choice produce high levels of racial residential segregation in hypothetical models that assume an absence of discrimination.⁴⁰

In this review of findings, frequent use has been made of the terms "cities" and "urban areas." The usage has deliberately been loose. The concepts of a housing market, a labor market, and a commuting area all connote a broad territory. The effects of any action that alters residential patterns in a specific location are not felt solely in that location. The kinds of discriminatory actions reviewed

³⁹ Spear, *op. cit.*, p. 26.

⁴⁰ Taeuber and Taeuber, *op. cit.*; Taylor, *op. cit.*

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earlier in this section, whether taken by school officials, other governmental officials, commercial or financial institutions, or other groups or persons, have effects that spread beyond the neighborhoods initially affected.⁴¹

In the thirty-five years since Myrdal's seminal study of America's racial problems was first published,⁴² American society has changed in many ways and race relations have experienced profound transformations. Social scientists have published thousands of additional studies of various aspects of race relations. If there is a common theme emerging from this myriad of studies, it is continual reaffirmation of Myrdal's observation of a process of cumulative causation binding the separate threads of social life into a system.⁴³ This review of research on a limited range of topics has shown that causes and effects of individual actions cannot be understood or evaluated apart from the broader social context in which they are imbedded. Residential segregation, school segregation, racial economic differences, housing preferences and neighborhood attitudes, discriminatory acts by school officials, and discrimination practiced by other governmental agencies are linked together in complex patterns of reciprocal causation and influence.

⁴¹ Hawley, *Human Ecology* (New York: Ronald, 1950); Berry and Kasarda, *Contemporary Urban Ecology* (New York: Macmillan, 1977); Taeuber, "Demographic Perspectives on Metropolitan School Desegregation," in *School Desegregation in Metropolitan Areas: Choices and Prospects* (Washington: National Institute of Education, 1977).

⁴² Myrdal, *op. cit.*

⁴³ *Ibid.*, 77.

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II.

Conclusions Social Science Can and Cannot Supply

The previous section reported a brief summary of some of the conclusions that can be drawn from the writings of social scientists who have studied school segregation, housing segregation, and other aspects of race relations in twentieth-century American society. A few dozen articles, chapters, and books were cited, from the thousands that might be included in a comprehensive literature survey. The individual scholarly investigations utilized a variety of information sources—interviews with realtors, government documents, records of housing sales prices, census data, etc. The techniques for analyzing information were varied—historical interpretation, statistical analysis, logical testing of predictions from formal theories, etc. The common link is a laying out of evidence and mode of analysis so that other scholars can examine the basis for the conclusions drawn. Many social scientists agree that the conclusions reported in Section I are reasonably well established. Of course the evidence is stronger for some conclusions than for others, and the scientist is always open to altering conclusions on the basis of new evidence.

The principal conclusions reported in Section I concern relationships among discriminatory actions by educational agencies, school segregation, residential segregation, and other types of institutionalized racial discrimination. A pervasive pattern of interdependence within American urban areas was documented. In particular, it was concluded that segregative school policies are among the causes of urban racial residential segregation.

Some social scientists have been asked to refine these general conclusions and provide precise answers about specific

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causal relationships in particular places and times.⁴⁴ They have been asked how much effect discriminatory and segregative school policies had on residential segregation and what exactly was the reciprocal effect of that incremental residential segregation on school attendance patterns. Even more precision is requested in the question: What is the numerical effect on current school attendance patterns that results from direct and indirect effects of individual discriminatory actions taken in the past by school officials?

Social scientists cannot answer such questions with precision. The questions can be rephrased to call for stating what the present would be like if the past had differed in certain specified respects. This is reminiscent of the grand "what if" games of history. What if the South rather than the North had been victorious in 1865? Would the United States be one nation? When would slavery have ended? What role would black labor have played in the industrialization of northern cities? Clearly there is fascinating material here for historical speculation, but any answers, however well grounded on scholarship and logical reasoning, are inherently fictional. And the game loses all point if the question becomes too narrow: What would the racial composition of Atlanta and of Chicago be in 1980? History cannot be unreeled and reeled back differently.

The present state of empirical knowledge and models of social change does not permit precise specification of the effects of removing particular historical actions. Although many of the causes of segregated outcomes are known, this knowledge is not so thoroughly quantified as to permit precise estimates of the effects of specific discriminatory acts on general patterns of segregation. In addition, the knowl-

⁴⁴ For an indication of the judicial context in which such questions have been posed, see Taeuber, *op. cit.*

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edge that is available is incomplete. Many of the links between discrimination and segregation are only dimly perceived and not yet carefully investigated. The work of many specialists—economists, psychologists, sociologists, political scientists, geographers—cannot be integrated into a grand model. Even if each individual link were well understood, the model could not be used to crank out estimates without understanding how the entire set of relationships functions as a system.⁴⁵

Social scientists studying real cities in a particular society and time period do not have available the techniques of experimental analysis for control of variables. There are a few hundred urban areas to be studied, and thousands of variables with which to describe them and differentiate one from another. The kinds of generalizations that are possible are limited in character. Historical reconstruction simply cannot meaningfully quantify what the racial distribution of pupils or residents would have been if particular school officials had acted differently. Delimiting the wrong that flowed from specific acts and righting the wrong are matters for jurisprudence, not social science.

III.

Knowledge about the Desegregation Process

Although most large urban school districts with substantial numbers of minority pupils enrolled have changed some of their practices as a result of *Brown v. Board of Education* and subsequent court decisions, many have never implemented comprehensive desegregation plans. Of those

⁴⁵ For an example of the inability to utilize certain formal models of the effects of prejudice and discrimination on racial segregation in the housing market, see Taylor, *op. cit.*

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that have implemented such plans, most of the activity has been in recent years. There has been relatively little opportunity for sustained study of the process of school desegregation in large urban areas. Nevertheless the social science literature on school desegregation already numbers hundreds of articles and books.⁴⁶

An early body of research on educational achievement utilized existing or only slightly modified standardized tests and assessment instruments. Many of these studies did not distinguish between racially mixed classrooms or schools that resulted from specific desegregation efforts and those that occurred for other reasons. Most lacked a time dimension, investigating only the situation at the time of study, or assuming that desegregation was an event that occurred all at once. There is a virtual consensus, from a wide variety of studies conducted in this manner, that desegregation does not damage the educational achievement of white children.⁴⁷

The *Coleman Report* found limited but significant educational gains for minority children, which it attributed primarily to the placement of these children in more challeng-

⁴⁶ Weinberg, *The Education of the Minority Child* (Chicago: Integrated Education Associates, 1970) lists 10,000 "selected entries."

⁴⁷ Coleman, *et al.*, *Equality of Educational Opportunity* (Washington: Government Printing Office, 1966), pp. 22, 297, 325; St. John, *School Desegregation: Outcomes for Children* (New York: Wiley, 1975), p. 35; Jencks and associates, *Inequality: A Reassessment of the Effect of Family and Schooling in America* (New York: Basic Books, 1972), pp. 105-6; Weinberg, *Desegregation Research: An Appraisal*, 2nd ed. (Bloomington, Ind.: Phi Delta Kappa, 1970), p. 88. There has also been some evidence of definite white gains in plans which combined desegregation with educational improvements. (St. John, pp. 157-62; Pettigrew, *et al.*, "Busing: A Review of 'The Evidence,'" in Nicolaus Mills, ed., *The Great School Bus Controversy* (New York: Teachers College Press), p. 148.

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ing educational settings dominated by students from families with more resources and stronger educational backgrounds.⁴⁸ The *Report*, and a number of reanalyses of the national statistics on which it was based, found that the quality of the school was more important to poor children while family influences were more decisive for middle-class children.⁴⁹

Research in the 1970's has moved toward a view of desegregation as a process rather than an event, a process which is very much influenced by the manner in which it is carried out. Segregation appears to be a deeply rooted problem. Years of quiet work within a physically desegregated school may be needed to attain the intended benefits.⁵⁰ Early experiences continue to influence later learning, and social and cultural patterns of race relations cannot be rapidly and easily altered in the school when profound inequalities of income, employment and occupational status, educational background, and social status prevail in the society.

The positive effects of desegregation can be enhanced by strong leadership of the principal in the school, by training for teachers who need help in the readjustment, and by school rules that are perceived as fair by both white and

⁴⁸ Coleman *et al.*, *op. cit.*, p. 22.

⁴⁹ Smith, "Equality of Educational Opportunity: The Basic Findings Reconsidered," in Mosteller and Moynihan, eds., *On Equality of Educational Opportunity* (New York: Random House, 1972), p. 312.

⁵⁰ Orfield, "How to Make Desegregation Work: The Adaptation of Schools to their Newly-Integrated Student Bodies," 29 *Law & Contemporary Problems*, No. 2, at 314 (1975); Forehand, Ragosta, and Rock, *Conditions and Processes of Effective School Desegregation* (Princeton, N.J.: Educational Testing Service, 1976), pp. 217-230.

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minority children.⁵¹ Efforts by teachers to explain racial issues and to assign students consciously to integrated work groups can have substantial positive effect.⁵²

The importance of beginning integration at the onset of public schooling has long been noted. Young children have the smallest gap in academic achievement and the least developed racial stereotypes.⁵³ Integration becomes part of their concept of school from the beginning, not a drastic change. Federal officials report that there is seldom any difficulty associated with desegregating the earliest grades.⁵⁴ A review of scores of published studies of academic achievement shows that a large majority of the cases with first grade desegregation bring positive educational results while later desegregation has little effect on black pupil

⁵¹ Forehand and Ragosta, *A Handbook for Integrated Schooling* (Washington: Government Printing Office, 1976).

⁵² Cook, "Interpersonal and Attitudinal Outcomes in Cooperating Interracial Groups," *Journal of Research and Development in Education*, 1978 12:1, 97-113; DeVries, Edwards, and Slaven, "Biracial Learning Teams and Race Relations in the Classroom: Four Field Experiments Using Teams-Games-Tournament," *Journal of Educational Psychology*, 1978, 70:3, 356-362; Slaven, "Effects of Biracial Learning Teams on Cross-Racial Friendships," *Journal of Educational Psychology*, 1979, forthcoming; Wiegel, Wiser, and Cook, "The Impact of Cooperative Learning Experiences on Cross-Ethnic Relations and Attitudes," *Journal of Social Issues* 1975:31, 219-244.

⁵³ Coleman, *et al.*, *op. cit.*, pp. 274-275; National Opinion Research Center, *Southern Schools: An Evaluation of the Effects of the Emergency School Assistance Program and of School Desegregation* (Chicago: NORC, 1973), pp. 45-47, 79.

⁵⁴ Report from Community Relations Service of the U.S. Department of Justice accompanying letter from Assistant Attorney General Ben Holman to Senators Edward Brooke and Jacob Javits, June 19, 1976; printed in *Congressional Record* (daily edition), June 26, 1976, pp. S10708-11.

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achievement scores.⁵⁵ A study of schools in the South showed that the more years of desegregation, the more positive were the results.⁵⁶ Pettigrew summarized the sociological theory and cited additional evidence.⁵⁷ Empirical results and social theory buttress the commonsense observation that small children have not yet learned that race is supposed to matter and therefore tend to act as if it does not.

Certain longer run effects of school desegregation may occur outside of the school. Few of these effects have yet been studied, but some evidence is beginning to accumulate. Students from integrated schools, for example, are more likely to succeed in strong colleges.⁵⁸ A retrospective study of black adults found that those who reported attending integrated schools as children were more likely in later years to live in racially integrated neighborhoods.⁵⁹ Ultimately, studies of the long-run effects of desegregation may provide crucial evidence on the strength of the indirect effects of school discrimination that were cited in Section I. Already there is limited evidence that school desegregation can spur stable residential desegregation.⁶⁰

⁵⁵ Crain and Mehard, "Desegregation and Black Achievement," forthcoming in *Law and Contemporary Problems*, 1979.

⁵⁶ National Opinion Research Center, *Southern Schools*, p. 53; Forehand, Ragosta, and Rock, *Conditions and Processes of Effective School Integration*, pp. 217-230.

⁵⁷ Pettigrew, "A Sociological View of the Post-Bradley Era," 21 *Wayne Law Review* 813, at 822.

⁵⁸ Crain and Mehard, "High School Racial Composition and Black College Attendance," *Sociology of Education*, April 1978.

⁵⁹ Crain and Weisman, *Discrimination, Personality, and Achievement* (New York: Seminar Press, 1972).

⁶⁰ Green, *op. cit.*, p. 252, re Riverside, Calif.; Taeuber, 1979, p. 20, re Milwaukee; Kentucky Commission on Human Rights,

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Social scientists have played a central role in a vigorous political and scientific debate over the demographic and enrollment effects of implementing desegregation plans. As yet there is little consensus over the terms of the debate, the appropriate measurement techniques and theoretical formulations, and the trustworthiness of various empirical results. Nevertheless there seems to be an emerging consensus that certain types of desegregation actions are most likely to result in large declines in public school enrollment by white pupils. If a plan is limited to a small fraction of the system and produces schools with large minority enrollments surrounded by readily accessible white schools, there is likely to be instability in white enrollments.⁶¹ A study of desegregation in large school districts across Florida showed that enrollment stability was aided by system-wide plans that avoided leaving schools substantially disproportionate in their racial composition.⁶² A study of the experience in Charlotte-Mecklenburg showed that the exclusion of only a few schools produced some residential instability.⁶³ Limiting a desegregation plan to

"Housing Desegregation Increases as Schools Desegregate in Jefferson County" (Louisville, 1978); Rossell, *Assessing the Unintended Impacts of Public Policy: School Desegregation and Resegregation* (Washington: National Institute of Education, 1978), p. 29; Orfield, "If Wishes Were Houses Then Busing Could Stop: Demographic Trends and Desegregation Policy," *op. cit.*, p. 51; Braun.combe, "Times Are A 'Changing in Denver," *Denver Post*, May 1, 1977.

⁶¹ Giles, "White Enrollment Stability and School Desegregation: A Two-Level Analysis," *American Sociological Review* 43: 1978.

⁶² Giles, Gatlin, and Cataldo, *Determinants of Desegregation: Compliance/Rejection Behavior and Policy Alternatives* (Washington: National Science Foundation, 1976).

⁶³ Lord, "School Busing and White Abandonment of Public Schools," *Southern Geographer* 15:1975; —, "School Desegregation Policy and Intra-School District Migration," *Social Science Quarterly* 56: 1977.

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the immediate vicinity of a ghetto or barrio is likely to accelerate the process of ghetto expansion described in Section I.

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Robert L. Crain (RAND Corp.)	Los Angeles, California
Robert A. Dentler (Boston University)	Boston, Massachusetts
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Cora B. Marrett (University of Wisconsin)	Madison, Wisconsin
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Diana Pearce (University of Illinois)	Chicago, Illinois
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J. Milton Yinger (Oberlin College)	Oberlin, Ohio

Dated: March 21, 1979

Supreme Court, U. S.
FILED

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MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States
October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief is confined to addressing matters raised in Respondents' Brief concerning the scope of this Court's review of the judgments below, the proper application of burden-shifting principles, and the relevance and weight of social science opinion on the legal issues presented here for review.

The Respondents' extensive discussion of the evidence in this case, largely devoted to matters which were not the subject of findings by the district court, is apparently based upon an assumption that the lower courts' ultimate findings of systemwide liability and remedy can be affirmed if supported by any evidence of further alleged instances of discriminatory conduct which were not the subject of specific findings by the trial court. Although not so characterized by either court below, Respondents repeatedly insist upon characterizing the findings of the trial court as mere "examples" of allegedly numerous instances of unconstitutional conduct. The Respondents' attempt to supplement the trial court's findings of remote and isolated instances of unconstitutional conduct must be rejected.

If the trial court's findings of isolated violations are insufficient to support its ultimate conclusions, this Court cannot be asked to search the record and to analyze the evidence anew in order to supply the findings which the trial court failed to make:

"It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make."

Kelley v. Everglades Drainage District, 319 U.S. 415, 421-22 (1943).

Indeed, the primary reason for the requirement of findings of fact and conclusions of law, Rule 52, Fed. R. Civ. P., is to insure that trial judges carefully state the process by which they reach their ultimate conclusions. Cf. *United States v. Merz*, 376 U.S. 192, 199 (1964). Specific findings are also essential for meaningful appellate review. As a consequence, it is a well recognized require-

ment that findings of fact must be made in sufficient detail and exactness "to indicate the factual basis for the ultimate conclusion" reached by the trial court. *Kelley v. Everglades Drainage District*, *supra*, 319 U.S. at 422. See also, *Hatahley v. United States*, 351 U.S. 173, 182 (1956); 5A MOORE, FEDERAL PRACTICE ¶¶ 52.05[1], 52.06[1] (1977); 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 2579 (1971). This requirement is even more critical in a school desegregation case, where trial courts are admonished that their findings must be supported "by factual proof and justified by a reasoned statement of legal principles." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977).

Consequently, the judgments below cannot be affirmed on the assumption that the record might support findings of additional instances of discrimination which were not the subject of specific findings by the trial court.¹ If the specific findings of remote and isolated violations are insufficient to support the judgments below, the judgments should be reversed or vacated, and the case remanded for the required findings.

While Respondents urge an improperly broad view of the Court's ability to supplement the findings of the trial court, they urge an improperly narrow view of the Court's power to review the findings challenged by Petitioners, asserting that these findings are insulated from

¹This is especially true in this case, where the evidence which Respondents urge in support of their claim of additional constitutional violations was met by extensive rebuttal evidence in each instance. For example, the Respondents' claim that certain optional zones and discontinuous attendance areas, not discussed in the trial court's opinion, were also discriminatorily motivated, or had a discriminatory effect, is rebutted by extensive evidence. See Pet. Br. pp. 26-34. Although the trial court made no findings concerning the use of rental facilities, boundary changes, and transportation for overcrowding, Respondents allege that these practices were also discriminatory in intent and effect, although there was extensive evidence to the contrary. See Pet. Br. pp. 34-36.

meaningful review by the "clearly erroneous" rule, Rule 52, Fed.R.Civ.P., and the "two court" rule. See Resp. Br. p. 4 n. 3. In fact, however, neither rule limits this Court's review of the findings challenged by Petitioners.

In the first place, the "two court" rule does not apply to findings of fact which determine constitutional questions. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1940); 5A MOORE, FEDERAL PRACTICE, ¶ 52.12 (1977).

Furthermore, both the "two court" rule and the "clearly erroneous" rule apply only to findings of fact which are untainted by an erroneous view of the law. If a finding of fact is induced by or results from a misapprehension of controlling substantive principles, the "clearly erroneous" provision of Rule 52 does not limit this Court's review. Rather, the Court is essentially reviewing a question of law, and the scope of review is therefore plenary. *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 193 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). Likewise, a finding of fact resulting from a misapplication of controlling legal principles is not within the application of the "two court" rule. *Keyes v. School District No. 1*, 413 U.S. 189, 198 n. 9 (1973).

The opinions below are replete with examples of findings infected with legal error. For example, the finding that Columbus was a dual system in 1954, despite the existence of many schools with racially mixed student bodies, was premised upon an erroneous legal presumption arising from the existence of five predominantly black central city schools at that time. See Pet. Br. pp. 67-74. Legal error also infected the trial court's findings that isolated post-1954 actions were intentionally discriminatory due to the misapplication of legal principles governing proof of discriminatory intent. See Pet. Br. pp. 81-95. Finally, the lower courts' use of legal presumptions and shifting bur-

dens of proof to reach ultimate findings of systemwide liability, and the requirement of a systemwide remedy, is yet another example of findings induced by a misapprehension of controlling legal principles. See Pet. Br. pp. 52-79. The "two court" rule and the "clearly erroneous" rule therefore do not limit the scope of this Court's review of these findings.

II

In our main brief, we have argued against the use of presumptions and shifting burdens of proof as a substitute for the detailed factual inquiry required of district courts in school desegregation cases. We do not intend to reiterate that argument here. However, because of the arguments raised by Respondents and various amici concerning the operation of burden shifting principles in the context of the trial of a desegregation case, Petitioners are compelled to address the nature of the defendants' burden if it can be assumed that, through the application of a presumption or through the plaintiffs' proof of a prima facie case, the "burden of proof" shifts to the defendants.

Respondents argue that, under *Keyes v. School District No. 1*, 413 U.S. 189 (1973), when the plaintiffs' proofs in a desegregation case have reached a certain level, the trial court may find that a prima facie case of discrimination has been made out, or that a legal presumption of discriminatory intent and effect is justified. Whether plaintiffs' proofs are characterized as a prima facie case, or as triggering a presumption, Respondents argue that once plaintiffs show intentionally segregative action in a substantial portion of the school system, the burden shifts to the defendants to prove (1) that the existence of other segregation within the district is "not adventitious", i.e., that it is not the result of other discriminatory acts, and (2) that their intentionally segregative acts have not created a dual school system. Resp. Br. pp. 119-120. See also, *Keyes, supra*, 413 U.S. 189, 201, 208 (1973).

Petitioners have already discussed the application of the *Keyes* presumptions to this case, and have demonstrated that the plaintiffs' proofs never rose to the level justifying a shift in the burden of proof to the defendants. Assuming that they did, however, what was the nature of the defendants' burden?

The concept of "burden of proof" in a lawsuit really encompasses two distinct burdens: (1) the burden of production of evidence on a fact in issue (burden of going forward), and (2) the burden of persuading the trier of fact that the alleged fact is true (risk of nonpersuasion). 9 J. WIGMORE, EVIDENCE §§ 2485, 2487 (3d ed. 1940).

The burden of going forward is associated with the risk that a dismissal or directed verdict may result if the party on whom the burden falls fails to sustain it. *Id.*, § 2487. On the other hand, the risk of nonpersuasion is the risk that, even though the plaintiff has produced evidence sufficient to meet his burden of initial production, the trier of fact may not be persuaded that the plaintiff is entitled to a relief by a preponderance of the evidence. *Id.*, § 2485.

The risk of nonpersuasion remains with the party who has the burden of pleading (generally, the plaintiff) and does not shift during or after the trial. *Id.* § 2489 p. 285. On the other hand, the burden of production (burden of going forward), may shift from one party to another during the course of trial.

This shift in the burden of going forward may occur in two situations. The first is where the plaintiff has adduced evidence from which reasonable men could not help but draw the inference of the fact to be proved. This level of proof is usually characterized as a *prima facie* case, and the plaintiff may be entitled to a directed verdict unless the defendant comes forward with some evidence in rebuttal. *Id.* § 2494 p. 299.

Presumptions are legal fictions which accomplish a similar shift in the burden of going forward. In logical

terms, if proof of fact A is introduced and a presumption exists to the effect that fact B may be inferred from fact A, the party denying the existence of fact B must come forward with some evidence or risk a verdict being directed against him.

As is the case where the plaintiff makes out a *prima facie* case, a presumption has the effect of shifting the burden of production to the defendant. It does *not* shift the burden of persuasion:

"... a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.*"

Rule 301, FED. R. EVID. (emphasis added). *See also*, WIGMORE, *supra*, §§ 2489, 2491.

Once there has been a shift in the burden of production, the defendant must come forward with evidence to rebut the presumption. Under the prevailing view, once the defendant has satisfied this burden of production, the presumption is spent. The plaintiff must then carry his burden of persuasion if he is to prevail on his claim. WIGMORE, *supra*, § 2487 pp. 280-81, § 2491 pp. 289-90.

These evidentiary principles apply with equal force in school desegregation cases. In such a case, the plaintiff has the burden of pleading and proving (1) actions by school officials with a segregative purpose (intent), and (2) that these actions resulted in a currently segregated condition (causation or effect). *Keyes, supra*, 413 U.S. at 198.

Although the plaintiff bears both the burden of production of evidence and the risk of nonpersuasion on these issues, *Keyes* also speaks of shifting the "burden of proof" to the defendants on both intent and effect, once the

plaintiffs prove intentional segregation in a substantial portion of the school system.² However, the lower courts in this case mistakenly viewed *Keyes* as authorizing a shift in both the burden of production *and* the risk of non-persuasion to the defendants. As a consequence, despite substantial evidence rebutting the plaintiffs' allegations of intentional discrimination and systemwide effect, the lower courts found that the defendants had failed in shouldering their "burden of proof". See, e.g., *Penick v. Columbus Board of Education*, 429 F. Supp. 229, 260 [Pet. App. 60-61]; *Penick v. Columbus Board of Education*, 583 F.2d 787, 798-99. [Pet. App. 160.] See also, *Brinkman v. Gilligan*, 583 F.2d 243, 251, 253-54, 258 (6th Cir. 1978). [Pet. App. 233, 237, 239, 246.]

Assuming that the use of presumptions and shifting burdens of proof was appropriate in the first instance,³ both courts erred in shifting the risk of nonpersuasion to the defendants. Under Rule 301, and generally applicable evidentiary principles, only the burden of production should have been shifted.

By thus equating a prima facie case or presumption with conclusive proof of a constitutional violation, both courts below committed the same error as was criticized by this Court in two recent employment discrimination

²Whether this shift in the burden of proof results from the proof of a prima facie case, or from the application of a legal presumption, appears to be immaterial. *Keyes* spoke of both concepts, and treated them as interchangeable. 413 U.S. at 208.

³As demonstrated in our main brief, this Court's insistence in *Dayton* upon factual proof of intent and effect implicitly rejected the avoidance of the "complex factual determination" through presumptions and shifting burdens of proof. Furthermore, assuming that shifting the burden of proof may be appropriate in some circumstances, Respondents in this case never made the threshold showing of intentional discrimination in a substantial portion of the school district at the time of trial, as required by *Keyes*.

cases. *Furnco Construction Co. v. Waters*, ____ U.S. ____, 57 L.Ed.2d 957 (1978); *Board of Trustees of Keene State College v. Sweeney*, ____ U.S. ____, 58 L.Ed.2d 216 (1978).

In *Furnco*, the Court was concerned with the operation of burden shifting principles when a plaintiff makes out a prima facie case of a discriminatory refusal to hire in violation of Title VII of the Civil Rights Act of 1964. The Court noted that proof of a prima facie case merely raises a strong inference of discrimination:

"A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based upon consideration of impermissible factors. [Citation omitted.] And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with *some* reasons, based his decision on an impermissible consideration such as race."

Furnco, ____ U.S. at ____, 57 L.Ed.2d at 967.

Nonetheless, proof of a prima facie case merely shifts the burden of production to the defendant, who can rebut it by introducing evidence of a legitimate, nondiscriminatory reason for his actions:

". . . it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race . . . To dispel the adverse inference from a prima facie showing . . ., the employer need only articulate some legiti-

mate nondiscriminatory reason for the employee's rejection' [citation omitted]."

Id., ____ U.S. at ____, 57 L.Ed.2d at 967-68.

Although the defendant offered evidence of legitimate motive, the court of appeals nonetheless found that the defendant had failed in its burden of proof, "apparently equating a prima facie showing with a discriminatory refusal to hire." *Furnco*, ____ U.S. at ____, 57 L.Ed.2d at 967. This misapplication of burden shifting principles compelled reversal of the court of appeals' judgment.

In *Keene State College*, *supra*, the Court found that the court of appeals in that employment discrimination case had erred in requiring the defendant to "prove" the absence of a discriminatory motive in failing to hire the plaintiff:

"While words such as 'articulate,' 'show,' and 'prove,' may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive' . . . [In *Furnco*] we made it clear that the former will suffice to meet the employee's prima facie case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded for further reconsideration in light of *Furnco*."

Keene State College, ____ U.S. at ____, 58 L.Ed.2d at 218-219.

The same misapplication of burden shifting principles has occurred in this case. Although the defendants "articulated legitimate nondiscriminatory reasons" for the actions challenged by plaintiffs, both courts required defendants to conclusively prove the absence of discriminatory mo-

tive.⁴ Similarly, although defendants offered evidence tending to show the absence of a systemwide effect from the isolated instances of discrimination found, both courts insisted that defendants conclusively prove the absence of systemwide effect.

This Court should therefore reject Respondents' argument that the judgments below should be affirmed because Petitioners failed in their burden of proof. Rather, the judgments should be reversed, and the lower courts instructed to insist upon proof, not presumption, in the trial of a school desegregation case.

III

As a final matter, Petitioners must take issue with the Respondents' attempt to bolster their arguments concerning the asserted reciprocal effect between racial composition of schools and racial composition of neighborhoods with a position paper signed by a number of "social

⁴A compelling example of this error can be found in the opinion of the court of appeals. When plaintiffs urged that defendants' school construction policies were intentionally discriminatory, the defendants demonstrated that schools were constructed in conformity with recommendations contained in a series of building studies performed by The Ohio State University. [Px 59, 60, 61, 62, 63, 64.] Race was not a factor in these studies [A. 577, 598-99], a fact conceded by plaintiffs' expert witness Dr. Foster. [A. 541.] The district court found that these studies were "comprehensive, scientific and objective", and that the Columbus Board constructed new facilities and additions to existing facilities "in substantial conformity" with the recommendations contained in the building studies. 429 F.Supp at 237-38. [Pet. App. 13-14.] Despite this extensive evidence of legitimate, nondiscriminatory reasons supporting the Board's school construction practices, the Court of Appeals found that the "gross statistics" concerning the racial composition of new schools, "requires a very strong inference of intentional segregation", and that on the sole basis of the 1975-76 pupil enrollment statistics, "we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation." 583 F.2d. at 800, 804. [Pet. App. 165, 173.]

scientists," attached as an appendix to Respondents' Brief.

At the outset, Petitioners must disagree with the assertion that the views expressed in the position paper are impartial, or that they are supported by "broad scholarly agreement." But this is really beside the point. The opinion testimony contained in the position paper is not a part of the record in this case, and therefore cannot be considered as evidence supporting the judgments below. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 (1970). Nor can the opinions expressed in the paper be characterized as matters of general knowledge subject to judicial notice. *Muller v. Oregon*, 208 U.S. 412, 419-21 and n. (1908). See also, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 717 (5th ed. 1978).

An even more fundamental objection concerns the appropriate weight to be accorded to social science opinion even where it has been properly received into evidence. Although social science opinion can often serve to illuminate questions presented to a court for adjudication, courts must hesitate to accept theories advanced by social scientists as being "truths" of sufficient reliability to be incorporated into rules of law.⁵ This is especially true where, as in the case here, the theory in question is fiercely debated among social scientists, and where the positions taken in that debate are often imbued with the particular political or social biases of the participants.⁶

⁵D. Moynihan, *Social Science and the Courts*, 54 THE PUBLIC INTEREST 12 (1979).

⁶The debate among social scientists concerning the existence of a reciprocal effect between the racial compositions of schools and neighborhoods is outlined in Wolf, *Northern School Desegregation and Residential Choice*, 1977 SUP. CT. REV. 63 (1977).

The purported impartiality of the Respondent's position paper can also be properly questioned on grounds of bias. Among the subscribers of the paper are individuals who have testified on behalf of plaintiffs in other school desegregation cases. Both Dr. Robert L. Green and Dr. Karl Taueber testified on behalf of the plaintiffs in this case. See also, Moynihan, n. 6 *supra* at 19.

Consequently, Petitioners urge the Court to decline the Respondents' invitation to stray beyond the record and governing legal principles by deciding this case upon inconclusive and partisan social science theory.

IV CONCLUSION

Petitioners respectfully request that the Court grant the relief requested at the conclusion of their main brief.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE**

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**MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE**

The undersigned, as counsel for the Neighborhood School Coordinating Committee ("NSCC") and the National Association for Neighborhood Schools ("NANS"), respectfully moves this Court for leave to file the accompanying brief, amici curiae, in support of petitioners, the Columbus Board of Education, et al., claim that, the decision of the lower courts, herein challenged, are in error and should be reversed.

Amici has been denied permission to file the accompanying brief by the respondents Gary L. Penick, et al.

As organizations dedicated to the proposition that critical community and individual interests not be ignored by courts framing equitable desegregation decrees, the

NSCC and NANS represent those innocent parties whose interest is to secure the best possible equal educational opportunity through the re-constitution of a more viable balance among the competing and disparate interests extant in school desegregation cases.

Through the pending class action entitled: *Reeves, et al. v. The Penick Class Representatives et al.*, Civil Action No. C-2-78-672 (S.D. Ohio, filed September 22, 1978), members of the NSCC and NANS have collaterally attacked both the liability and remedy orders of the *Penick* court.¹

Reeves claims that the *Penick* class representatives, its counsel (as designated by the N.A.A.C.P.), and the *Penick* court failed to fairly and adequately represent and protect the interests of the absentee-members of the *Penick* class by ignoring the disparate and antagonistic interests extant among the class, both during the liability and remedy phases of the proceedings. The *Reeves* case highlights the fact that the respondent *Penick* class representatives do not and, indeed, cannot represent before this Court the totality of the interests once purported to be represented by them, viz., all Black and White parents of minor chil-

¹ In addition to the *Penick* class representatives, the Complaint names the Columbus Board of Education, its individual members and the National Association for the Advancement of Colored People ("The N.A.A.C.P.") as additional defendants. The class consists of all Black and White parents of minor children thereof attending schools in the public school system of Columbus, Ohio, whose interests, being different and antagonistic to those before the *Penick* court, were not fairly or adequately represented by the *Penick* class representatives and their lead counsel, as designated by the N.A.A.C.P., during the liability and remedy phases of the *Penick* proceedings. A motion to dismiss and/or consolidate has been filed by the *Penick* class representatives and the N.A.A.C.P. A Motion to Certify the Class has been filed by the plaintiff class representatives. As of the date of this filing, the motions are pending for decision.

dren thereof attending schools in the public school system of the State of Ohio and in the City of Columbus.

Likewise, neither the interests of the Columbus Board of Education, nor the interests of the Ohio State Board of Education and the Superintendent of Public Instruction (respondents herein) are representative of the interests of the *Reeves* class, the NSCC and NANS. This is so for one immutable reason: no party presently before this Court can aggressively present the highly relevant legitimate and recognizable community and personal interests at stake in the formulation of equitable remedial relief in this school desegregation case. See *Keyes v. School District No. 1*, 413 U.S. 189, 240-250 (1973). (Powell, J., concurring in part and dissenting in part).

The NSCC and NANS respectfully request that they be given the opportunity to present the following issues through their amici curiae brief which accompanies this motion:

1. Whether the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceeds the jurisdiction of a federal court where the court has failed to determine whether such remedy creates a totally reflective and realistic equilibrium between the remedial interests of discriminatees, and the legitimate expectations of parents and students thereof, to be free from the disruption and dislocation of constituent elements of a community, which occurs as a result of, *inter alios*, extensive student transportation decrees which intrude upon fundamental constitutional rights of liberty and privacy.

2. Whether a federal court may presume, on the basis of those considerations set forth in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), that,

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was violated as a result of a finding that local school authorities intentionally maintained and created a racially imbalanced school system, in the absence of any attempt to quantify the harm which may have resulted as a direct result thereof, and, specifically, with respect to whether the quality of the educational opportunity afforded a child assigned to a racially imbalanced school was inferior to that afforded other children in the community, and whether the students who were required to attend the racially imbalanced school were deprived of more important social contacts than the children in other schools.

The NSCC and NANS believe the views they seek to present to this Court will contribute to a proper resolution of the critical issues before this Court, and will be for the benefit of those parties for whom they seek to represent.

WHEREFORE, the NSCC and NANS respectfully request this Court to permit them to file the brief, amici curiae, which is submitted herewith.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that three copies of this motion for leave to file brief amici curiae have been served upon all counsel of record in this case, pursuant to Rule 33, Rules of the Supreme Court of the United States on this *21* day of February, 1979.

Ira Owen Kane

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-610

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vs.

GARY L. PENICK, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE NEIGHBORHOOD SCHOOL
COORDINATING COMMITTEE AND THE
NATIONAL ASSOCIATION FOR NEIGHBORHOOD
SCHOOLS, AMICI CURIAE, IN
SUPPORT OF PETITIONERS

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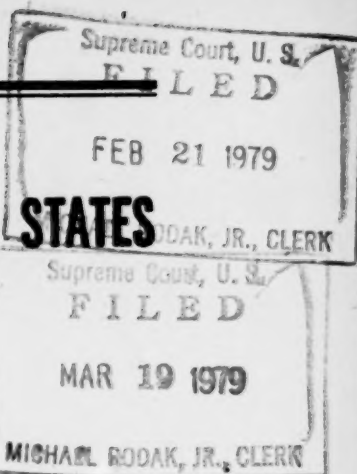


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SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

This brief is submitted pursuant to a motion filed with this Court on behalf of the Amici, the Neighborhood School Coordinating Committee ("NSCC") and the National Association for Neighborhood Schools ("NANS"), the respondents Gary L. Penick, et al., having declined to consent to its filing.

The NSCC is a local community organization located in Columbus, Ohio. Its membership approximates one thousand parents whose school children attend the Columbus public school system. The NSCC is dedicated to the realization of equal educational opportunity for all and equal protection for all citizens of the United States. In particular, the NSCC is concerned that equal educational opportunity be afforded to all citizens through a process which balances the interests of discriminatees against the legitimate expectations and aspirations of innocent third parties subject to school desegregation decrees.

The NANS is a nationally prominent organization founded in August of 1976. Its membership approximates four hundred thousand individuals associated with locally based affiliated organizations. Its stated purpose is to educate the public with respect to the benefits to be served through heightened recognition of the neighborhood school concept.

QUESTIONS ADDRESSED

1. Whether a federal court may presume, on the basis of those considerations set forth in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was violated as a result of a finding that local school authorities intentionally maintained and created a racially imbalanced school system, in the absence of any attempt to quantify the harm which may have resulted as a direct result thereof, and, specifically, with respect to whether the quality of the educational opportunity afforded a child assigned to a racially imbalanced school was inferior to that afforded other children in the community and whether the students who were required to attend the racially imbalanced

school were deprived of more important social contacts than the children in other schools.

2. Whether the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceeds the jurisdiction of a federal court where the court has failed to determine whether such remedy creates a totally reflective and realistic equilibrium between the remedial interests of discriminatees and the legitimate expectations of parents and students thereof, to be free from the disruption and dislocation of constituent elements of a community, which occurs as a result of, *inter alios*, extensive student transportation decrees which intrude upon fundamental constitutional rights of liberty and privacy.

ARGUMENT

I. THE DECISIONS BELOW FAILED TO DETERMINE WHETHER, ON THE BASIS OF POST-1954 CONSIDERATIONS, THE CHALLENGED PRACTICE WAS HARMFUL AND WHETHER IT WAS SUFFICIENTLY HARMFUL TO JUSTIFY THE DRASTIC REMEDY IMPOSED TO ELIMINATE THE HARM.

All remedial school desegregation decrees have sought to implement the Equal Protection Clause through a process of vindication, *viz.*, to vindicate the found constitutional violation at any cost. In school desegregation cases, where the full mélange of racial, social-community and educational interests are at stake, courts must not only care-

fully scrutinize whether the practice being challenged is harmful but also whether it is sufficiently harmful to justify the costs of eliminating it.

In *Brown v. Board of Education of Topeka Kansas*, 347 U.S. 483 (1954), this Court held that student assignments based upon race were unconstitutional and ordered that this practice be eliminated. In so holding, this Court relied heavily upon the evidence tendered by social scientists, *id.* at 494 n. 11, in order to quantify the harm that resulted from racially based student assignment policies that had as their declared purpose the separation of the races. As this court stated:

"To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

Since the conclusion of the social scientists was that forced segregation was psychologically detrimental, *id.* at 495 n. 11, the obvious remedial action was to abolish separate schools for Black and White children by requiring the creation of a school system that was racially balanced. It is from this holding that the alleged benefits of desegregation, or, integration of the races arose, and from which the highly controversial school desegregation decrees have issued.

This Court has recognized that a member of a minority group that has been discriminated against does not automatically qualify as a "victim of discrimination" simply by virtue of his race. Rather, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 363-364 (1977), this Court emphasized that each individual requesting relief must prove that he or she has *actually* suffered dis-

crimination. See also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977).

Relying on the holding of *Brown, supra*, lower federal courts, after having determined that local school officials undertook to intentionally create and maintain a dual school system based on race, have concluded, *ipso facto*, that such actions constitute sufficient harm to the discriminatees so as to justify the imposition of judicially imposed sanctions. Absent from this process of presumptive analysis is the albeit difficult but necessary task of subjecting to strict judicial scrutiny the issue of whether the conduct complained of was in fact harmful. For it is only after such an analysis has been undertaken that a court can realistically determine the manner, method and means by which to eradicate the harm.

Upon examination of what desegregation is designed to achieve, one can quantify the harm which must be found in order to predicate a remedial order which creates a totally reflective and realistic equilibrium between the interests of discriminatees and the legitimate expectations of innocent third parties.

Social scientists in the 1950's opined that desegregation would provide Black children with:

"[A] greater sense of personal dignity; a rise in personal ambition; a greater confidence and respect for their own sub-group . . . Negro youths are likely to attain higher standards of academic proficiency and exert their capacities more fully after desegregation, because of increased morale, decreased self-hatred, and a fuller sense of sharing the American Dream". St. John, *SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN* 43 (1975).

Social scientists also believed that desegregation would in-

crease the educational achievement of Black children merely because White schools had greater educational resources. Lines, *Race and Learning: A Perspective on Research*, 11 INEQUALITY IN EDUC. 26 (1972). Still another basis for integrating schools was the "contact theory", which premised that greater contact between the races would result in greater considerations of mutual understandings and tolerance of cultural differences. Armor, *The Evidence on Busing*, IN THE GREAT SCHOOL BUS CONTROVERSY 84-85 (N. Mills ed. 1973).

Segregation, therefore, was deemed harmful because it stigmatized Blacks, deprived Blacks of valuable contacts with the so-called dominant group, thereby perpetuating their subordinate position, and because segregation had the inevitable effect of reducing the financial and educational resources available to all Black students because their schools were attended only by members of the least dominant group.

Since *Brown I*, *supra*, a plethora of studies have surfaced which have measured the remedial effects of school desegregation decrees. One survey reached four disparate conclusions: (1) racial integration results in an increase in the school performance of minority youth; (2) racial integration has a mixed effect on minority students; (3) racial integration has no effect on the academic achievement of minority students; and (4) racial integration has negative effects on the scholastic achievement of minority students. Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROB. 241, 243 (1975). Still other surveys of similar studies on desegregation and academic achievement state that, over half of the studies conducted have found that no significant difference in edu-

cational achievement between segregated and desegregated Black children exists.¹ St. John, *supra*, at 39. See, Kiesling, *The Value to Society of Integrated Education and Compensatory Education*, 61 GEO. L. J. 857 (1973).

Likewise, Professor Owen M. Fiss, in his article entitled: *The Jurisprudence Of Busing*, 39 LAW & CONTEMP. PROB. 195, 201-204 (1975), has observed that: (1) there is no longer a consensus in the relevant academic professions as to the harmfulness of segregation. This is due in part to the growing disbelief in the validity of the proposition that social betterment derives from governmental intervention; (2) one wonders whether segregation is *that* harmful or harmful at all where the remedies imposed consume fiscal resources of the community, expose children to safety hazards, reduces the time available for classes, and loses whatever psychological or emotional advantages which might arise from having all the children in a neighborhood attend the school identified with that neighborhood; and (3) there is no longer a consensus in the Black community that segregation is harmful. Some Blacks have raised their voices against integration because of its conflict with the ideal of self-determination. Others are concerned with having to suffer the burdens of busing. Still others are offended by the racist implication that Blacks will learn better when they are in a setting dominated by Whites. And others are concerned with the use of financial resources for busing when such resources can be used for more traditional academic purposes.

¹ See also, the 1972 statement made by Roy Innis, then Director of the Congress of Racial Equality, that school integration is a "bankrupt, suicidal method . . . based on the false notion that Black children are unable to learn unless they are in the same setting as White children." N.Y. TIMES, Mar. 13, 1972, at 30, Col. 4.

Professor James S. Coleman who, pursuant to Section 402 of the Civil Rights Act of 1964, 42 U.S.C. § 2000-1 (1970), was requested to determine the extent that equal educational opportunity was not available to various racial groups in the United States' public educational institutions, first determined that integration would bring about achievement benefits not available in a segregative setting; however, in a later report prepared by Mr. Coleman entitled: SCHOOL DESEGREGATION AND CITY-SUBURBAN RELATIONS (1978), Mr. Coleman rejected the foregoing conclusion.

First, Mr. Coleman rejects the proposition that the elimination of *de jure* school segregation would, *pari passu*, eliminate racial segregation in the schools. This is supported by studies demonstrating the white exodus to the suburbs which has produced a situation where most large urban school systems are majority black, while the surrounding suburban areas are predominately white. See also ARMOR, WHITE FLIGHT, DEMOGRAPHIC TRANSITION, AND THE FUTURE OF SCHOOL DESEGREGATION, as presented at the meeting of the American Sociological Association, San Francisco, September, 1978.

Second, Mr. Coleman rejects the assumption that integration would automatically improve the achievement of lower class Black children. Citing the Pasadena and Riverside, California desegregation experiences, Mr. Coleman points out that the studies show either no achievement effects, or else losses. See also Stephen, Walter G., *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, PSYCH. BULL (1978), Vol. 85, No. 2, 217-288.

Finally, Mr. Coleman concludes:

"A review of the large number of analyses of effects of desegregation on achievement has recently been

carried out, showing no overall gains. In some cases, there seem to be slight gains, in others no effects, in still others losses in achievement. Some of the most carefully studied cases, over a period of years following desegregation, such as in Pasadena and Riverside, California, show either no achievement effects, or else losses. Thus, what once appeared to be fact is now known to be fiction. It is not the case that school desegregation, as it has been carried out in American schools generally brings achievement to disadvantaged children. It is probably true that desegregation under optimal conditions will increase achievement of disadvantaged children. But that is not the point: very likely any school changes, under optimal conditions, will have this effect. What we must look for is the effect that occurs under the variety of actual conditions in which desegregation is carried out.

The implication of this recognition of the actual effects of desegregation on achievement is that no longer should we look solely, or even primarily, to racial balance in the schools as a solution to inequality of educational opportunity. That inequality of opportunity is not something to be easily overcome. If we are looking for policies to help bring about equality of educational opportunity, it is necessary to look more broadly."

The Amici do not suggest for one moment that this Court's decision in *Brown I*, *supra*, was in error, or, that the pernicious holdings of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), should be reinstated. Rather, Amici submit that, the foregoing studies and surveys mandate that a court's analysis should not cease after it has determined that the actions of local school authorities were motivated by some degree of discriminatory *animus*. Courts should and must be required to take the next step of subjecting to strict

judicial scrutiny the effects that such conduct had on those claiming to have been harmed by same. It is only after this critical analytical step has been taken, may a court determine the true nature of the remedy to be developed.

In this case, the district court held that "Each black school child in Columbus must have the opportunity for the integrated education and attendant educational advantages contemplated by *Brown I*, *supra*, and the cases which have followed." *Penick v. The Columbus Board of Education*, 429 F. Supp. 229, 267 (S.D. Ohio, 1977). Yet, the district court failed to determine whether the conduct of the local authorities was intentionally motivated for the purpose of stigmatizing Black children — and whether, in point of fact, Black children were stigmatized as a result of the alleged conduct; whether such conduct had the effect of depriving Black children of contacts with White children, so as to cause them to suffer psychological or emotional harm; and whether the Black children suffered disparity of educational opportunity in that local school authorities intentionally sought to make both financial and educational resources available to White children on more favorable, or, disproportionate terms. This Court, however, has never excused private parties from the requirement of establishing injuries to their own legally cognizable rights. *See, e.g., Warth v. Selden*, 422 U.S. 490, 495 (1975).

Notwithstanding the failure of the district court to quantify the harm which flowed from the found intentional acts of the local school authorities, the district court proceeded to impose a drastic remedy — the stated purpose being to ". . . enhance the quality of education in Columbus — that will not only encumber petitioners' educational and administrative responsibilities but will intrude upon the duly recognized liberty and privacy interests of both Black and

White children. For, as here, the desegregation remedy ordered by the district court requires that: *every* school in the system be racially balanced to within $\pm 15\%$ of the system's overall racial composition; the implementation thereof will involve the dislocation of over 42,000 children from their neighborhood schools; extensive cross-town transportation be implemented for 37,000 students on 213 buses (to be accomplished, six different school starting times must be scheduled so that each bus can make an average of six trips each day); and that the grade structures of nearly every elementary school be altered.

Amici submit that the imposition of such a drastic remedy, in the absence of any determination of the nature and extent of the harm suffered, or, as to whether such a remedy will, in fact, enhance educational opportunities, *ibid*, and integrated experiences, creates the anomalous situation where the imposition of a remedy — which should be designed to achieve a truly reflective and realistic vindication of the harm — is based not upon quantifiable standards, *supra*, but, rather, upon judicial guesswork. In an area as sensitive as this, Amici submit that such an approach is ill-conceived and unwarranted.

While this Court's opinion in *Dayton Board of Education*, *supra*, requires a district court to "determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted . . ." *id* at 402, it implicitly sanctions lower federal courts to assume that the harm specified in *Brown I*, *supra*, as resulting from assignments of students on the basis of race, is the identical harm which results from post-1954 conduct of local school officials in which student attendance is segregated, not because students have been specifically assigned to schools on the basis of race but on the basis of geographic proximity. Without re-

quiring the lower federal courts to specifically determine whether the latter produces any harm, or, no harm at all, the remedial action to be taken will never be truly reflective of the harm.

If the enhancement of equality of educational opportunity is the avowed purpose of school desegregation cases, and equality of educational opportunity can be abstracted from the Equal Protection Clause, as we believe it can, it is imperative, then, that the lower federal courts be required to reject the use of analytical presumptions, based upon pre-1954 considerations, as the sole predicate for concluding that a constitutional violation has occurred. Rather, a return to the basic and direct fact-finding process is critically necessary in order to confront, head on, the issue of whether the conduct of local school authorities was in fact harmful. Once having quantified the harm, the lower federal courts can then go about the business of realistically determining whether the remedial action to be taken not only fits the harm, but whether it will truly eradicate it.

II. THE LOWER FEDERAL COURTS, IN APPROVING THE DESEGREGATION PLAN AT ISSUE, FAILED TO DETERMINE WHETHER SUCH A PLAN CREATED A TOTALLY REFLECTIVE EQUILIBRIUM BETWEEN THE REMEDIAL INTERESTS OF DISCRIMINATEES AND THE LEGITIMATE EXPECTATIONS OF PARENTS AND STUDENTS THEREOF.

In cases where this Court has been presented with instances of actional past race discrimination, the Court has addressed the difficult issues that arise in the fashioning of proper remedies. In such cases the Court has consistently held that every effort should be made to put identifiable victims of discrimination in the position they would have been in but for the discrimination. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772-773 (1976). This Court has also required that the scope of the remedy must be tailored to fit the nature and extent of the violation proved. When the disparity between the violation found and the relief granted becomes too great, the remedy must be rejected, as it was in *Dayton*, 433 U.S. 419. Furthermore, in considering what constitutes proper and realistic relief, there is an affirmative obligation to determine whether the legitimate expectations of innocent third parties would be imperiled by a proposed remedy. If so, there must be undertaken the delicate task of balancing the interests at stake.

Amici submit that the lower courts in the case at bar have ignored these fundamental principles. In approving the desegregation plan at issue, the lower federal courts failed to create a totally reflective and realistic equilibrium between the remedial interests of discriminatees and the

legitimate expectations of parents and students thereof to be free from the disruption and dislocation of constituent elements of a community, which occurs as a result of extensive student transportation decrees which, as here, intrude upon fundamental rights of liberty and privacy. See *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Regents of the University of California v. Bakke*, 98 S.Ct. 2732, 2787 N. 41 (1978).

The crucial starting point for consideration of whether a court induced desegregation plan can realistically achieve its stated purpose, is the ability of the lower federal courts to gauge the response of those to be directly affected by it. For such a plan's effectiveness is totally dependent upon the willingness of those affected by it to adhere to same.

It is beyond cavil that, judicially induced desegregation plans not only intrude upon the "local autonomy" of school districts, *Dayton*, 433 U.S. 410, but encroach upon important "community aspirations and personal rights." *Keyes*, 413 U.S. 243. The consumption of sparse financial resources for the purpose of implementing the plan, and the extraction of students from their neighborhood schools, has and will continue to cause rejection of school operating levies, White-flight, racial tensions, and a breakdown in a community's support for its educational institutions.

There are some who will argue that those who reject court-induced desegregation plans harbor latent forms of prejudice and bigotry. Those same individuals will argue that integration should occur at any cost. Amici reject such generalized propositions. A school desegregation plan affects the entire community, both Black and White children alike; accordingly, it is imperative that a district court, before adopting any plan, be required to determine not only whether the plan is tailored to the harm but whether

the plan can realistically achieve its stated goals without intruding upon the rights and expectations of those who will be directly affected by it.

In *Keyes*, 413 U.S. 251, Justice Powell stated:

"We have strayed, quite far as I view it, from the rationale of *Brown I* and *II*, as reiterated in *Swann*, that courts in fashioning remedies must be 'guided by equitable principles which include the adjusting and reconciling [of] public and private needs, *Brown II*, 349 U.S. at 300, 99 L. Ed. 2d. 1083'.

I urge a return to this rationale. This would result, as emphasized above, in no prohibition on court-ordered student transportation in furtherance of desegregation. But it would require that the legitimate community interests in neighborhood school systems be accorded far greater respect."

Amici submit that while it is important that a remedy be tailored to fit the harm, *Dayton*, 433 U.S. at 420, it is equally important that the remedy be subjected to strict judicial scrutiny with respect to whether it will prejudice those innocent parties who did not participate in any constitutional violation and whether it is, in fact, the most efficacious remedy for eradicating the harm.

District courts should require the parties to present evidence relating to the psychological and social ramifications of any plan submitted to it. Clearly, if such evidence is deemed relevant in relation to the issue of whether segregation is harmful, it should be equally relevant to the issue of whether the plan as proposed will impose unwarranted harm on those subject to its edict. Moreover, studies and surveys such as those referred to herein should be considered in order to determine the efficacy of alternative methods of remedial action; viz, freedom-

of-choice plans; inter-district voluntary transfers; vouchers for education; incentives for attendance at integrated schools; and the concept of voluntary regional integrated schools. See, e.g., Calkins & Gorwar, *The Right to Choose an Integrated Education: Voluntary Regional Integrated Schools — A Partial Remedy for DeFacto Segregation*, 9 HARV. C.R. — C.L.L. REV. 171 (1974).

In the case at bar, the district court imposed a remedial order which will, in the words of Justice Rehnquist, impose "... severe burdens . . . on the Columbus School system and the Columbus community in general . . ." *Columbus Board of Education, et al. v. Penick, et al.*, — U.S. —, 58 L. Ed. 2d 55, 59. Amici agree with Justice Rehnquist's assessment. The proposed reassignment of 42,000 students, 37,000 of which will be transported by bus away from their neighborhood schools, has already caused a rejection of three (3) non-school renewal levies (November 1976, November 1977, and June 1978), White-flight, and a significant decrease in student enrollment. Some middle ground must be found which will counter these adverse consequences and, at the same time, achieve the vindication of the constitutional violations so found. To "let the buses roll," and to create community and parental uncertainty through the breakdown of community aspirations, without any consideration of the effects, is error.

One alternative is to abandon court ordered desegregation plans and let school desegregation occur naturally through community changes in residential housing patterns and practices. In view of the absence of findings which demonstrate definitive and meaningful educational and social benefits from court ordered desegregation plans (Armor, *supra*, and St. John, *supra*) this alternative, if properly structured by local school authorities acting under specific judicial reference guidelines, may hold some validity.

A second alternative is that of an inter-district freedom-of-choice plan. Under this procedure, as suggested by Professor Coleman, families can make their choice of schools independently of their choice of residence, with reasonable transportation expenses provided. State funds would necessarily follow the child so as not to increase the financial burden upon the receiving district.

A third alternative offered by Professor Coleman is the "Vouchers for Education" plan:

"Perhaps the simplest, cleanest, and most straightforward way to provide equal educational opportunity, independent of race, residence, or wealth, is to give every child a voucher or entitlement, to be used in any accredited school, public or private. Such a plan, which has recently been proposed in Michigan as well as in other states, does not immediately exhibit its potential for encouragement of school integration. But that potential can be quickly realized if the vouchers are worth more in integrated schools. This means that integrated schools would have somewhat higher expenditures, a somewhat richer program, than non-integrated schools . . . No one is excluded, by reason of race or any other attribute — except his preference for a segregated school. If he chooses such a school, he pays in the form of a somewhat less rich educational program." Coleman, *supra*, at 14.

The foregoing are not all inclusive; many variations on the theme can and should be developed in order to meet Justice Powell's admonition that courts should return to the rationale that the "... fashioning [of] remedies . . . be guided by equitable principles which include the adjusting and reconciling [of] public and private needs." *Keyes*, 413 U.S. 189, 251.

Amici submit that the desegregation plan, as ordered by the district court, failed to heed Justice Powell's admoni-

tion. For the Plan as ordered fails to create a totally reflective and realistic equilibrium between the legitimate expectations of the discriminatees and the rights of innocent parties who played no role in the violations so found. The plan, as ordered, should be rejected as having been the product of excessive judicial action.

In conclusion, Amici submit that specific remedial guidelines are necessary in order to provide lower federal courts with a proper frame of reference from which they may determine not only whether a desegregation plan is tailored to the violation, but whether the plan is realistic and effective. For example, historical educational constructs (e.g., the neighborhood school concept) should be isolated and subjected to careful scrutiny with respect to whether their continued viability can be sustained. If they cannot, school authorities should be charged with the responsibility of developing a plan which either utilizes these constructs in a constitutionally permissible manner, or, which gradually replaces the same with realistic educational substitutes, designed to meet the educational aspirations and needs of the community. Moreover, surveys and studies of the local community should be prepared for the purpose of determining whether sufficient financial resources will be available to enhance the quality of equal educational opportunity and in order to determine the make-up of the school system when a plan is implemented. If it is determined that sufficient financial resources may not be available, courts must be required to determine whether the inability to provide enhanced educational opportunity is outweighed by the need for an immediate eradication of the harm so found.

If reasonable minds prevail, none of the foregoing suggestions should be the subject of vigorous opposition.

CONCLUSION

For those reasons advanced herein, Amici respectfully urge that the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that three copies of this brief amici curiae have been served upon all counsel of record in this case, pursuant to Rule 33, Rules of the Supreme Court of the United States, on this 27 day of February, 1979.

... Ira Owen Kane

IRA OWEN KANE

MOTION FILED
FEB 22 1979

IN THE
Supreme Court of the United States

October Term, 1978.

No. 78-610.

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

v.

GARY L. PENICK, et al.,
Respondents.

No. 78-627.

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

v.

MARK BRINKMAN, et al.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI
CURIAE ON BEHALF OF THE DELAWARE
STATE BOARD OF EDUCATION, ALEXIS I.
DuPONT SCHOOL DISTRICT, CLAYMONT
SCHOOL DISTRICT, CONRAD SCHOOL DIS-
TRICT, MARSHALLTON-McKEAN SCHOOL DIS-
TRICT, NEWARK SCHOOL DISTRICT, NEW
CASTLE-GUNNING BEDFORD SCHOOL DIS-
TRICT AND STANTON SCHOOL DISTRICT,
AMICI CURIAE, AND BRIEF AMICI CURIAE.**

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CASTLE-GUNNING BEDFORD SCHOOL DIS-
TRICT AND STANTON SCHOOL DISTRICT,
AMICI CURIAE.**

Pursuant to Rule 42(3) of this Court, the Delaware State Board of Education and former independent school districts of the State of Delaware, Alexis I. DuPont School District, Claymont School District, Conrad School District, Marshallton-McKean School District, Newark School District, New Castle-Gunning Bedford School District, and Stanton School District, move this Court for leave to file the attached brief as amici curiae in support of the position of the petitioners in the above matters.

In support of this motion, the applicants represent as follows:

1. The Delaware State Board of Education is the petitioner in *Delaware State Board of Education v. Evans*, No. 78-671, filed on October 20, 1978.

2. The Alexis I. DuPont School District, Claymont School District, Conrad School District, Marshallton-McKean School District, Newark School District, New Castle-Gunning Bedford School District and Stanton School District are the petitioners in *Alexis I. DuPont School District, et al. v. Evans*, No. 78-672, filed on October 20, 1978.

3. The petitions in the above entitled cases present substantial questions concerning the propriety of federal court desegregation remedies in light of this Court's decisions in *Dayton Board of Education v. Brinkman*, 433 U. S. 406 (1977); *Brennan v. Armstrong*, 433 U. S. 672 (1977); and *School District of Omaha v. United States*, 433 U. S. 667 (1977). The petitions in the *Columbus* and *Dayton* cases present questions concerning the proper scope of federal court desegregation orders and the disposition of these cases by the Court will likely have a substantial impact upon the disposition of these applicants' petitions.

4. The instant cases present this Court with an opportunity to further articulate and clarify the legal and equitable principles which must govern lower courts not only in these instant cases, but in other cases pending in this Court as well as the numerous cases presently pending in the lower federal courts throughout the country.

5. Applicants believe that their brief expression of views contained in the appended brief, based on their experiences in a case which is both markedly similar and dissimilar from the cases before the Court, can aid the Court in formulating a broadly applicable rule of decision.

6. These applicants have requested the consent of the parties to these cases to the filing of a brief as amici curiae, but consent has not been granted by the respondents. The consents on behalf of the petitioners in both cases are being filed with the Clerk. Wherefore, these applicants respectfully move this Court for leave to file the accompanying brief amici curiae.

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EDUCATION, ALEXIS I. DUPONT SCHOOL DIS-
TRICT, CLAYMONT SCHOOL DISTRICT, CON-
RAD SCHOOL DISTRICT, - MARSHALLTON-
McKEAN SCHOOL DISTRICT, NEWARK
SCHOOL DISTRICT, NEW CASTLE-GUNNING
BEDFORD SCHOOL DISTRICT AND STANTON
SCHOOL DISTRICT, AMICI CURIAE.

OPINIONS BELOW

The July 14, 1978 opinion of the Sixth Circuit Court
of Appeals in *Penick v. Columbus Board of Education* is

reported at 583 F. 2d 787 (6th Cir. 1978). The March 8, 1977 liability opinion and order of the District Court are reported at 429 F. Supp. 229 (S. D. Ohio 1977). The July 29, 1977 order and the October 14, 1977 memorandum and order of the District Court directing the systemwide desegregation plan in the Columbus School District are not reported and are reproduced in the Appendix to the Petitioners' petition for certiorari in the *Columbus* case.

The July 27, 1978 opinion of the Sixth Circuit Court of Appeals in *Brinkman v. Gilligan* is reported at 583 F. 2d 283 (6th Cir. 1978). The unreported opinion of the District Court was entered on December 15, 1977 and is reproduced in the Appendix to the petition for certiorari filed in *Dayton Board of Education v. Brinkman*.

JURISDICTION

This Court's jurisdiction has been invoked pursuant to 28 U. S. C. § 1254(1). Certiorari was granted in both cases on January 8, 1979. 45 U. S. L. W. 3451.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides, in part:

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

INTEREST OF THE AMICI CURIAE

The Delaware State Board of Education is the petitioner in *Delaware State Board of Education v. Evans*, No. 78-671, filed with this Court on October 20, 1978. Alexis I. DuPont School District, Claymont School District, Con-

rad School District, Marshallton-McKean School District, Newark School District, New Castle-Gunning Bedford School District, and Stanton School District are the petitioners in *Alexis I. DuPont School District, et al. v. Evans*, No. 78-672, also filed with this Court on October 20, 1978. Both petitions seek to invoke this Court's review of a desegregation order which, inter alia, has conglomerated eleven formerly independent political entities of the State of Delaware (including the petitioner districts); within the conglomeration area has imposed an areawide racial balance plan involving more than 60% of the students in the State of Delaware; has dictated a substantial increase in local property tax rates upon the residents of the former petitioner districts; and has disenfranchised the citizens of the affected area from elections of their school board until 1984, all of this allegedly by way of remedy for undetermined constitutional violations. The District Court opinion is reported as *Evans v. Buchanan*, 447 F. Supp. 982 (D. Del. 1978), and was affirmed by the Third Circuit Court of Appeals on July 24, 1978, as *Evans v. Buchanan*, 582 F. 2d 750 (3rd Cir. 1978). Both opinions may be found in the Appendix to the Petition for Certiorari in No. 78-671. This Court has not yet acted upon the petitions for certiorari filed by these amici.

The *Columbus* and *Dayton* cases present this Court with questions the resolution of which may be determinative of the rights of the parties in Nos. 78-671 and 78-672. The Sixth Circuit Court of Appeals in *Columbus* approved, and in *Dayton* imposed, comprehensive racial balance plans for metropolitan, urban areas. In both cases, the Sixth Circuit sought to justify these excessive remedies by the finding that dual school systems existed as of the time of this Court's decision in *Brown I*, *Brown v. Board of Education*, 347 U. S. 483 (1954), combined with the find-

ing of discrete constitutional violations subsequent to that time.

In *Evans v. Buchanan*, the federal courts have imposed a comprehensive racial balance plan on an entire metropolitan urban area which formerly consisted of eleven autonomous school districts, each a separate governmental entity under Delaware law, without any finding of inter-district violations by any of the school districts. The alleged justification for the extreme remedy was that the eleven school districts (or their predecessors) once maintained dual systems of education prior to *Brown I* in accordance with state law and that, although ten of the districts had operated unitary systems since shortly after *Brown I*, vestiges of de jure segregation had not been eliminated in five buildings in the eleventh district, and that discrete constitutional violations, including acts of non-school officials, had occurred subsequent to *Brown I*, although the courts below have never made findings that any of these violations involved segregatory intent or motive.

In all three cases, i.e., *Dayton*, *Columbus*, and *Wilmington*, the Courts of Appeals concluded that it was the unmeasured, cumulative effect of the foregoing condition which was to be remedied, thus purporting to justify an areawide racial balance in each case.

SUMMARY OF ARGUMENT

In imposing areawide racial balance plans in Columbus, Dayton and Wilmington, the federal courts have gone demonstrably beyond the proper scope of any equitable remedy in a school desegregation case. In each case, the area of school desegregation is an urban, metropolitan area with residential concentrations of blacks. In each case, the courts have recognized that this phenomenon of racial concentration was not caused by school officials but was, in fact, beyond their control. It has been recognized that without any of the alleged violations in the cases, substantial racial concentration would nevertheless exist. The application of comprehensive racial balance desegregation orders in this context represents an aberration of the equitable principles to which this Court has hewed in school desegregation cases. This Court should take this opportunity to require the lower courts to adhere to the purpose of school desegregation remedies as previously announced by this Court. That is, like any equitable remedy, school desegregation remedies are to restore the victims of discrimination to a position approximating as closely as possible that which would have existed in the absence of any constitutional violation. The remedies here have been punitive rather than restorative.

ARGUMENT

School desegregation remains an intractable social and legal issue in 1979, twenty-five years after *Brown I*. One major reason is the patent unwillingness of the lower federal courts to accept this Court's rulings that a remedy is warranted only by a constitutional violation and then only to the degree that the remedy is specifically designed to cure the actual effects of the violation. In the absence of definitive action by this Court in these cases, school desegregation promises to remain an unresolved issue for many more years to come.

I. Nationwide or Regional Standards

In the two "northern" cases before the Court, dual systems were found to have been maintained as of 1954. In Wilmington, a "southern" case, there were undeniably dual school systems in existence in 1954 as a result of state law. However, the school systems of the State were effectively desegregated by 1967, *Evans v. Buchanan*, 379 F. Supp. 1218, at 1222-23; *Evans v. Buchanan*, 393 F. Supp. 428 at 451; and the school systems of the metropolitan Wilmington area had been recognized as having been "integrated" by 1960, *Evans v. Ennis*, 281 F. 2d 385, at 393 (3d Cir. 1960). The Wilmington School District alone in the northern tier of districts was found to have committed later constitutional violations. 393 F. Supp. 428, at 435-36.

This Court must eventually decide whether racial imbalance in metropolitan areas is to be treated differently in the north than in the south—that is, whether punitive desegregation decrees are appropriate for one area of the country because original sin can never be redeemed. We urge this Court to adopt a single standard for school desegregation decrees, to be applied to all states, by acknowledging that *de jure* segregation, once eliminated,

cannot be a factor in imposing additional duties upon otherwise innocent school boards.

In *Dayton Board of Education v. Brinkman*, 433 U. S. 406 (1977), this Court stated:

"The duty of both the District Court and the Court of Appeals, in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is first to determine whether there was any action in the conduct of the business of the school board which was intended to and did in fact, discriminate against minority pupils, teachers and staff." 433 U. S. at 420.

Under this Court's precedents, it is clear that the first inquiry in all jurisdictions is to determine whether school officials have fulfilled their affirmative obligation to eradicate the vestiges of the officially imposed dual system. But, the Third Circuit suggested that the ruling in *Dayton* has no applicability to the former southern and border states which maintained *de jure* segregation as of 1954. *Evans v. Buchanan*, 582 F. 2d 750 at 763, 766 (3rd Cir. 1978). This suggestion would make it unnecessary for the lower courts to make any findings as to the extent, if any, of the continuing effects of pre-*Brown* violations in such cases. To find a pre-*Brown* violation to exist as a historic fact would become a sufficient predicate for a systemwide racial balance remedy. To the contrary is *School District of Kansas City v. State of Missouri*, 460 F. Supp. 421, 441 (W. D. Mo. 1978).

This Court has never ruled that there is a greater duty to eradicate the vestiges of a dual system in a "de jure" State. Nor has it ever implied that a different remedial standard is applicable. In fact, the Court has indicated the contrary. As stated by Mr. Justice White, dissenting in *Milliken v. Bradley*, 418 U. S. 717, at 777 (1974):

"That these broad principles have developed in the context of dual school systems compelled or authorized by state statute at the time of [*Brown I*] does not lessen their current applicability to dual systems found to exist in other contexts, like that in Detroit, where intentional school segregation does not stem from the compulsion of state law, but from deliberate individual actions of local and state school authorities directed at a particular school system. The majority properly does not suggest that the duty to eradicate completely the resulting dual system in the latter context is any less than in the former."

The thrust of the Sixth Circuit's rulings in *Columbus* and *Dayton* is that, given the existence of a dual system in 1954 and the existence of discrete constitutional violations thereafter, the remedial power of the federal courts is virtually unlimited to decree an areawide racial balance remedy. The Third Circuit's view, as expressed in *Evans v. Buchanan*, *supra*, appears to be that such unlimited power exists where the prior dual system was one mandated by statute and that the extent, if any, of the continuing effects of such a system is not relevant.¹ We urge this

1. In *Evans v. Buchanan*, the Court of Appeals considered the fact that a statutorily mandated dual school system existed in New Castle County, Delaware, in 1954 implemented, as it was, by interdistrict transfers of black and white children from some suburban districts to the city district to be the "base" reason for the inapplicability of *Dayton*. The Court of Appeals (as did the single Judge District Court that succeeded the three Judge Court) did not consider the lack of causation between those interdistrict transfers and the vestiges found to exist in five Wilmington district schools by the three Judge Court and gave no weight to the three Judge Court's findings that (1) the interdistrict transfers were terminated following *Brown*, 393 F. Supp. at 433; (2) the termination of the transfers did not have a significant effect on the racial balance of the Wilmington schools, 393 F. Supp. at 434, fn. 8; and (3) the ten suburban districts operated unitary systems shortly after *Brown* and thereafter, 393 F. Supp. at 437, fn. 19. The Courts also ignored the observations of a predecessor panel of the Court of Appeals for

Court to declare again that the function of the remedy is only to eradicate the actual effects of prior unlawful segregation, whatever the 1954 status of the State, and that reversal should be forthcoming in both the Sixth and Third Circuit cases.

II. Incremental Segregative Effect

This Court's 1977 decision in *Dayton Board of Education v. Brinkman*, *supra*, would seem to require inferior courts to review constitutional violations to determine the actual continuing effect of those violations upon the composition and distribution of the public school population and to fashion a remedy designed, as nearly as practicable, to place the school system and its students in a condition that would have existed in the absence of the violations. This would necessarily impose upon the lower courts the duty to make "complex factual determinations". 433 U. S. at 420. That appears to have been the understanding of the District Court in the *Dayton* case. It is also the approach adopted by the trial judge in the *Indianapolis* case, a multi-district case. See *United States v. Board of School Commissioners of the City of Indianapolis*, 456 F. Supp. 183 (S. D. Ind. 1978).

The Sixth Circuit Court of Appeals in the *Columbus* and *Dayton* cases and the Third Circuit Court of Appeals in the *Wilmington* case have adopted a different interpretation of the meaning of this Court's decision in *Dayton*.

1. (Cont'd.)

the Third Circuit to the effect that many of Delaware's schools, "particularly in the Wilmington metropolitan area" had been integrated, *Evans v. Ennis*, 281 F. 2d 385 at 393 (3d Cir. 1960). A conclusion of attenuation between the only pre-*Brown* interdistrict school violations and the continuing vestiges found in five schools located in the city school district should have been inescapable. Rather, the Court permitted a fact of history to control a critical issue of the case, seizing upon this Court's "long since ceased" language.

In *Penick v. Columbus Board of Education*, 583 F. 2d 787 (6th Cir. 1978), Judge Edwards eviscerated the *Dayton* rule of specific findings of violation with a remedy to match by ruling that school policies had systemwide implications and therefore were systemwide violations. He then concluded that "the impact of the total amount of segregation found" was the incremental segregative effect which must be remedied. Since racial imbalance marked the *Columbus* system, a systemwide racial balance plan was deemed in order.

Similarly, in *Brinkman v. Gilligan*, 583 F. 2d 243 (6th Cir. 1978), the Sixth Circuit, overruling findings of fact made by the trial judge, concluded that the violations found had systemwide impact and, relying upon its earlier ruling in *Columbus*, concluded that the segregation to be remedied was the "total amount of segregation found". 583 F. 2d at 258. In addition, the Court, *ex post facto*, imposed a burden of proof upon the defendants which they apparently had not met (having never been given the opportunity to do so.)

In *Evans v. Buchanan*, 582 F. 2d 750 (3rd Cir. 1978), the Third Circuit initially found this Court's *Dayton* pronouncement to be inapplicable to a "southern" case. 582 F. 2d at 763, 766. Nevertheless, the Third Circuit proceeded to conclude that, even were *Dayton* applicable to a "southern" case, all that a court need do is consider the cumulative effect of the violations and devise a remedy at least broad enough to overcome those effects, 582 F. 2d at 764, whatever else it also brings within its ken.² Accord-

2. The illogic of this approach is vividly presented in the *Wilmington* case. Even though the Court of Appeals for the Third Circuit held in 1977 that it would be highly speculative to determine which of the eight suggested violations were summarily affirmed by this Court and, therefore, to be redressed (555 F. 2d at 377), the Third Circuit held in 1978 that it is the combined effect of all of the separate violations that must be cured by the

ing to the Third Circuit, the burden of proof then passed to the defendants to demonstrate that the proffered plan was "arbitrary, fanciful, or unreasonable." The fact is that the proponents of the racial balancing plan admitted unequivocally that the plan in no way attempted to restore the victims of discrimination to the position they would have occupied but for constitutional violations. But this was not deemed to sufficiently meet the defendants' burden of proof, a burden which was again imposed after the fact.

In *Columbus* and *Dayton* and *Wilmington*, it was conceded by the courts below that residential concentration of minorities would have existed to a significant degree in spite of the alleged constitutional violations. Nevertheless, in each case, the courts approved remedial decrees requiring maximum racial diffusion throughout the school districts in question (in Ohio) and in eleven districts in the metropolitan *Wilmington* area, none of which, except the *Wilmington* district, was guilty of any constitutional violation. The conditions thus imposed do not even purport to represent what would have existed in the total absence of constitutional transgression. It is apparent that this Court's language in *Dayton* in 1977 as to "incremental segregative effect" has been ignored.

III. Burden of Proof

The allocation of burden of proof is fundamental to the orderly and just functioning of the litigation process. The allocation of the burden of proof represents, on the one hand, a substantive legal determination while, on the

2. (Cont'd.)

remedy (582 F. 2d at 764). The court-imposed requirement for the school authorities to develop a plan to remedy all of these suggested violations, the continuing segregative effects of which had not been determined by the trial court, was an impossible one as observed by the three judge dissent in 555 F. 2d 373 at 383-385.

other hand, it establishes the procedural framework in which litigants must operate. In most litigation, the burdens of proof are well established and clearly understood by the parties. In desegregation litigation, it increasingly appears that there is no clearly established burden of proof and that, rather, courts have manipulated the burden of proof, after the fact, to justify a desired result.

Distortion of the burden of proof can take different forms. In the *Columbus* and *Dayton* cases, the Sixth Circuit made a quantum leap from the finding of discrete constitutional violations to an areawide urban racial balance remedy by finding that a dual system existed in 1954, that systemwide segregation prevailed at the present time and that only a systemwide racial balance remedy would redress that condition. This process, which completely eliminates the need for the "complex factual determinations" referred to by this Court in *Dayton, supra*, involves nothing less than an unfounded presumption of a direct causal connection between remote, historical facts, isolated subsequent occurrences, and a present condition. Such unstructured and unrestrained use of an ill-defined presumption certainly seems to be in contravention of the causation requirements enunciated by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977).

In *Evans v. Buchanan*, 582 F. 2d 750 (3rd Cir. 1978), the Third Circuit adopted a similar burden shifting process to justify the areawide racial balance result. The Third Circuit invoked the *Keyes* presumption, *Keyes v. School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973), to support the proposition that in a school desegregation case with a prior history of de jure segregation, the burden of proof was upon the defendant to establish that the proffered racial balance plan was "arbitrary, fanciful, or unreasonable", which burden the court found

the defendants had failed to meet. 582 F. 2d at 764-765.³ Thus, in Wilmington, as in Ohio, the court justified an areawide racial balance plan by holding that defendants had failed to meet the burden of proof, despite the acknowledgement by all concerned that the racial composition of the affected schools would in no way have approximated the composition required by the plan in the absence of any or all of the alleged constitutional violations. The Third Circuit's use of *Keyes, supra*, to justify this procedure is dubious at best. *Keyes* was, of course, a single district case concerned strictly with the actions and nonactions of school officials. In the proper context, the *Keyes* presumptions are appropriate and, in fact, have been deemed a tautology. Kenner, *From Denver to Dayton, The Development of a Theory of Equal Protection Remedies*, 72 NWU Law Rev. 382, 386 (1977). The *Keyes* presumption loses all logical content in the context of a multi-district case premised largely on housing practices.

Fundamental fairness requires that parties to desegregation litigation have the benefit of clearly established burdens of proof when they try their cases, rather than being confronted with shifting burdens of proof, established after the fact, which justify a given result in a given case.

3. The Third Circuit implied that the trial court held extensive hearings which were designed to give the defendants an opportunity to meet this burden of proof. Since this burden of proof was, however, first imposed by the appellate court and was never alluded to in the trial court, this implication was clearly incorrect.

CONCLUSION

In confronting the problem of racial separation in our society, lower federal courts have inflexibly misapplied this court's decisions that the remedy for a dual school system is a unitary one. Once the dual system has been replaced by a unitary one, further constitutional violations, if any, are to be met by specific remedies measured by the effects of the wrongs. Persistent racial separation in urban metropolitan areas of this nation cannot credibly be presumed to be caused by school boards in the absence of proof thereof. But federal courts, in striving inflexibly to maximize racial balance at the expense of all other considerations, have foreclosed innovative or more flexible approaches to this nationwide urban problem, approaches more likely to conform to this Court's expressed doctrine that a remedy is not punitive but curative, not a license for federal court control of state educational systems but only a judicial tool for restoring that which has been improperly taken.

We urge this Court to reverse the decisions of the Sixth Circuit Court of Appeals and in so doing to establish clear and uniform guidelines for the control of desegregation litigation in Delaware and throughout the nation.

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IN THE
Supreme Court of the United States

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

vs.

MARK BRINKMAN, et al.,
Respondents.

**BRIEF OF SPECIAL SCHOOL DISTRICT NO. 1,
MINNEAPOLIS, MINNESOTA, AMICUS CURIAE**

Dated: February 21, 1979.
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**BRIEF OF SPECIAL SCHOOL DISTRICT NO. 1,
MINNEAPOLIS, MINNESOTA, AMICUS CURIAE**

INTEREST OF AMICUS

Special School District No. 1, Minneapolis, Minnesota ("the School District") is a political subdivision of the State of Minnesota charged with the responsibility of operating and governing the public schools in the City of Minneapolis. (Minn. Laws ch. 462 (1959).)

Since 1972, the School District, pursuant to federal court desegregation orders, has implemented a substantial

desegregation/integration plan resulting in a multitude of significant changes in the organization of its schools. As a result, the School District has eliminated any incremental segregative effects at the six schools for which there were specific findings of discriminatory acts in the assignment of pupils in the 1960's. In addition, as a result of the plan, there has been substantial, systemwide reduction of concentration or isolation of minority pupils.

Yet the federal court litigation continues.

Now pending in this Court is the School District's petition for certiorari to review the judgment of the Eighth Circuit Court of Appeals affirming the district court's denial of the School District's motion to dissolve or modify the desegregation decree. (*Booker v. Special School District No. 1*, 451 F.Supp. 659 (D. Minn.), *aff'd*, 585 F.2d 347 (8th Cir. 1978), *pet. for cert. filed*, 47 U.S.L.W. 3348 (No. 78-781, Nov. 11, 1978).) Since, according to the Clerk of this Court, the School District's petition is being held until this Court has decided the *Columbus* and *Dayton* cases, the School District submits this brief, amicus curiae, to focus attention on transcending issues of national importance in the *Columbus*, *Dayton* and *Minneapolis* cases.

ARGUMENT

With the granting of certiorari in the *Columbus* and *Dayton* cases, this Court has once again returned to the task of amplifying "guidelines, however incomplete and imperfect, for the assistance of school authorities and courts" in implementing the basic principles of *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), and *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). (E.g.,

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 14 (1971).)

Now, as in the past, this Court's establishment of clear guidelines regarding the proper scope of federal judicial remedies for school districts' violations of the equal protection clause of the fourteenth amendment is of the utmost importance for all of the federal courts, for school districts and communities throughout the United States, and for school children and their parents.

In amplifying the guidelines, this Court needs to reaffirm the principle established in the first *Dayton* case that the federal judicial remedy must be limited to eliminating the "incremental segregative effect" of the constitutional violations. (*Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977).) This principle, although first formulated in 1977, has its roots in, and is consistent with, this Court's prior school desegregation cases. (E.g., *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 16.)

Moreover, the "incremental segregative effect" principle is also consistent with, if not required by, this Court's rulings that proof of discriminatory or segregative intent or purpose is a necessary condition for proving violations of the equal protection clause;¹ that segregatory intent or motive is not a sufficient condition for the constitutional violation and that there must also be proof of causation, *i.e.*, proof that the act complained of would not have occurred in the absence of the impermissible purpose or motive;² that a city's having "both predominantly black

¹See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Keyes v. Special School District No. 1*, 413 U.S. 189, 208 (1973).

²*Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. at 270 n.21; *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-27 (1977).

and predominantly white schools . . . is not alone violative of the Equal Protection Clause;³ that school desegregation decrees must recognize the vital national tradition of local autonomy of school districts;⁴ and that considerations which have led this Court to treat race as a constitutionally suspect classification are not entirely vitiated in a remedial context.⁵

But merely reaffirming the "incremental segregative effect" principle will not be sufficient, given the treatment of that principle by the lower courts in the *Columbus*, *Dayton* and *Minneapolis* cases. Further action is necessary in order to ensure that the lower federal courts follow this Court's decisions regarding judicial desegregation remedies.

First, this Court should establish the permissible methods of proving "incremental segregative effect" and the elimination of such effect.⁶ Under the first *Dayton* decision, of course, the constitutional norm is what the racial distribu-

³*Washington v. Davis*, 426 U.S. at 240; see also *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. at 413; *Austin Ind. School Dist. v. United States*, 429 U.S. 990, 992-95 (1976) (Powell, J., concurring); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 436 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 24.

⁴*Dayton Bd. of Ed. v. Brinkman*, 433 U.S. at 410; *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977); *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976); *Keyes v. Special School Dist. No. 1*, 413 U.S. at 240-53 (Powell, J., concurring); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. at 16, 30-31; *Brown II*, 349 U.S. at 300. The tradition of local autonomy of schools is more than that; it is rooted in the constitutional allocation of powers between the federal government, on the one hand, and state and local governments, on the other hand. (U.S. Const., 10th amend.)

⁵*Regents of Univ. of Calif. v. Bakke*, — U.S. —, 57 L.Ed.2d 750, 776 (Powell, J.), 815-16 (Brennan, J.) (1978); *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 172-74 (1977) (Brennan, J., concurring); *DeFunis v. Odegaard*, 416 U.S. 312, 337-43 (1974) (Douglas, J., dissenting).

⁶The *Minneapolis* case has such evidence. (See Petition for Certiorari, at 7-8, 13-14, *Special School Dist. No. 1 v. Booker*, No. 78-781 (Nov. 11, 1978).

tion of the school population *would have been* in the absence of the constitutional violation. (433 U.S. at 420.) Thus, evidence of a hypothetical condition or "alternative universe" is necessary. The key issue here is residential or housing patterns in the "alternative universe". If, as the district court in the *Minneapolis* case thought, the party seeking to prove the "alternative universe" must establish a causal link between the hypothetical school system and housing patterns and thus prove hypothetical residential patterns, then the "incremental segregative effect" principle is totally meaningless, for "no court in any school case will ever be able to say with any assurance 'where people would have lived, where schools would have been located [or] how much integration would have obtained' absent officially imposed discrimination." (*Booker v. Special School Dist. No. 1*, 451 F.Supp. at 659. See Petition for Certiorari, at 13-14, *Special School Dist. No. 1 v. Booker*, No. 78-781 (Nov. 11, 1978); *Accord Findings of Fact, Conclusions of Law, Decision and Order*, at 10-11, 20, 24-25, *Armstrong v. O'Connell*, No. 65-C-173 (E.D. Wis. Feb. 8, 1979.) The net result of such an approach is a *sub rosa* obliteration of the distinction between *de facto* and *de jure* segregation. Instead, the School District respectfully suggests that for purposes of establishing "incremental segregative effects" and the elimination of such effects, housing or residential patterns in the "alternative universe" should be assumed to be the same as they were or are in the real world unless there is specific evidence that the school officials took actions which directly caused changes in housing patterns.⁷

⁷This Court also needs to state the obvious—that evidence regarding the "alternative universe" of necessity must make assumptions. Thus, it is improper for a court to reject evidence of "incremental segrega-

Second, this Court should make it clear that the "incremental segregative effect" principle applies to all cases "where mandatory segregation by law of the races in the schools has long since ceased." (433 U.S. at 406.) In other words, *Dayton* was not a "sport" limited to its facts or to cases where there are only limited violations similar to those in *Dayton*. This had been decided by this Court when it vacated systemwide remedy judgments in the *Omaha* and *Milwaukee* cases. (*School Dist. of Omaha v. United States*, 433 U.S. 667 (1977); *Brennan v. Armstrong*, 433 U.S. 672 (1977).)⁸ Yet some lower courts, like the lower courts in the *Columbus* and *Minneapolis* cases, believe that *Dayton* and the "incremental segregative effect" principle are so limited. (*Booker v. Special School Dist. No. 1*, 451 F.Supp. at 661. See Petition for Certiorari, at 13, *Special School Dist. No. 1 v. Booker*, No. 78-781 (Nov. 11, 1978); Petition for Certiorari at 18-20, *Columbus Bd. of Ed. v. Penick*, No. 78-610 (Oct. 11, 1978); accord Findings of Fact, Conclusions of Law, Decision and Order, at 6, *Armstrong v. O'Connell*, No. 65-C-173 (E.D. Wis. Feb. 8, 1979).)

Third, this Court needs to point out that certain language in earlier cases should not be read to mandate systemwide quota or racial balancing orders, such as were

tive effect" or its elimination on the grounds that it involved judgments as to why the discriminatory act occurred or as to what would have happened had the act not occurred. Yet that is what the district court did in the *Minneapolis* case. (*Booker v. Special School Dist. No. 1*, 451 F.Supp. at 662; Petition for Certiorari at 13-14, *Special School Dist. No. 1 v. Booker*, No. 78-781 (Nov. 1978).)

⁸This Court should clarify the relationship between the presumptions discussed in the *Denver* case (*Keyes v. Special School Dist. No. 1*, *supra*, and the "incremental segregative effect" principle.

entered in the *Columbus* and *Minneapolis* cases,⁹ which are not supported by the need to eliminate "incremental segregative effect" under *Dayton*. One such case is *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 422 U.S. at 25, where this Court under an unusual set of facts approved the use of a mathematical ratio for racial balance in the schools as a "first step" in formulating a remedy. Other cases needing reinterpretation in light of *Dayton* are *Green v. County School Board*, 391 U.S. 430, 438 (1968), where this Court said that the goal of the federal courts was to desegregate the entire school system "root and branch",¹⁰ and *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971), where this Court stated that the goal of judicial remedies was to achieve the "greatest possible degree of actual desegregation, taking into account the practicalities of the situation." The need for clarification of these earlier cases is demonstrated by the action of the district court in the *Minneapolis* case in basing its denial of the School District's dissolution motion on the ground that this Court had not overruled or qualified *Green* and *Davis*. (*Booker v. Special School Dist. No. 1*, 451 F.Supp. at 664; accord Findings of Fact, Conclusions of Law, Decision and Order, at 14, *Armstrong v. O'Connell*, No. 65-C-173 (E.D. Wis. Feb. 8, 1979).)

⁹Petition for Certiorari, at 6, 9-10, *Special School Dist. No. 1 v. Booker*, No. 78-781 (Nov. 11, 1978) (no school shall have more than 39% of one minority group or more than 46% of all minority groups); Petition for Certiorari, at 26 n.10, *Columbus Bd. of Ed. v. Penick*, No. 78-610 (Oct. 11, 1978) (decree set limits on a school's black enrollment at plus-minus 15% of total district-wide black enrollment).

¹⁰As was pointed out in the concurring opinion in *Austin Independent School District v. United States*, 429 U.S. 990-95 (1976), the "root and branch" metaphor was used in a case involving a rural, sparsely populated school district, not a large urban school system.

Finally, this Court should clearly state that the "incremental segregative effect" principle applies to school districts already subject to federal court desegregation decrees as well as to school districts which are still litigating the liability question. Such a conclusion is consistent with, and required by, general equitable principles as well as by this Court's decision in *Pasadena City Board of Education v. Spangler, supra*.

CONCLUSION

Special School District No. 1, Minneapolis, Minnesota respectfully requests this Court to address the points discussed herein in its decisions in the *Columbus* and *Dayton* cases.

Dated: February 21, 1979.

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No. 78-610

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Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF THE AMERICAN JEWISH CONGRESS
AS AMICUS CURIAE**

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

GARY L. PENICK, *et al.*,
Respondents.

No. 78-627

DAYTON BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

MARK BRINKMAN, *et al.*,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN JEWISH CONGRESS
AS AMICUS CURIAE

This brief *amicus curiae* is submitted with the consent
of the parties.

Statement of the Case

Both of these cases are before this Court, one of them for the second time (No. 78-627), after years of litigation. In each case, the Court of Appeals for the Sixth Circuit held that an urban public school district had had a systemwide policy of racial segregation prior to 1954, that it had not taken effective steps to undo the effects of that policy and that it had engaged in further acts of segregation during the period between 1954 and the initiation of the action. In each case, the Court of Appeals found that a systemwide policy of segregation was in effect when the suit was started and that it had a systemwide impact and held that a systemwide remedy was required. This Court granted the petitions for writ of certiorari, filed by the two school boards, challenging those conclusions.

Question to Which this Brief Is Addressed

This brief *amicus curiae* is addressed to the question whether the Court of Appeals, in arriving at its conclusion in each case that systemwide illegal segregation existed which had a systemwide impact which, in turn, required a systemwide remedy, applied principles that are sound, workable and consistent with the decisions of this Court.

In arguing that it did, we assume that the Court of Appeals properly evaluated the evidence in the record and we argue that it followed appropriate procedures in deducing its conclusions as to systemwide policy and impact from that evidence.

In further arguing that a systemwide remedy was appropriate, we express no opinion on the particular remedies ordered by the courts below.

Interest of the Amicus

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities in order to speed the day when all Americans may enjoy full equality without regard to race.

We submit this brief *amicus curiae* because we believe that it is essential to obtain prompt and effective implementation of this Court's decisions condemning racial segregation in public schools. Such implementation, already too long delayed, would be further delayed if not entirely frustrated if the contentions of the petitioners in these cases were upheld. Entirely unworkable and unrealistic restraints would be imposed on the process of judicial enforcement of the Constitution.

We regard judicial intervention in the operation of public schools as a thing to be avoided as far as possible. It cannot be avoided, however, when public school authorities engage in deliberate unconstitutional acts of segregation and, over a period of more than 20 years, not only fail to

take effective steps to undo the effects of their misconduct but engage in further unlawful acts. This Court said, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), that, in public school desegregation cases, "Judicial authority enters only when local authority defaults." There has been such a default in Columbus and Dayton. The power of the courts to take corrective action therefore now exists. They should not be hampered. In our opinion, they would be hampered by acceptance of the arguments offered by petitioners as a basis for reversing the decisions below.

Summary of Argument

I. The Court of Appeals correctly found that a systemwide policy of racial segregation was in effect in the Columbus and Dayton schools at the time these two suits were started.

A. The finding that segregation policies were in effect in 1954 rests on ample evidence and proper inferences from that evidence. The Court of Appeals drew reasonable conclusions as to the natural result of petitioners' intentionally illegal acts and properly concluded that the pre-1954 policy was systemwide.

B. The findings of systemwide illegal policies after 1954 were likewise proper. The inferences drawn by the Court of Appeals were consistent with the decisions of this Court and with common sense. It is unlikely that a school board would have a segregative intent as to only part of the schools it administers and it is reasonable, in view of

the evidence of post-1954 segregative acts, to put on the petitioners the burden of proving, from facts peculiarly within their knowledge, a neutral explanation of their acts.

II. The Court of Appeals properly found in each case that the systemwide policy of segregation had a systemwide impact, requiring a systemwide remedial order. This Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), does not require separate measuring of the effect of each act of illegal discrimination. Nor does it require the plaintiffs in a school desegregation action in which a systemwide policy of discrimination has been shown to exist to establish that every present manifestation of racial separation is due to the defendants' past illegal conduct. Such a requirement has never been applied by this Court in school segregation cases, North or South. Adoption of that requirement would make further progress toward implementation of this Court's decisions condemning such segregation virtually impossible.

Since the Court of Appeals properly found in each case both a systemwide policy of segregation and a systemwide impact of that policy, it properly ordered imposition of a systemwide remedy.

Argument

These cases deal with two school districts as to which there is a clear record of intentional acts of segregation over a substantial period, extending up to the time the two suits were started. That fact obviously requires rejection of the Columbus Board's emotional assertion that, if the approach of the court below is approved, "any urban

school system serving a community with racially imbalanced residential patterns may be presumed to be in violation of the equal protection clause and under a constitutional duty to achieve a strict racial balance in every school in the system" (Petitioner's Brief in No. 78-610, p. 50). There is no reason to assume that every urban school district in the country has a history like that of Columbus and Dayton.

Accordingly, we do not address, and this Court need not consider, the question of the power and obligation, if any, of the courts to correct *de facto* segregation in the absence of proof of intentional unconstitutional conduct.

POINT I

The Court of Appeals correctly found in each case that a systemwide policy of segregation was in effect in the schools.

The Court of Appeals concluded in each case that the school district was being operated under a general policy of maintaining segregation up to the time that the case was initiated (583 F.2d, at 253, 814). This conclusion was based on clear evidence that such a policy was in effect prior to 1954, that there was never any clear break with that policy or effort to undo its effects and that there was evidence of official acts designed to maintain segregation subsequent to 1954. We submit that, on these facts, common sense required the conclusion of a systemwide policy of segregation reached by the Court of Appeals.

A. Pre-1954 Segregation

The Court of Appeals found in the Dayton case that, "at the time of *Brown I* [*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)], defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment" and that "defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system" (583 F.2d at 247, 252).¹ It made similar findings in the Columbus case (*Id.*, at 798-9).² It further found that neither district took the kind of corrective steps that the decisions of this Court require in such circumstances "to effectuate a transition to a racially non-discriminatory school system." *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (*Brown II*) (583 F.2d at 249, 800).

The obligation to take such steps exists whether the prior segregation was of the Southern type (by virtue of statute) or the Northern type (by virtue of official action without statutory authority). That was made clear when this Court imposed the same obligation in *Keyes v. School District*, 413 U.S. 189, 203 (1973).

Petitioners in No. 78-627 appear to deny that the evidence and findings of a policy of intentional segregation up to 1954 have any probative effect on the issue of whether such policies continued thereafter (Brief No. 78-627, pp. 16-17). That argument might have been valid if there had

1. Specifically, the court found, *inter alia*, that prior to 1954 the school board had a "purposely segregative" faculty assignment policy (583 F.2d, at 247-8), applied "racially motivated student assignment practices" (at 248), including optional transfers for white students in black schools (at 249), and excluded the black high school from the City Athletic Conference (at 249-50).

2. The findings included assignment of faculty on a racial basis and gerrymandering of attendance districts (583 F.2d, at 797-8).

been a break with the past—if the Board had moved effectively to undo the effects of the pre-1954 segregation. As noted above, the Court of Appeals found that it had not. Indeed, we find the petitioners in No. 78-627 still insisting that the Dayton schools were never segregated (Brief, p. 16), a posture they could hardly assume if they had engaged in the kind of corrective effort that the law requires. (Petitioners in No. 78-610 do not concede even *arguendo* that the Columbus school system was ever segregated. See pp. 63-4 of their Brief.)

Petitioners devote a great deal of space to criticizing the Court of Appeals for considering the “natural and foreseeable” results of their actions as proof of illegal “intent” (Petitioners’ Brief in No. 78-627, pp. 20-26; in No. 78-610, pp. 81-90). They urge that the Court of Appeals drew an inference of such intent from the mere fact of racial imbalance or from such acts as locating a school in an area of racial concentration.

The Court of Appeals did no such thing.³ Thus, the language quoted by petitioners in No. 78-627 follows a

3. Note, however, that the fact of racial imbalance is not irrelevant. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), a case involving the criminal conviction of a black person, this Court found that proof of a low proportion of Negroes at every stage of the jury selection process, together with the fact that the race of each individual was stated on the forms used by the jury commissioners, was sufficient to shift to the state the burden of disproving discrimination, even though “there is no evidence that the commissioners consciously selected by race” (at 630). The Court said (at 631-2):

Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.

This decision and a number of others to the same effect were cited with approval in *Washington v. Davis*, 426 U.S. 229, 241 (1976).

recitation of evidence showing a number of clearly intentional acts of segregation (583 F.2d at 247-51). The Court of Appeals then properly concluded that “the natural, probable and foreseeable result of defendants’ activities was the creation and perpetuation of a dual school system” (*id.* at 252). In view of the previous findings of intent, this is a far cry from using the foreseeable result concept “to determine segregative intent” (Petitioners’ Brief in No. 78-627, p. 20).

In the Columbus case, petitioners go even further and say that the Court of Appeals drew its inference of segregative intent as to certain actions of school officials “solely” because a disproportionate impact may have been foreseeable (Petitioners’ Brief in No. 78-610, pp. 87, 89). That was obviously not the case (573 F.2d, at 251-2).

We submit that the Court of Appeals had ample basis for its findings that a systemwide policy of intentional segregation was in effect in Columbus and Dayton when this Court handed down its decisions in the *Brown* case.

B. Post-1954 Segregation

The Court of Appeals further concluded, in each case, that a systemwide policy of segregation was in effect at the time that the suit was started (583 F.2d, at 253, 814). In each case, that finding rested not only on the evidence of such a policy before 1954 and an absence of subsequent corrective measures but also on a number of acts of deliberate segregation in the subsequent years.⁴ Petitioners

4. As to Dayton, the Court of Appeals found, *inter alia*, a continuation of “racial assignment of faculty through the 1970-71 school year” (583 F.2d, at 253), assignment of students and faculty on the

(footnote continued on next page)

seek to minimize the significance of these incidents by characterizing the lower courts' conclusions regarding system-wide segregation as resting on "remote and isolated" violations (See, e.g. Petitioner's Brief in No. 78-610, pp. 48, 62).

The word "remote" presumably applies to the pre-1954 practices. It is established, however, that such practices do not lose their impact merely by the lapse of time, particularly when their effects have never been undone. As this Court said in *Green v. County School Board*, 391 U.S. 430, 438 (1968): "This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system." With respect to the "Northern" type of segregation, this Court said in *Keyes* (413 U.S., at 210-11):

The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

The validity of petitioners' use of the word "isolated" can only be judged on each record as a whole. Since we do not regard this *amicus* brief as an appropriate place to

basis of race when certain schools were closed (at 253-4) and the "use of optional attendance zones for racially discriminatory purposes" (at 255).

As to Columbus, the Court found a "segregative school construction and siting policy," a student assignment policy which produced a large majority of racially identifiable schools and a racially based faculty assignment policy (*id.* at 814).

argue factual issues, we limit ourselves to expressing the opinion that the evidence reviewed by the Court of Appeals in the two cases (583 F.2d at 253-7, 799-800) shows far more than mere isolated acts. In the *Keyes* case, this Court specifically rejected an effort to characterize similar evidence as showing only "isolated and individual" violations (413 U.S. at 208-9).

A large part of the petitioners' attack on the findings of the Court of Appeals consists of objections to its use of presumptions as a basis for shifting the burden of proof. In particular, they object to the fact that the Court of Appeals treated evidence of intentional segregation in parts of the school district as sufficient basis for drawing an inference that a systemwide policy of segregation could be presumed in the absence of evidence to the contrary (Petitioners' Brief in No. 78-610, pp. 62-67; in No. 78-627, pp. 18-20).

The procedure used by the Court of Appeals, we submit, was entirely consistent with this Court's decision in *Keyes*. After reviewing the general principles of law applicable to inferences and burdens of proof (413 U.S., at 207-8), this Court said (at 208):

Applying these principles in the special context of school desegregation cases, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a *prima facie* case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other

segregated schools within the system are not also the result of intentionally segregative actions.

Plainly, then, the presumptions challenged by the petitioners were not "created by the Sixth Circuit" (Petitioners' Brief in No. 78-627, p. 18). That court followed the paths laid down by this Court in *Keyes*.

Neither are these presumptions "artificial and erroneous" (*ibid*). They are consistent not only with the general principles of evidence reviewed in *Keyes* but also with common sense.

To begin with, it is inherently unlikely that a school board would have a policy of segregating part but not all of the district under its management. The Columbus and Dayton Boards did segregate certain schools both before and after 1954. We suggest that the segregatory intent evidenced by these activities could hardly have applied to some but not all of the schools in the district. Nothing in the 25 years of litigation since *Brown* suggests that school authorities commonly have such bifurcated policies. Although they may in some cases, the high likelihood that they do not is a logical first step in the adoption of a rebuttable presumption to that effect. It is based on the "probabilities of the situation." Clearly, "*Presuming and Pleading*," 12 Stan. L. Rev. 5, 12-13 (1959).

Taking the next step toward such a presumption is justified by the fact that a systemwide policy of segregation would not ordinarily surface in all parts of a district. It would be invoked on a school-by-school and device-by-device basis, when and where needed to preserve segrega-

tion. In those parts of a district where segregation continued of its own momentum, no overt applications of a continuing policy would be needed. But the policy would still be general.

Third, some of the kinds of segregating devices which the Boards used here—gerrymandering of attendance districts, optional attendance zones, and site selection—do not automatically proclaim their illegal intent or nature. As Judge Jerome N. Frank said in *F. W. Woolworth Co. v. N.L.R.B.*, 121 F.2d 658, 660 (CA 2, 1941):

Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me," like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland.

Hence, each instance of possible segregatory action must be examined in detail, as the decisions below show. It must be expected that some will go unnoticed—or at least unproven.

Finally, and perhaps most important, the facts regarding each practice are peculiarly within the knowledge of the school officials and not readily accessible to the plaintiffs. This is the classic situation for the creation of a rebuttable presumption. McCormick, *Evidence* (Second Edition (Cleary), St. Paul, 1972), p. 787. Once the plaintiffs have succeeded in obtaining evidence of a number of instances of deliberately segregative acts, as they did here, it is not unreasonable to hold that those who claim that

these instances were "isolated" have the burden of showing that their conduct was otherwise proper.

We submit that the Court of Appeals properly found that the Columbus and Dayton school districts were racially segregated in 1954, that petitioners did not act effectively to integrate the schools thereafter and that both districts were being operated under a systemwide policy of segregation when these two suits were started.

POINT II

The Court of Appeals properly found in each case that the systemwide policy of segregation had a systemwide impact, requiring a systemwide remedial order.

The Court of Appeals found in each case that the systemwide policy of segregation in effect at the time the suit was started had had a systemwide impact. Thus, in the Dayton case, it declared that the remedy must reflect both the failure to disestablish the pre-1954 segregation and the "post-1954 acts of systemwide impact which have contributed affirmatively to the continuation of a segregated system" (583 F. 2d, at 257). In the Columbus case, it held that "each policy or practice cited had (and was intended to have) a systemwide application and impact" (583 F. 2d, at 814).

Petitioners argue that, under this Court's earlier decision in the Dayton proceeding, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), the court below could not make a finding of systemwide segregation

or order a systemwide remedy without a showing, presumably by the plaintiffs, that, but for the illegal acts of segregation and the failure to correct them, there would have been no segregation at the time the suit was started. Thus, in the Columbus case, petitioners, after referring to various instances of segregative acts, assert that they must be disregarded because "there is no evidence in this record that *any* of these past instances have a current impact" (Brief, pp. 62-3; see also Petitioners' Brief in No. 78-627, pp. 16-18). This approach is obviously at odds with the plain holding by this Court in the *Keyes* case, *supra* (413 U.S., at 208), quoted above, that a finding of intentional segregation shifts to the school authorities the burden of "proving that other segregated schools within the system are not also the result of intentionally segregated actions." The term "result," in this context, is equivalent to "impact."

Having failed to meet the burden thus described, petitioners in effect ask this Court to treat its decision in *Dayton I* as having overruled this aspect of *Keyes*. We submit that *Dayton I* should not be so construed.

The key paragraph in the *Dayton I* decision reads as follows (433 U.S., at 420):

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington v. Davis, supra*. All parties should be free

to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S., at 213.

It must be noted that this Court reached this conclusion at a point in the Dayton proceedings in which the Court of Appeals had made findings on only a limited number of acts of segregation, all subsequent to 1954. Pursuant to the language in the second sentence of this paragraph, further evidence was taken in the case and much more extensive findings were made by the Court of Appeals. Thus, this case can no longer be viewed as one "where mandatory segregation by law of the races in the schools has long since ceased." The supplemental record makes it clear that whatever segregation formerly existed has continued. The courts below have now found that intentional discrimination has continued up to the initiation of the suits.

Petitioners place heavy reliance on this Court's use in *Dayton I* of the word, "incremental," insisting that it requires an analysis of the effects of each separate act of segregation. We submit that "incremental" in this context means "cumulative" or "additive." It refers to the amount by which the acts of segregation, taken together,

added to the segregation that might otherwise have existed. The Court of Appeals was correct, we submit, in saying in the Columbus case (583 F. 2d, at 814) that:

Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation. Dayton does not, however, require each of fifty segregative practices or episodes to be judged solely upon its separate impact on the system. The question posed concerns the impact of the total amount of segregation found—after each separate practice or episode has added its "increment" to the whole. It was not just the last wave which breached the dike and caused the flood.

This interpretation is borne out by the balance of the sentence in *Dayton I* in which "incremental" appears. It refers to the effect of the violations on the distribution "of the Dayton school population," not its effect on separate parts of that population.

Additional support for this interpretation can be found in the fact that petitioners' approach would be unworkable. We do not believe that this Court could have meant, as the petitioners in the Columbus case assert (Petitioners' Brief, p. 56), that the *Dayton I* decision "mandates a detailed factual inquiry into the current effect of specific acts of discrimination by school officials, thereby sorting out that portion of racial imbalance in schools proximately caused by school officials from the portion of racial imbalance attributable to housing patterns and the discriminatory acts of others." Are the courts to assess separately the effect of each intentionally segregative use of optional attendance areas, discontinuous attendance areas, site selection and

racial assignment of teachers—all of which constitute parts of a systemwide policy?

The *Dayton I* decision was issued on the basis of findings by the Court of Appeals of only a limited number of segregative acts, all subsequent to 1954, and this Court apparently proceeded on the assumption that whatever official segregation existed before 1954 had “long since ceased.” In such a situation, in which the remedial order might well be limited to a few schools involved in isolated acts of segregation, an analysis of the specific impact of the acts in question might well be appropriate and feasible. But that is not the case here.

Neither can petitioners’ interpretation of *Dayton I* be justified by the phrase, “when that distribution is compared to what it would have been in the absence of such constitutional violations.” Certainly the kind of piecemeal analysis which petitioners believe that this language requires has never been conducted in the many cases in which this Court has required systemwide desegregation. Those cases, dealing primarily with states in which segregation was required by statute, establish that segregation must be eliminated “root and branch.” *Green* case, *supra*, 391 U.S. at 437-8. The *Keyes* case establishes that the same rules apply to the “Northern” type of official segregation (413 U.S., at 210).

We do not believe that the cases require the lower courts to determine how much of the existing segregation can be attributed to deliberate illegal acts and how much to, for example, residential segregation—a factor much empha-

sized by petitioners (see, for example, Petitioners’ Brief in No. 78-610, pp. 13-17, 63-4, 74-9). The existence of such segregation was noted by this Court in the *Swann* case and elicited this comment (402 U.S., at 26):

In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority’s compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority’s proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

There is nothing here to support the view that the courts in segregation cases are required to measure the impact of a systemwide segregation policy, as distinguished from the impact of such factors as residential segregation, on each school.

To the extent that a single sentence in this Court's opinion in *Dayton I* suggests the contrary, we urge this Court to make it clear that that was not its intention. We believe that it would be unrealistic to require plaintiffs and courts in school segregation cases to reconstruct the past and to establish what would have happened if the public school authorities had not violated their constitutional obligations. It is our considered opinion, as an organization that has been close to the struggle for equality during the past decades, that such a requirement would bring progress toward undoing past segregation to a halt.

For the reasons given above, we believe that the Court of Appeals properly found that, in both *Dayton* and *Columbus*, there was a systemwide policy of segregation in the public schools, which had a systemwide impact. This Court's decision in *Dayton I* establishes that, on these findings, the Court of Appeals was required to order the formulation and application of a systemwide remedy (433 U.S., at 420).

Conclusion

It is respectfully submitted that this Court should hold that, in both No. 78-610 and No. 78-627, the Court of Appeals properly found that a systemwide policy of racial segregation was in effect in the public schools at the time the suit was started, that that policy had a systemwide im-

pact and that a systemwide remedial order was therefore appropriate and necessary.

Respectfully submitted,

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DAYTON BOARD OF EDUCATION, et al.,
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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF THE NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., AND THE INTERNATIONAL
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AGRICULTURAL IMPLEMENT WORKERS OF AMERICA
AS AMICI CURIAE**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

- v -

GARY L. PENICK, et al.

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
Petitioners,

- v -

MARK BRINKMAN, et al.

=====

On Writs Of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., AND THE INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA AS AMICI CURIAE

Interest of Amici*

The NAACP Legal Defense and Educational Fund,
Inc., is a non-profit corporation established

*Letters of the parties consenting to the filing
of this brief by amici have been filed with the
Clerk.

under the laws of the State of New York. It was formed to assist black persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. (The Legal Defense Fund is not part of the National Association for the Advancement of Colored People (NAACP) although it was founded by it and shares its commitment to equal rights. The Legal Defense Fund has had for over 20 years a separate board, program, staff, office and budget.) For many years attorneys associated with the Legal Defense Fund have represented black parents and school children in school desegregation litigation before this Court and numerous lower courts, see, e.g., Brown v. Board of Education, 347 U.S. 483; Green v. County School Board, 391 U.S. 430; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1; Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189. The Legal Defense Fund believes that its experience gained in prosecuting school desegregation actions and assisting in the desegregation process in school districts throughout the Nation may benefit the Court in deciding the instant cases.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) represents some 1,500,000 active workers, and their families, in the automobile, aerospace, agricultural implement and related industries. Including spouses and children, UAW represents more than 4-1/2 million persons throughout the United States and Canada. The UAW, since its founding days back in the mid-30's, has worked diligently against all forms of discrimination and racism and in favor of an ever more integrated society. UAW believes in school integration in all areas of the Nation and is deeply concerned lest the Court's decision in these cases turn back the clock on school desegregation in the North. UAW is dedicated to an industrial society in which black and white workers live in harmony in the mills and factories and believes that a society separated in the schools will never be a society integrated in the mills and factories.

ARGUMENT

Introduction

A quarter century after Brown v. Board of Education, 347 U.S. 483, these cases bring the Court and Nation to an important crossing in the

road to the elimination of racial segregation in public schools. We urge the Court to affirm the decisions of the Court of Appeals for the Sixth Circuit, which has followed this Court's decisions, and to resist the demands of petitioners for restrictive rules which will have the practical effect of preserving racial segregation in the schools by effectively precluding its elimination.

One major thrust of this Court's leading decisions implementing Brown has been an emphasis on practical remedial rules which actually result in the elimination of segregation. That is the major contribution of such decisions as Green v. County School Board, 391 U.S. 430, United States v. Montgomery County Board of Education, 395 U.S. 225, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, and Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189. Prior to Green and Swann the holding of Brown often existed as a right without a remedy. After Green and Swann many communities desegregated for the first time because of the new emphasis on the affirmative duty to desegregate by means such as those approved in Swann. Keyes applied these principles to a northern school district which had pervasive segregation caused by official policies

without the sanction of state statute. Although segregation in the Denver schools in Keyes was not total as it had been in Green and Swann, the Court held that substantial systemic discrimination would call for a systemwide desegregation decree. Keyes thus guided lower federal courts in determining when to hold a partially segregated northern school system to be equivalent to, and subject to the same remedies as, a classic dual system. The Sixth Circuit has faithfully applied the Keyes rules in these Ohio cases.

The Columbus and Dayton school boards ask the Court to make a fundamental turn away from the course it charted from Brown to Keyes. Indeed, they seek to reverse Keyes by building upon a passage in the Court's 1977 Dayton I opinion which actually cited Keyes:

"The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. Washington v. Davis, supra. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found,

the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. Keyes, 413 U.S., at 213. (Dayton Board of Education v. Brinkman, 433 U.S. 406, 420.)

The petitioners would turn the "incremental segregative effect" language of Dayton I into a rule that would measure the rights of minorities with a "micrometer" - to borrow Judge Weinstein's apt word.^{1/} If this Court interpreted the "incremental effect" requirement as a full-fledged retreat from Keyes it would turn its back on the problem of segregation by administrative practice and policies in those communities which never had statutory school segregation. Such a retreat from Keyes would cut off any hope of integrating the schools of many of our nation's communities and represent a tragic turning away from Brown. The Sixth Circuit read Dayton I in a way which harmon-

^{1/} Judge Jack B. Weinstein's as yet unpublished speech at the Benjamin N. Cardozo School of Law criticized rulings which "measure compassion for minorities and the poor with a micrometer."

ized its language with Keyes, Swann and Green and rejected the call for a fundamental retreat in the effort to vindicate the right to a nondiscriminatory public education. We submit, in the argument which follows, that the Sixth Circuit was entirely correct in finding constitutional violations in both cases, and in concluding that the violations were sufficiently substantial in their effects as to demand systematic, and not piecemeal, remedies.

I. The Court Of Appeal's Findings of Constitutional Violations Are Consistent With This Court's Prior Decisions.

A. The Dayton and Columbus School Boards Maintained Intentionally Segregated Systems Prior To The Brown Decision And Failed To Take Affirmative Steps To Desegregate Prior To These Lawsuits.

Two unanimous panels of the Sixth Circuit found that the Columbus and Dayton school boards had engaged in intentional racial segregation in violation of the Equal Protection Clause of the Fourteenth Amendment. A common feature of the two cases, found by both panels, is that the school systems were discriminatory at the time of Brown and that steps to desegregate them had never been undertaken by the school authorities. The 1954

segregation was extensive, affecting at least 54 percent of Dayton's black pupils and 46 percent of Columbus' black elementary and junior high pupils, and the present segregation can be directly traced to that foundation. See infra.

Columbus.

In the Columbus case the panel (Judges Edwards, Lively and Merritt) held that the failure to desegregate the pre-1954 de jure system would have been a sufficient basis to affirm the district court's finding of present unconstitutional segregation even if there had been no other proof. (Of course there was extensive proof of recent segregative actions as well, as we shall discuss below.) District Judge Duncan's careful analysis of pre-Brown segregation (429 F. Supp. at 234-238) is briefly summarized by the Court of Appeals (583 F.2d at 796-799), which observed that Judge Duncan's finding that the Columbus system was dual and unlawful in 1954 were not seriously challenged in the briefs or oral argument on appeal. 583 F.2d at 798.^{2/} Similarly in this

2/ The "enclave of separate, black schools," i.e., Champion Junior High School and four elementary schools, Mount Vernon, Garfield, Felton and Pilgrim, was created, maintained and expanded from 1909 forward in east-central Columbus through the use of classic segregatory devices such as the assignment of faculty and staff on racially identifiable bases, gerrymandering of zones, and

Court the board devotes but two paragraphs of its over forty-page fact statement to the pre-1954 era, dismissing the segregatory practices as "reprehensible" but without current impact on the system. Petitioners' Brief, No. 78-610, p. 39. However, the Courts below demonstrated that the "reprehensible" discrimination was directly connected to current conditions. By the time of Brown the Board had created an enclave of five all-black schools which deliberately isolated a substantial portion of the black children in the system in all-black schools all with black principals and a heavy concentration of black teachers. Although segregation in Columbus schools was not total in 1954, the Court of Appeals found that intentional segregation did affect "a substantial portion of black students, as shown by the District Judge's findings and as supported by the record." 583 F.2d at 801. Approximately 46 percent of black elementary and junior high pupils

2/ Cont'd.

the use of optional zones. See, Keyes v. School District No. 1, supra, 413 U.S. at 201-202; Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 20-21. The district court expressly noted that "[d]efendants do not appear to assert that these results were an accommodation to the neighborhood school concept." 429 F. Supp. at 236.

in the system attended these five de jure segregated schools.^{3/} The courts below found that the 1975-76 pupil assignment figures demonstrate that the board had never carried out its continuing constitutional duty to desegregate the Columbus schools in two and a half decades. 583 F.2d at 800.

Dayton.

The panel in the Dayton case (Judges Phillips, Peck and Lively) reached a similar conclusion:

Although we believe this finding to have been implicit in the previous decisions of this court, we now expressly hold that at the time of Brown I, defendants were intentionally operating a dual system in violation of the Equal Protection Clause of the fourteenth amendment. Our holding is based upon substantial evidence, much of which is undisputed. The finding of the district court to the contrary [footnote omitted] is clearly erroneous, Rule 52, Fed. R. Civ. P., and is based upon both a failure to attribute the proper legal significance to the evidence of pre-Brown I violations and upon various errors of law. 583 F.2d at 247.

^{3/} In 1954-55, systemwide enrollment was 55,354 pupils, including 32,642 elementary students, 12,647 junior high students and 8,348 high school students.

The District Judge acknowledged intentional segregation existed prior to Brown, but dismissed the case and granted no relief on the ground that "[a]cts of intentional segregation which ended in excess of twenty years ago are not constitutional violations in the absence of a showing of an incremental segregative effect thereof." Pet. for Certiorari, No. 76-627, p. 188a. In reversing this conclusion the Sixth Circuit noted that the Dayton Board had an overt policy of faculty segregation which forbade black teachers

3/ Cont'd.

Pl. L. Ex. 61 at p. 28. Black enrollment was approximately 15 percent in this period. 429 F.Supp. at 268; 583 F.2d at 799. The approximate number of black students was 8,303 pupils systemwide, 4,896 elementary pupils and 1,897 junior high.

The 1954-55 enrollment at black Champion junior high was 739, and the enrollment at black Beatty Park (which replaced the Mount Vernon school), Felton, Garfield and Pilgrim elementary schools was 2,384. Pl. L. Ex. 61 at pp. 22-24.

Thus, 48.7 percent of black elementary students (2,384 of 4,896) in the Columbus school system attended the four black schools, and 39.0 percent (739 of 1,897) of black junior high students attended Champion. Overall, 46.0 percent of black elementary and junior high students (3,123 of 6,793) attended the five schools, and 37.6 percent of black pupils systemwide (3,123 of 8,303) attended the five schools.

from teaching white or mixed classrooms until at least 1951-52 and effectively continued the policy through the 1970-71 school year. 583 F.2d at 247-248. The court found the faculty segregation policy "inextricably tied to racially motivated student assignment practices." Ibid. For example, by staffing schools such as Dunbar High with all-black faculties who were forbidden to teach white pupils the board established a citywide all-black high school which operated so much apart from Dayton's white system that its athletic teams were forbidden to compete with other Dayton schools. This total separation was exactly in the classic pattern of dual systems in the Deep South. To be sure, some black pupils were permitted to attend other Dayton high schools which were predominantly white, but they were segregated and discriminated against within schools by practices such as "separate facilities, including separate swimming pools and locker room facilities . . . maintained at Roosevelt [school] for black and white students" until about 1950 (583 F.2d at 251), the total exclusion of black children from the swimming pool at Steele High School (A. 423-

424) and the segregation of black children in the back rows of classes they did attend with whites. (A. 90). The Court of Appeals noted that the "choice" of attending Dunbar was for many blacks "merely a less drastic alternative than attending other schools which practiced intra-school segregation and discrimination." 583 F.2d at 250.

The Court of Appeals described comparable manipulations which created all-black elementary schools, and concluded that "at the time of Brown I, approximately 54.3 percent of the black pupils in the Dayton school system were assigned to four schools that had all black faculties and student bodies."^{4/} 583 F.2d at 251. The Court of Appeals said that "Garfield, Willard, Wogamon and Dunbar schools were deliberately segregated or racially imbalanced due to the actions of defendants" (583 F.2d at 251), that this discrimination was not "confined in one distinct area" (583 F.2d at 252),

^{4/} The Court of Appeals found that beginning in 1912, the Dayton school board continuously maintained first all-black classes and then all-black schools on the West Side of Dayton through the use of "subterfuge[s] to segregate children," (Clemons v. Board of Education of Hillsboro, Ohio, 228 F.2d 853, 856 (6th Cir. 1956)) such as student transfer policies, assignment of faculty and staff on a racially identifiable basis, and the use of dual overlapping attendance zones. 583 F.2d at 249-251.

but rather that the "segregative practices at the time of Brown I infected the entire Dayton public school system" (Ibid.) by working to "maintain other schools in the district as predominantly white." (Ibid.) The Court found that the district not only failed to adopt an effective desegregation program after Brown, but that its actions "actually have exacerbated the racial separation existing at the time of Brown I." (583 F.2d at 253).

Columbus and Dayton

In light of the findings of the Court of Appeals that both systems were dual at the time of Brown and that there was no effort to dismantle these dual systems, the conclusions of constitutional violation are firmly based on Keyes. In Keyes, after first noting that segregation in Denver had not been statutory, the Court's opinion stated that "nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." 413 U.S. at 201. The Keyes opinion held that in the absence of a showing that racially inspired school board

actions were limited to "separate, identifiable and unrelated units," then "proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system." There is no plausible claim in either Dayton or Columbus that the pre-1954 discrimination was limited to "separate, identifiable and unrelated units." Rather, the Court of Appeals properly found that such discrimination was sufficiently integral and systematic to render them dual racial systems. And as the Court said in Keyes, "where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' Brown II, supra at 301." 413 U.S. at 203.

The main significance of 1954 is that the board's constitutional duty to desegregate stems from that time. The finding that the segregated situation which existed in 1954 still exists in the 1970's demonstrates that no effective desegregation plan, (Green v. County School Board, supra, 391 U.S. at 439-440) had been implemented in Dayton or Columbus. Of course if either system had become integrated in the years since 1954, then an inquiry about new constitutional violations would be required. But the

segregated schools of the 1970's trace directly to the pre-1954 segregation without any intervening era of desegregation. Indeed, there is no claim in either case that an effective desegregation plan has been implemented. Both boards defended on the ground that they were not operating dual systems in 1954. Having lost on this defense, and having failed to show that the systems were ever subsequently desegregated, Green and Swann require a judgement against the defendants.

As we shall discuss below, the post-1954 actions of the school authorities were not racially neutral. But even if defendants arguments of neutrality were valid, Swann teaches that "an assignment plan is not acceptable simply because it appears to be neutral." 402 U.S. at 28. Even if the Dayton and Columbus authorities' actions since Brown are assumed arguendo to have been neutral, the results obtained from their policies which concededly eschewed any affirmative desegrative action failed to "counteract the continuing effects of past school segregation." Swann, *supra*, 402 U.S. at 28. Accordingly, the Sixth Circuit was correct in finding systemwide constitutional violations, and systemwide efforts

to desegregate the systems are required by Swann and Keyes.

- B. In Addition To The Failure To Take Affirmative Actions To Desegregate Dayton and Columbus Following Brown, The School Boards Maintained Racially Segregated Systems By Aggravating Discriminatory Acts.

Both Sixth Circuit panels rejected the school boards' arguments that their conduct since the Brown decision had been racially neutral, and instead found the existence of illicit intentionally segregatory actions and policies, with systemwide impacts.

Columbus.

In the Columbus case the Sixth Circuit panel endorsed the trial judge's extensive findings that the school authorities used their site selection and new school construction policies intentionally to segregate black children in the many schools constructed between 1950 and 1975. The panel held that "the District Judge was justified in relying in part on the history of the Columbus Board's site choices and construction program in finding deliberate and unconstitutional systemwide segregation." 583 F.2d 804.^{5/} The segregation of

^{5/} The district court described in detail the site location and establishment of attendance boundaries for Gladstone (1965) and Sixth Avenue (1961) elementary schools in the area southwest

faculty members in racially identifiable black and white schools was also maintained into the 1970's. 583 F.2d 804-805.^{6/} A series of specific instances of gerrymandering, pupil attendance options, and discontinuous pupil assignment areas which operated to segregate black students were also set forth in both opinions below (583 F.2d

5/ contd.

of the east-central black community, and for Cassady and Innes Road elementary schools in 1975 in the north Mifflin annexation area. 429 F. Supp. at 248-251. Other segregative construction occurred at all levels in and around the expanding black community between 1950 and 1975, viz., the Arlington Park area to the northeast, the mixed central city area, the Marion-Franklin Township area, another annexed area east of Marion-Franklin Township, the area north of the central black community and in the east-central area itself. See, Respondents' Brief, No. 68-610, pp. 50-76.

6/ The teacher assignment policy ended in 1974 only after independent administrative proceedings before the Ohio Civil Rights Commission resulted in reassignment of faculty to approximate the systemwide racial composition. 429 F.Supp. 238, 259-260. The administrative proceedings, however, did not concern discriminatory administrative staff assignment, which continued unabated. Thus, in 1975-76, 73.3 percent of black administrators were assigned to schools with 70-100 percent black student bodies. 429 F. Supp. at 240.

at 805-813).^{7/} The Court of Appeals found these actions are "significant ... in indicating that the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." 583 F.2d at 805. The findings of manipulation of the neighborhood school concept for segregative purposes effectively destroys the board's claim to neutrality in its conduct since Brown.

7/ The court below described in detail the segregatory use of gerrymandering and optional attendance zones involving the Near-Bexley Option in a small white enclave east of Columbus' black east-central core area, and the Highland, West Mount and West Board Elementary Options. 429 F. Supp. at 243-247, 271-274. Other such options involved the Downtown area, Pilgrim elementary, Franklin-Roosevelt junior highs, Central-North high schools and East-Linden-McKinley high schools. See, Respondents' Brief, No. 78-610, pp. 45-58.

The courts below also detailed the segregatory use of discontinuous pupil assignment zones involving Moler-Alum Crest elementary schools, and Heimandale-Fornof elementary schools. 429 F. Supp. at 247-248, 275. Other discontinuous zoning involved the Near-Bexley options, Arlington Park-Eleventh Avenue-Leonard elementary schools, Arlington Park-Linmoor junior highs, Arlington Park-Medina junior highs and, Pinecrest-Jones Road-Barnett elementary schools. See, Respondents' Brief, No. 78-610, pp. 50-68.

Judge Edwards' opinion dutifully analyzed the finding of violation in Columbus in accordance with the Dayton I requirement that the incremental segregative effect of such violations be considered. 583 F.2d at 814. Judge Edwards described five aspects of the violation (including the pre-1954 conduct discussed above) as necessarily systemwide in their impact:

(1) The pre-1954 establishment of "five schools intentionally designed for black students and known as 'black' schools" had a systemwide effect;

(2) The post-1954 failure to desegregate the system had systemwide impact;

(3) The school construction and siting policy was systemwide in its impact;

(4) The student assignment policy which produced the large majority of one-race schools was held to be systemwide;

(5) The segregated faculty assignment policy affected both black and white students systemwide and racially identified the schools.

The panel concluded with its own holding that 6,600 pages of the record supported a finding tracking the language of Dayton I that the policies and practices of segregation had systemwide application and impact. 583 F.2d at 814.

The district court expressly held that "[t]he evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state boards." 429 F. Supp. at 266. This finding applied to 1975-76 statistics, means that 65.5 percent of the black pupils in the Columbus public school district were "substantially and directly affected" by de jure segregation.^{8/}

Dayton.

Similarly, Judge Phillips, writing for the panel in the Dayton cases, thoroughly reviewed the record of school authorities' conduct since Brown and concluded that there were substantial post-Brown violations. 583 F.2d at 253-257. The court found discrimination in faculty assignments. Pre-Brown racial faculty assignment policies were

^{8/} 65.6 percent of black students attended schools with 50 percent or greater pupil enrollment. See Pl. Ex. 392. At the elementary level 74.5 percent of black students were attending predominantly black schools, 56.8 percent at the junior high level and 53.6 percent at the high school level.

maintained through 1969 and effectively continued in practice through 1970-1971. 583 F.2d at 253, 503 F.2d at 697-700. The board was still opening new all-black schools with all-black faculties in the 1960's, e.g., McFarlane and the new Dunbar. 583 F.2d at 253-254. The court rejected the contention that the racial imbalance was adventitious, pointing out that optional attendance zones were used in the 1970's for racially segregative purposes. 583 F.2d at 255.^{9/} The court also made findings that school construction and site selection decisions as well as grade structure and reorganization decisions had contributed affirmatively to the continuation of the segregated system set up prior to 1954. 583 F.2d at 256-257. The policy of replacing inner city schools with sometimes irregularly sized schools in the same attendance zones and building new schools at the peripheries of the expanding Dayton community far from inner city areas resulted in 22

9/ See, e.g., optional attendance zones involving Dunbar, Patterson Coop, Colonel White-Kiser, Roosevelt-Fairview and White, Residence Park-Adams, Westwood-Gardendale, Jefferson-Brown and Jefferson-Cornell Heights. 503 F.2d at 695-696, Respondents' Brief No. 78-627, pp. 44-51.

of 24 new schools and 78 of 86 additions that were 90 percent or more black or white. 583 F.2d at 255. The school board's reorganization of 20 elementary schools into a middle school system in 1971-72, as the Ohio State Department of Education put it, added "one more action to a long list of state imposed activities which are offensive to the Constitution and which are degrading to school children." 583 F.2d at 256, 503 F.2d at 702.^{10/}

Finally, the panel considered the incremental segregative effect of what it called the "defendants' most egregious practices." 583 F.2d at 258. Like the panel in the Columbus case, it found that pre-Brown segregation "'affect[ed] a substantial portion of the schools, teachers and facilities' of the Dayton schools and, thus clearly had systemwide impact." 583 F.2d at 258. The court also said that post-Brown acts "perpetuated and increased public school segregation in

10/ Although the Court of Appeals did not find it necessary to rely on such proof in its last opinion, the Dayton school board also pursued segregative transfer and transportation policies. 503 F.2d at 703; Respondents' Brief, No. 78-627, pp. 53-59.

Dayton." 583 F.2d at 258.^{11/}

These solid findings of post-Brown discrimination reinforce the conclusion that the Dayton and Columbus boards have not only failed to fulfill their obligations to dismantle the dual systems they created prior to Brown, but affirmatively contributed to the segregation extant today. The depth and detail of the findings is impressive. The conclusions of segregative intent are based upon objective facts in the records and should be affirmed.

II. The Sixth Circuit Has Properly Applied the Equitable Principle That A Remedy Must Be Reasonably Related To The Violation

- A. The Dayton I Requirement Of Findings Of Incremental Segregative Effect Should Either Be Interpreted In Harmony With Keyes, As The Sixth Circuit Read It, Or It Should Be Overruled.

^{11/} In 1971-72, the year the action was filed, the Dayton school district had 54,000 students, 42.7 percent of whom were black. There were 69 schools; 49 had student enrollments 90 percent or more of one race (21 black, 28 white), 75.9 percent of black students being assigned to the 21 black schools. 503 F.2d at 694-695, 583 F.2d at 254.

Both panels of the Sixth Circuit read this Court's Dayton I opinion as reaffirming the Keyes holding that where segregation policies had a systemwide impact systemwide relief is required. Both courts deemed that it was compliance with Dayton I to determine that the identified segregative policies of the two school board were not isolated or limited to insubstantial fragments of the systems, but were instead systemwide in their application. Both panels acknowledge the Dayton I language which called for findings about the "incremental segregative effect" of the violations and a comparison of the present racial distribution of the pupils with "what it would have been in the absence of such constitutional violations." (583 F.2d at 257; 583 F.2d at 813). However, neither opinion deemed it necessary to embark on a highly supposititious and hypothetical reconstruction of where the pupils might be if the pervasive segregation policies had never been implemented. Where segregation is isolated, as for example by a recent gerrymander that affects a few schools and pupils, one might reasonably attempt such a reconstruction, and reach a conclusion to limit the remedy to a few schools. But where, as in these cases, so many aspects of the segregation

policy were of long standing and were systemwide in their effects there can be no meaningful reconstruction of what might have occurred. This Court could not have intended to so burden the process of desegregation.

Dunbar High School in Dayton illustrates the difficulty with such a reading of Dayton I. As we have described above, Dunbar was established as a citywide high school for blacks, with an all-black faculty, and a policy forbidding blacks to teach whites. It was named for a well-known black poet. Blacks were either automatically assigned to Dunbar or induced to attend by other means including the discouraging effects of segregative and discriminatory treatment in the white schools. Whites were excluded from Dunbar by the overt faculty policy. It is difficult to imagine how the attendance pattern of all of Dayton's high schools might have developed if Dunbar had never been established and maintained as the citywide school for blacks only, or if it had ever been desegregated after being established as a one-race school. No witness could testify with any certainty whether black citizens would have located their homes near other high schools if their

children had been welcomed there or that whites would have lived near Dunbar if it had been an integrated school from the beginning. Segregated schools were an integral part of the ghettoization of blacks. Who can know to what extent the ghettos of Dayton and Columbus would be different, if the schools had been operated on a non-discriminatory basis, and had taught a lesson of non-discrimination and equality instead of a lesson of white supremacy.

If the Dayton I holding does limit the right to a desegregated education to schools which plaintiffs can prove would have been integrated absent specific discriminatory conduct, it would resurrect the school-by-school fractionating of these cases which the majority rejected in Keyes, over dissents by Mr. Justice Powell and Mr. Justice Rehnquist. In granting a stay in Columbus, Mr. Justice Rehnquist indicated a view that the Sixth Circuit was misinterpreting the Court's Dayton I mandate. Columbus Board of Education v. Penick, 58 L Ed 2d 55 (Justice Rehnquist in chambers). If that view is correct (and we urge above that it is not) then we believe that the Dayton I requirement should be overruled. If plaintiffs have the burden of proving a basis for

desegregation school-by-school, or of calculating the precise numbers of pupils affected by each segregationist act, the Dayton I rule will impose a practical barrier to any meaningful relief even if the case of egregious overt segregation such as at Dunbar High.

We ask the Court to adhere to the express holding of Keyes that plaintiffs in a school desegregation case should not "bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system," and that "a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities" was a proper predicate for finding that a system was a dual system. 413 U.S. at 200-201. This was the Court's "common sense" conclusion considering the reciprocal effect that a policy of keeping some schools black has in keeping other schools white, and the effect that earmarking certain schools as black would have on the racial composition of the neighborhoods in the metropolitan area. 413 U.S. 202-203. This holding of Keyes seemed to have been clear at the time to the members of the Court who dissented. The dissenting opinion of Mr. Justice Powell objected to a systemwide remedy in part because although

the school board was "legally responsible for some of the segregation that exists," he believed that if they had properly discharged their "constitutional duty ... over the past decades, the fundamental problem of residential segregation would persist." 413 U.S. at 249. Mr. Justice Rehnquist dissented, objecting to the application of the Green decision's affirmative desegregative duties to Denver, and relief that might require that "pupils be transported great distances throughout the district to and from schools whose attendance zones have not been gerrymandered." 423 U.S. at 257. The majority rejected this argument with a reaffirmation of Green. Keyes, supra, 413 U.S. at 200-201, note 11.

It is this central holding of Keyes that petitioners seek to reverse through their reading of Dayton I. We believe, however, that the Keyes holding about the interrelationship between segregative practices among schools within a system is as valid today as when Keyes was decided six years ago. The contrary rule that plaintiffs in a school desegregation case should have the burden of school-by-school justification of a desegregation remedy is as invalid today as when rejected in Keyes.

Where the school-district has been shown to have engaged in a segregation policy which has had substantial impact, the same "[c]onsiderations of 'fairness' and 'policy'" (Keyes, supra, 413 U.S. at 214) which led to the Keyes holding as to the allocation of the burden of proof still apply. Nothing has changed since 1973 which requires this Court to adopt new procedures and remedies for the disestablishment of northern public school segregation. The lesson of over two decades of school desegregation jurisprudence is that the substantive right to equal educational opportunity is governed by the law of procedure and remedy. We therefore respectfully submit that these cases present the Court with no less an issue than the future of school desegregation in the North: "[t]o take away all remedy for the enforcement of a right is to take away the right itself." Poindexter v. Greenhow, 114 U.S. 270, 303.

We urge the Court to affirm the rule of Green and Swann that any school district which has violated the constitutional rights of its black students must undertake the maximum feasible amount of desegregation. Their duty is to "make every effort to achieve the greatest possible

degree of actual desegregation, taking into account the practicalities of the situation" and considering the use of "all available techniques including the restructuring of attendance zones and both contiguous and noncontiguous attendance zones." Davis v. School Commissioners of Mobile County, 402 U.S. 33, 37; see Swann, supra, 402 U.S. at 22-31. That rule would be entirely crushed and thwarted in most of the Nation by a doctrine which considers the process of desegregation as a necessary evil to be applied grudgingly and sparingly as if with a "micrometer" -- to repeat Judge Weinstein's characterization.

B. These Cases Will Determine The Future Of School Desegregation In The North.

In a February 1979 survey the United States Commission on Civil Rights found "that the adjustment of parents and students to desegregation continues and the predictions of serious racial conflict and a deteriorating quality of education have proved groundless."^{12/} The Commission found that school desegregation" not only continues to

^{12/} U. S. Comm. on Civil Rights, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT, ii (Feb. 1979).

be a constitutional requirement but a vital national goal that we believe is broadly supported by the American people." Id. at iii. The Commission found that integration was a success in many communities, including notably Charlotte-Mecklenburg, North Carolina, and Denver, Colorado, the communities involved in Swann and Keyes. Id. at 34-35, 40-41, 72. This Court's leadership has had a salutary effect in many communities. Without such continued leadership, however, the future of integration in the North would be bleak. The Commission also found that in some districts and regions--notably the Northeast and North Central regions--segregation remains at discouragingly high levels. Id. at ii, 20.

The specter of endless segregation of the races in the public schools of the North haunts these cases. The adoption of petitioners' position would remove the light of hope for an integrated society at the end of the tunnel, and with it the essential trust and confidence between the races on which our national stability and progress depend.

This Court might have chosen one or more direct routes to desegregation of the public schools of the North rather than the labyrinthic "de jure" inquiry. The Court might have found

state-induced and supported housing segregation patterns sufficient ground for invalidating and remedying the concomitant school segregation.^{13/} Or the Court might have held that school authorities must advance a truly compelling interest before perpetuating by student assignment the racial isolation of our urban residential patterns.^{14/} Finally, this Court under the broad protective provisions of the Thirteenth and Fourteenth Amendments might have invalidated and provided remedies for de facto school segregation.^{15/}

These are routes which would promise nationwide school desegregation rather than a continuing double standard between North and South predicated on past de jure conduct. But this Court has instead relied in Keyes upon the narrower route for Northern school desegregation through findings of school board discriminatory intent and presumptions based thereon. Now petitioners would render

13/ Cf., Milliken v. Bradley, 418 U.S. 717, 755 (1974) (Stewart, J. concurring).

14/ Silard, Toward Nationwide School Desegregation: A "Compelling State Interest" Test of Racial Concentration in Public Education, 51 N. Car. L. Rev. 675 (1973) (passim).

15/ Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 40 N.Y.U.L. Rev. 285 (1965).

Keyes meaningless and unworkable and thus make permanent the pattern of segregated public schools in the North. Those who have devoted their lives to laboring in the vineyards for an integrated society believe they have earned the right to speak plainly: If this Court were to accept petitioners' position, segregated schools (and as a consequence a more segregated society) will be the legacy of the Court, just as surely as a segregated society was the legacy of the Court that decided the Civil Rights Cases, 109 U.S. 3 and Plessy v. Ferguson, 163 U.S. 537.

CONCLUSION

It is respectfully submitted that the judgments of the United States Court of Appeals for the Sixth Circuit in these cases should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et als.,

Petitioner,

v.

PENICK, et als.,

Respondent.

No. 78-627

DAYTON BOARD OF EDUCATION, et als.,

Petitioner,

v.

BRINKMAN, et als.,

Respondent.

**BRIEF OF THE FAIR HOUSING COUNCIL
OF BERGEN COUNTY, NEW JERSEY
AMICUS CURIAE**

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**BRIEF OF THE FAIR HOUSING COUNCIL
OF BERGEN COUNTY, NEW JERSEY
AMICUS CURIAE**

Interest of Amicus

The Fair Housing Council of Bergen County, New Jersey, is a non-profit membership organization. Its 4,000 members are caucasian and minority citizens committed to the goal of equal opportunity in housing and the benefits to be derived from an integrated living experience.

The Council provides housing counselling and assistance to minority families seeking housing within Bergen County and, where necessary, provides legal assistance to individuals who have been denied housing because of their race. In addition, the Council is challenging the racial steering of real estate brokers throughout the County in a federal class action suit.

The goals and interests of the Fair Housing Council have been seriously impeded by patterns of school segregation. White families are routinely discouraged by real estate brokers from moving into integrated neighborhoods because of the racial composition of those schools. Black families, on the other hand are told that they will not be "comfortable" in white communities and that their children will be ostracized in the "white" schools of such neighborhoods. The racial composition of the schools is the single most important factor defining which neighborhoods are "open" to blacks. In the absence of meaningful desegregation of the schools, the residential choices of black families will continue to be restricted. The practices and techniques of racial exclusion are not unique to Bergen County, but may be found all across the nation. Indeed, they were demonstrated to exist in the instant cases.

Reversal of the Sixth Circuit's opinions implementing systemwide desegregation remedies will be a signal to communities throughout this country to continue to "stonewall" desegregation efforts and to maintain their exclusive white school systems. For these reasons, the Fair Housing Council of Bergen County joins as *amicus curiae* in urging affirmation of the Circuit Court's Opinions.

Amici have received the written consents of petitioners and respondents to file this brief. Those consents have been filed with the Clerk of the Court concurrently with the filing of this brief.

ARGUMENT

I.

A Systemwide Remedy Is Mandated Where, as in the Cases at Bar, Petitioners Have Failed to Meet Their Burden of Proving That Despite Their Intentional Segregative Acts the Same Degree of Racial Segregation Would Exist in the Schools Because of Residential or Other Factors Which They Did Not Control.

Petitioners have failed to show that the existing racial imbalance within their respective school systems was the result of social dynamics or acts of others for which they had no responsibility. *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 260, *aff'd* 583 F. 2d 787 (6th Cir. 1978); *Brinkman v. Gilligan*, 583 F. 2d 243 (6th Cir. 1978). This failure is grounded on two erroneous assumptions. First, Petitioners maintain that residential patterns have completely negated any segregative impact which any intentional segregative acts of the school board might have had. Second, they maintain that the mere passage of time since the last "alleged" discriminatory act of the school board makes any effect of such action so attenuated as to excuse liability. Both assumptions fly not only in the face of the legal standards heretofore announced by this Court, but in the face of what this Court has termed a "common sense" understanding of the dynamic interaction between residential and school patterns. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 203 (1973).

A. Petitioners May Not Rely on Residential Patterns to Excuse or Negate Their Intentional Acts of Segregation Within the School System.

In *Penick v. Columbus Bd. of Education*, *supra* (6th Cir. 1978), the Court of Appeals for the Sixth Circuit affirmed the finding of the lower court that at the time of *Brown I*,

Columbus Petitioners were operating a dual school system and hence were under an affirmative duty to desegregate that system. *Id.* at 798-799, *aff'g*, 429 F. Supp. at 260-61. Similarly in *Brinkman v. Gilligan*, *supra*, another panel of the Sixth Circuit reached the same conclusion with respect to the Dayton schools, setting aside the clearly erroneous findings of the district court to the contrary. 583 F. 2d at 247. Both Courts proceeded to find that plaintiffs-respondents had, at the least, carried their prima facie burden of establishing intentional segregation within a substantial portion of the school district, *Brinkman v. Gilligan*, *supra*, 583 F. 2d at 258. *Penick v. Columbus Bd. of Educ.*, *supra*, 583 F. 2d at 815. Therefore the burden shifted to Petitioners to overcome the presumption that the current racial composition of the school population reflected the system-wide impact of these violations. *Keyes*, *supra*, 413 U.S. at 208. Petitioners have failed to meet that burden. Significantly, the Court of Appeals was not required in either of the cases to rely upon the *Keyes* presumptions due to the direct nature of the proof.

Petitioners argue herein, that whatever effects their actions may have had on the racial composition of the schools have been negated by residential patterns. Hence a systemwide remedy is not appropriate. Petitioners' argument misconstrues the applicable burdens in fashioning a school desegregation remedy. Plaintiffs' burden is to establish a systemwide violation within a substantial portion of the school district. *Keyes*, *supra*, 413 U.S. at 211, *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). Plaintiffs are under no burden to establish the actual effect of such violations on the residential patterns of the school district. Rather, a school board which has been found guilty of a constitutional violation is in the same position as any other defendant who wishes to "mitigate damages". It must show by a preponderance of the evidence that the

same result would have been reached in the absence of its impermissible actions. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 271, at n. 21 (1977).

While Petitioners' burden at this stage of a school desegregation case is a heavy one, which may be difficult to meet, *Evans v. Buchanan*, 447 F. Supp. 982 (D. Del. 1978), it is consistent with equitable principles of fairness. It is only appropriate that after plaintiffs in a school desegregation case have borne the increasingly heavy burden of establishing intentional *de jure* segregation in a significant portion of the school district or the entire system that the offending party should bear the burden of restricting any remedy flowing from that violation.

Petitioners have failed to show either that the same degree of segregation would have existed in the Columbus and Dayton School systems, absent their actions, or that the remedies approved by the courts below impose a greater degree of desegregation on the Dayton and Columbus systems than would have been possible absent the remedying of Petitioners' unconstitutional acts. Rather, Petitioners claim to meet their burden by pointing to the existence of residential segregation as "proof" that the schools would have been segregated anyway. Avowing no control over housing discrimination, Petitioners conclude that they no longer have any responsibility for the system which their acts put in place.

This approach ignores the symbiotic relationship between schools and housing patterns which was recognized by this Court in *Swann v. Bd. of Educ.*, 402 U.S. 1 (1971).

The construction of new schools and the closing of old ones are two of the most important functions of local school authorities . . . The result of this will be a deci-

sion which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

Id. at 20-21.

Further, this Court noted that the building and closing of schools in certain areas

does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning" further lock the school system into the mold of separation of the races.

Id. at 21.

In the instant cases, the records below clearly establish Petitioners' intent and success in establishing and maintaining racially identifiable schools throughout. By their selection of school sites, closing of schools, assignment of faculty, and busing of neighborhood black youths past white schools, Petitioners acted to insure that schools would open and remain racially identifiable. Similarly, Petitioners acted to insure that white children, regardless of their residence in or near integrated neighborhoods could attend "white" schools regardless of whether such attendance zones were contiguous or not, and regardless of whether nearby "black" schools were under-utilized. See RBP* at

* RBP refers to Respondent's brief in *Penick*; RBB refers to Respondent's brief in *Brinkman*.

pp. 10-96, RBB at pp. 12-73. *Penick v. Columbus Bd. of Educ.*, *supra*, 583 F.2d at 795-798; *Brinkman v. Gilligan*, *supra*, 583 F.2d at 249-256.

The impact of Petitioners' actions on their school systems cannot be isolated from their reciprocal impact on the racial composition of neighborhoods surrounding the schools. Referring to many of the tactics used by Petitioners herein, this Court in *Keyes*, *supra*, emphasized the interaction of school policies and residential segregation

... the use of mobile classrooms, the drafting of student transfer policies, the transportation of students and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.

Keyes, *supra*, 413 U.S. at 202.

The school which Petitioners have established as racially identifiable remains in the community long after the original residents have moved. It serves as a central magnet in defining the neighborhood. Families in search of housing often use school attendance zones in making their housing decisions.¹ Substantial evidence in *Penick v. Columbus*, *supra*, that the nature of the schools is an important consideration in real estate transactions, buttresses this conclusion.

In making housing choices, white families often assume that districts with integrated schools are inferior not only

¹ Taeuber, *Demographic Perspectives*, 21 Wayne L. Rev. 833, 843 (1975).

because it is believed that school authorities rapidly lose interest in integrated or predominantly black schools, see e.g. Campbell and Maranto, "The Metropolitan Educational Dilemma," *The Manipulated City* 305, 310, Gale and Moore ed. (1975), but because whites continue to operate under the misperception that blacks and racial minorities are inferior.² This assumption has been bolstered and encouraged by the treatment which black students have encountered from school officials. As the district court in *Brinkman v. Gilligan*, 446 F. Supp. 1232, (SD Ohio 1977) acknowledged, such treatment had been "at least inhumane and by present standards reprehensible. *Id.* at 1237.

Segregated school patterns also impact on the decisions of minority homeseekers. As *amici's* experience in securing housing for minority families within predominantly white areas demonstrates, such families are often deterred from moving into such communities because their children may be the only minority students in the "neighborhood school." In the absence of true desegregation of the schools, such children remain isolated and subject to being ostracized by their classmates. This Court has recognized the courage required of black children to break with tradition to get into white schools. *Green v. County School Bd. of New Kent Cty.*, 391 U.S. 430, 435-6 (1968).

In the absence of segregated residential patterns, Petitioners' neighborhood school system may have been appropriate:

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. *But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.*

² See note 7, *infra*, and accompanying text.

Swann, supra, 402 U.S. at 28. (emphasis supplied). As the Sixth Circuit has held, this is precisely the situation in the cases at bar. Further, Petitioners' alleged neighborhood school system was quickly abandoned when the neighborhood was an integrated one.

Any argument which *Dayton* Petitioner may make denying the interaction of school policies and residential composition is belied by their own resolution allegedly calling for faculty desegregation:

The administration will continue to introduce negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers.

Such resistance could only have come from the white community since black parents were consistently petitioning the school board for the integration of the schools. Clearly the school board was aware that the introduction of black faculty would change the identity of a school within a white community trying to maintain its white identity. As Professor Taeuber has noted:

Assignment of a black principal and the shifting of a school attendance boundary are highly visible deliberate acts that may imply racial consequences to homeseekers, landlords with vacancies, and banks with funds to loan.

Taeuber, *supra*, note 1 at 845.

Rather than confront the dynamic between school and residential segregation, Petitioners would have this Court accept the proposition that the primary determinants of residential patterns are "[e]conomic pressures and voluntary preferences". *Austin Independent School District v.*

U.S., 429 U.S. 990, 994 (1976). This position is unsupported by any evidence produced by Petitioners. Moreover it is directly contradicted by sociological research in this area and by evidence introduced by Respondents at trial.³ Further, to the extent that other governmental agencies may have contributed to residential segregation, e.g. discriminatory policies of FHA and VA mortgages,⁴ thereby exacerbating the degree of racial isolation within the schools, it is appropriate that the effects of such actions be remedied within the school desegregation plan. *U.S. v. Bd. of School Com'rs.*, 573 F.2d 400 (7th Cir. 1978). For "the State cannot avoid the Fourteenth Amendment by fragmenting responsibility. If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations." *Id.* at 410.

This Court has not reached the question of whether "a showing that school segregation, as a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree". *Swann, supra*, 402 U.S. at 23. In the cases at bar, however, Petitioners *have been adjudged guilty of intentional discrimination*. They cannot be allowed to restrict the remediation of those violations by claims that other state agencies were also guilty! Whether it was the school district acting alone, or in concert with other governmental

³ Taeuber and Taeuber, *Negoes in Cities* (1965), p. 94; Housing Segregation in the Tri-State Region, Regional Plan Association, 235 East 45 Street, N.Y., N.Y. 10017 (1978) (Fewer than one-fifth of the residents of segregated black areas prefer to live in segregated black areas; only about six percent (6%) of the racial segregation in the New York, New Jersey and Connecticut region is due to income).

⁴ See, U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia*, July, 1974, p.36.

agencies, the effect is the same: an unconstitutional school system which must be desegregated "root and branch."

In the instant cases, Petitioners have failed to rebut the direct proof and inference that their segregative actions infected not only the schools systems but residential patterns. Nor have they demonstrated that residential patterns developed independently of other state action. They therefore cannot claim that some "unknown or unknowable" factor created the residential patterns which they now claim justify the maintenance of a significant number of one race schools within their systems.

Amici respectfully urge this Court to affirm the remedies ordered by the Sixth Circuit as Petitioners have failed to carry their burden of demonstrating that the degree of desegregation ordered below would not have existed in the absence of Petitioners' actions.

B. In the Absence of a Showing by Petitioners That They Have Met Their Affirmative Duty to Desegregate the Schools They Cannot Claim That the Effects of Their Intentional Segregative Actions Are So Attenuated as to Deny Respondents Meaningful Relief.

As indicated in the preceding point, separate panels of the Sixth Circuit found that both the Dayton and Columbus school boards were operating dual systems at the time of *Brown I. Supra* at 3-4. Pursuant to this Court's mandate in *Green v. Country School Bd. of New Kent County*, 391 U.S. 430 (1968), therefore, Petitioners had an affirmative duty to desegregate their respective school systems "root and branch".

All of the lower courts, including the district court in *Dayton v. Brinkman, supra*, 446 F. Supp. at 1240 agreed that defendants had utterly failed to meet this duty. Petitioners, however, ask this Court to ignore not only their

failure to comply with *Green* but the fact that they have acted with actual or foreseeable knowledge so as to exacerbate the degree of racial segregation within the schools. Although Petitioners have put in place segregated school systems, they argue that the mere passage of time has sufficiently attenuated their acts from any segregative effects remaining in the system. As a result they claim the "right" to maintain a significant number of one race schools within the districts. But Petitioners have locked in a system of school segregation. They cannot now refuse to open the doors.

In *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, this Court

reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional".

This is not to say however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did.

Id. at 211.

To the extent that Petitioners rely on this Court's enunciation of the *Dayton* standard's application to cases where "mandatory segregation by law of the races in the schools has long since ceased" as altering the *Keyes* standard, we urge its rejection.

This Court suggested in *Swann v. Bd. of Educ.*, 402 U.S. 1 (1971) that at some point in time the relationship be-

tween past segregative acts and present segregation may be so attenuated as to be incapable of supporting a finding of *de jure* segregation, *Id.* at 31-32. By the time a court addresses the remedial phase of a school desegregation case this finding of intentional segregation has already been made. Any "attenuation", therefore, is not applicable in the remedial stage of litigation in the absence of a showing that the offending school board has acted affirmatively to undo the effects of its actions.

Unless Petitioners can show that they have acted affirmatively, no amount of time will so attenuate the effects of the Boards' actions. Once a segregated system is put in place, it does not "just go away", nor as we have argued in the preceding section can the Board disclaim responsibility for the reciprocal effect the segregated system has on residential patterns within the area. As this Court has made clear "a connection between past segregative acts and present segregation may be present even when not apparent." *Keyes, supra*, 413 U.S. at 211. Therefore, the close examination of any connection between Petitioners' past actions and present segregation, mandated by this Court, cannot be met by Petitioners' claim that the mere passage of time relieves them of any responsibility for their actions. *Id.*

Amici submit that any deference to Petitioners' position would be an unfortunate reminder of this Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896) which not only gave approval to a Jim Crow system that was already in place but which gave legal and moral authority for the great expansion of Jim Crow. C. Woodward, *The Strange Career of Jim Crow* (3rd ed. 1974). "[P]resent events have roots in the past", *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 332 (1952) and until Petitioners prove

that those roots have been destroyed their effects on the present cannot be denied.

For these reasons *amici* urge this Court to reaffirm its commitment to the affirmative duty announced in *Green* and to explicitly reject any argument that an offending school board that has not conformed to that mandate can rely on the mere passage of time to avoid the implementation of a meaningful remedial order.

II.

The Systemwide Remedies Ordered Below Reflect a Proper Balancing of the Individual and Collective Interests.

Respondents have demonstrated beyond doubt the legal sufficiency of the proofs below in mandating a systemwide remedy pursuant to this Court's recent pronouncement in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977). This remedy reflects not only a careful tailoring of the remedy to meet the constitutional violation but a proper "balancing of the individual and collective interests" involved in school desegregation cases. *Swann v. Charlotte Mecklenburg Board of Education*, 420 U.S. 1, 16-17 (1971).

In view of recent pronouncements of several members of this Court reflecting an increasing concern with the protection of individual interests in the formulation of school desegregation remedies, however, *amici* are concerned that the collective interests involved in this Court's review of the pending cases be emphasized.

In *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) this Court stressed the importance of public education:

It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

and recognized the far-reaching consequences of school segregation:

To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Id. at 494.

As a result, the Court declared that

"in the field of public education, the doctrine of separate but equal has no place."

Id. at 495.

This Court's decision in *Brown I* was not merely a recognition of the importance which education plays in guaranteeing minority citizens full participation in society. It was a reaffirmation of this nation's commitment, over one hundred years ago, to eliminate the badges and indicia of slavery. The years that followed *Brown I* brought a legalistic form of equality to blacks and other minorities that has in large measure been a form without substance. The full societal participation which is the hallmark of true equality has yet to be achieved. In 1968 the Kerner Commission⁵ found us moving rapidly toward two societies,

⁵ Report of the National Commission on Civil Disorders (1968).

separate and unequal. The prophesy of the Kerner Commission is borne out by economic and educational data which demonstrate unmistakably that blacks and similar racial minorities continue to be deprived of full participation in our society.⁶ The most dramatic effects of this dual system are evidenced by the decay of our inner cities, racial hostility, and race riots.

While a school desegregation remedy "can only carry so much baggage", *Swann, supra*, 402 U.S. at 22, the interaction between education and the socio-economic position of racial minorities must be foremost in the Court's attention in reviewing desegregation remedies. The collective interest is not only in ensuring equality of educational opportunity but in the concomitant effects such opportunity will have on breaking down this dual social-economic structure as well. *Milliken v. Bradley*, 418 U.S. 717, 780 (1974) (White J., dissenting).

Moreover, the primacy of the collective interest in undoing the effects of state imposed segregation must be considered against the historical background of this country. The legally required separation of the races was not restricted to the schools but carried over into all aspects of public and even private life, see *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964),

⁶ The 1975 median income for white families was \$14,268 while for minority families it was only \$9,321. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 405 (Table 650) (1976). As of that same year, 57.5% of the black population in the United States over 25 years of age had not graduated from high school and 12.3% had attended school for less than five years. For the entire population the corresponding figures were 37.5% and 4.2%. *Id.* at 123 (Table 198). 14.5% of the white population who were at least twenty-five years old, but only 6.4% of the black population, had completed four or more years of college. *Id.* at 123 (Table 199).

assuring that when blacks and whites interacted at all, it would be with assumptions of black inferiority.

Twenty-five years after *Brown I* our nation's schools are still segregated. While some progress has been made in Southern states, no comparable progress has been made in many Northern cities. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 218-19 (Powell, J.) This continued separation of the races confirms white misperceptions that racial minorities, and blacks in particular, are inferior. These misperceptions in turn fuel the continuing exclusion of minorities.⁷

It is only when a school desegregation remedy "promises realistically to work, and promises realistically to work now" *Swann, supra*, 402 U.S. at 20 (citing *United States v. Montgomery Bd. of Educ.*, 395 U.S. 225, 235-36 (emphasis in the original) that the collective interest in adherence to the constitutional norm and in breaking down the dual system that continues to enslave minority citizens can be met.

This Court has decreed that the remedy should insure as far as possible that the individual victim is restored to the position he or she would have occupied but for the discrimination. *Milliken v. Bradley, supra*, 418 U.S. at 746. Insofar as blacks have been stigmatized and humiliated by the operation of segregated school systems, no court remedy will be able to "make them whole."

⁷ The interdependence of social institutions and racial stereotypes is a generally accepted principle in social psychology. See, e.g., G. Allport, *The Nature of Prejudice* (1954). G. Simpson & J. Yinger, *Racial and Cultural Minorities: An Analysis of Prejudice and Discrimination* (4th ed. 1972) (Once fixed in the culture, the stereotyped mental pictures of other groups) react back upon [the culture], guiding the interaction of the groups involved. *Id.* at 153 (footnote omitted).

But the victims of discrimination should not be made to suffer further humiliation and exclusion because of undue concern for parents and children who may suffer some inconvenience because of a school desegregation remedy. Petitioners convey the impression that the "inconvenience" doctrine provides a basis for reversal. However, this Court squarely faced and rejected that doctrine in *Swann, supra*, 402 U.S. at 24:

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be *administratively awkward, inconvenient, and even bizarre* in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems. (Emphasis added)

Amici do not dispute the interests or concerns voiced by members of this Court with respect to school desegregation remedies.⁸ When these concerns are voiced without equal emphasis on the collective interests noted above, however, such statements may be read by recalcitrant school boards as encouragement for their continued resistance to appropriate school desegregation remedies. The cases currently

⁸ Yet, *Swann*, 402 U.S. at 15 instructs:

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

before this court are exemplary. Petitioners herein attempt to characterize a desegregation plan which limits pupil transportation to a maximum twenty minute bus ride as unduly burdensome on school officials and students. *Amici* submit that such a characterization is not only inconsistent with the opinions of this Court but misconstrues the nature of a school desegregation remedy.

To construe a school desegregation remedy as a "burden" is to define it as a penalty. But the goal of a school desegregation remedy is to *undo* the constitutional violation and to implement a school system that conforms to the mandates of the Thirteenth and Fourteenth Amendments. The benefits of a school desegregation remedy, therefore, accrue to blacks and whites alike.

Amici submit that any inconvenience attributed to the short bus rides contemplated by the Dayton and Columbus remedies is far outweighed by the many benefits of an integrated education. Children educated in an interracial atmosphere are not only better prepared for and committed to the benefits of life in a pluralist society but have the benefit of participating in dialogue with those who may offer a different perspective on learning experiences. *Brown v. Bd. of Education, supra*, 347 U.S. at 493-4. As Justice Powell has noted

"In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, cooperate with one another in their common pursuits and endeavors."

Keyes, supra, U.S. at 242.

Even if *amici* were to accept the characterization of a school desegregation remedy as a burden rather than a

benefit, this Court has noted in another context that "a sharing of the burden of past discrimination is presumptively necessary [and] is entirely consistent to any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.'" *Phelps Dodge Corp. v. NCRB*, 313 U.S. 177, 188 (1941); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777-78 (1976) (footnote omitted). Moreover, the "burden" imposed in northern school desegregation cases is no greater than that borne by southern families. In southern school desegregation cases this Court has not hesitated to order busing to eliminate, not entrench, vestiges of duality, and to bring about integration of school faculties because such plans were the only feasible way of desegregating systems that were in violation of the constitutional norm. *Swann, supra*.

In reviewing school desegregation remedies, this Court has also given deference to the local autonomy of school districts, *Dayton Bd. of Educ. v. Brinkman, supra*, 433 U.S. at 410; and cases cited therein. Such deference is certainly appropriate when school boards are operating constitutional systems and when the area of the boards' concern is educational policy. In cases such as the ones currently before this Court, however, we are confronted with local school boards that have maintained segregation and exacerbated racial imbalance for reasons totally unrelated to educational policies. Petitioners have failed to establish that their actions were taken for any reason other than the impermissible one of denying children an integrated education. The actions of these boards have in fact been *ultra vires*. Hence the basis for the traditional deference accorded educators' decisions simply does not apply to the cases presently on review before this Court.

The remedies proposed herein do not require school boards to engage in unnecessary transportation of children. *Keyes, supra*, 413 U.S. at 251 (Powell, J.). Nor have defendant school boards demonstrated that their unconstitutional actions are entitled to continued deference by this Court. Therefore, when these interests are weighed against the collective interests outlined above, the scale tips unfailingly in favor of the systemwide remedies ordered by the Sixth Circuit. This Court should affirm those remedies.

CONCLUSION

Respondents in the instant cases have borne the heavy burden of establishing that Petitioners acted intentionally in establishing and maintaining a dual school system. Petitioners, however, argue that despite any intentional segregative actions of the Dayton and Columbus school boards, Respondents should be denied meaningful relief. Petitioners' argument relies on their commitment to a "neighborhood school" system and upon claims that residential patterns and the passage of time have so attenuated any impact their actions could have had as to excuse their prior actions. Petitioners, however, do not demonstrate how these other factors have eradicated the effects of their actions. Rather, they ask this Court to announce a new standard: Within a certain number of years, all vestiges of the discriminatory conduct of school boards either disappears or is subsumed by residential patterns. As *amici* have argued, in the absence of affirmative action to desegregate dual systems, Petitioners can never be heard to claim that the vestiges of their actions have disappeared. Nor, in light of the reciprocal relationship between housing and school patterns, can they ever claim that housing patterns have "covered up" the effects of their discriminatory conduct.

The *amici*, as an organization deeply involved in attempting to eliminate housing segregation, is convinced that the failure to affirm the Sixth Circuit's holdings will intensify and solidify both residential and school segregation nationally. If Petitioners' position is adopted, the Court, *sub silentio*, will not only have overruled *Brown I* but will have eviscerated the Thirteenth and Fourteenth Amendments. Thus, the reality of "two societies—black, white, separate and unequal" will be tragically insured.

For these reasons, *amici* urge affirmance of the opinions of the Sixth Circuit and the immediate implementation of the remedies ordered therein.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-610, 78-627

COLUMBUS BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

GARY L. PENICK, *et al.*,

Respondents.

DAYTON BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

MARK BRINKMAN, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS *AMICI CURIAE***

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IN THE
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-v.-

GARY L. PENICK, et al.,
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Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION
AND THE
INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS
AMICI CURIAE

Interest of the Amici*

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 200,000 members dedicated to defending the personal rights of the people guaranteed by the Constitution.

Central among the constitutional rights of the people is the fundamental right to equal treatment under law. No component of that right is more precious than the right of minority children to receive an education in school systems that are not segregated. The ACLU believes, as this Court recognized twenty-five years ago, that "[s]eparate educational facilities are inherently unequal" because they deprive minority children of "the benefits they would receive in a racially integrated school system." Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).

Because of our strong belief that separate educational facilities are in-

* Letters from the parties consenting to the filing of this brief have been filed with this Court pursuant to Rule 42.2.

herently unequal, the ACLU has consistently pursued enforcement of the right to a non-segregated education. For example, in Crawford v. Board of Education of the City of Los Angeles, 17 Cal.3d 280 (1976), we successfully urged under the California Constitution that a current state of school segregation is unconstitutional regardless of its causes, and that it must be remedied through system-wide desegregation. In Evans v. Buchanan, 393 F.Supp. 428 (D.Del. 1975) (three-judge court), aff'd, 423 U.S. 973 (1975), reh. denied, 423 U.S. 1080 (1976), remedy imposed on remand, 416 F.Supp. 328 (D.Del. 1976), appeal dismissed, 429 U.S. 973 (1976), aff'd, 555 F.2d 373 (3d Cir. 1977), cert. denied, 434 U.S. 880 (1977), reh. denied, 434 U.S. 944 (1977), we successfully urged that urban vs. suburban school segregation resulting from state contributions to segregated housing is unconstitutional and that it must be remedied through inter-district school desegregation.

Our belief in effective school desegregation also has resulted in our frequent appearance before this Court in

school desegregation cases. For example, we represented the minority school children before this Court in Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976). And we have appeared amicus curiae, on behalf of the minority school children in such cases as Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977), and Keyes v. School District No. 1, 413 U.S. 189 (1973).

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (IUE) has over 285,000 members throughout the Nation, 100,000 of whom are women, and many of whom are members of disadvantaged minority groups. The IUE represents over 20,000 employees in the Dayton and Columbus, Ohio, areas.

The IUE is a leader among unions in championing the civil rights of its members. The IUE, as an affiliate of the AFL-CIO, fully supports the AFL-CIO policy, restated by President George Meany on March 19, 1979 "to support and share responsibility for the development of workable school desegregation programs." The IUE has instituted numerous suits

under federal and state fair employment laws, and has filed many charges of discrimination with administrative agencies. The IUE believes in full educational opportunities for all Americans, and supports the establishment of a single public school system that will make quality integrated education available to all children, regardless of race, color, creed, sex or national origin.

Because the ACLU and the IUE believe that the arguments raised by the school boards in the instant two cases, if adopted even in part by this Court, would severely undermine the rights established by Brown and its progeny, we urge in this brief that those arguments be rejected and that the right of minority children to a non segregated education be reaffirmed by this Court.

SUMMARY OF ARGUMENT

As Respondents have pointed out in their briefs, the Dayton and Columbus school districts operated racially segregated school systems at the time of Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), and thereafter engaged in numerous segregative practices which maintained and increased the level of actual segregation. As Respondents have argued, on the basis of settled school desegregation law, the Dayton and Columbus school districts were properly found to have engaged in unconstitutional system-wide segregation and thus were constitutionally required to implement systemwide desegregation. The propriety of these findings and obligations with regard to Dayton, in No. 78-627, are required by Brown v. Board of Education of Teopka, 347 U.S. 483 (1954), Green v. County School Board of New Kent County, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The propriety of these findings and obligations with regard to Columbus, in No. 78-610, are similarly required by

Brown, Green, and Swann, and by Keyes v. School District No. 1, 413 U.S. 189 (1973).

Amici agree entirely with the arguments advanced in Respondents' briefs in this Court. Like Respondents, we believe that settled school desegregation law compels the conclusion that the Columbus and Dayton school districts were properly found to have engaged in unconstitutional system-wide segregation and thus were constitutionally required to implement system-wide desegregation.

While we agree with Respondents' arguments, we believe that the same conclusions must be reached under other evidentiary and legal approaches to these cases. It is these other approaches which form the focus of this brief.

First, we believe that, having been found to have operated an intentionally segregated school system at the time of Brown v. Board of Education, 347 U.S. 483 (1954), defendants were under an affirmative duty to root out racial segregation in the schools' "root and branch." Green v. County School Board of New Kent County, 391 U.S. 430 (1968). Having failed to do so, defendants should bear all eviden-

tiary burdens on facts necessary to establish an excuse for non-compliance.

Second, we believe that, even in the absence of the affirmative duty imposed by Green, defendants should bear the persuasion burden on the issue of culpable scienter in an equal protection case seeking prospective relief from racial segregation, so long as plaintiffs have produced sufficient evidence of culpable scienter to satisfy a traditional production burden. We also believe that the requirement of culpable scienter in an equal protection case seeking prospective relief from racial segregation may be satisfied by a showing of recklessness or deliberate indifference to the rights of racial minorities.

Finally, aside from the evidentiary matters that form the major portion of our argument, we believe that this Court must recognize as it did in Brown through Swann, that the Fourteenth Amendment imposes an affirmative constitutional obligation on school districts to operate racially integrated schools to the maximum extent feasible. In this context, racial segregation may be distinguished from racial discrimination. While discrimination is offensive, segregation especially offends the Fourteenth

Amendment. This Court has never held that the Fourteenth Amendment permits a state to be in the business of operating racially segregated facilities. To the contrary, if the Fourteenth Amendment prohibits anything, it prohibits the maintenance of racially segregated state facilities, including of course racially segregated public schools.

As Justice Powell pointed out in Keyes v. School District No. 1, 413 U.S. 189, 227 (1973) (concurring opinion), the genesis of segregation provides no grounds for the adoption of variable equal protection principles. Whether segregation is caused by state law, by the manipulation of a neighborhood school policy, or by imposition of a neighborhood school policy upon segregated neighborhoods, the relevant intent is the same: that intent is to operate racially segregated schools and to compel black children and white children to attend those separate schools. From a Fourteenth Amendment standpoint, such a condition unequivocally violates the Brown mandate that "[s]eparate educational facilities are inherently unequal." 347 U.S. at 495.

ARGUMENT

Recent decisions of this Court have placed a substantial premium on deciphering the mental states of defendants alleged to have violated a variety of legal norms. E.g., Castaneda v. Partida, 430 U.S. 482 (1977) (racial discrimination in the selection of juries); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 229 (1977) (racial discrimination in the construction of public housing); Washington v. Davis, 426 U.S. 252 (1976) (racial discrimination in employment); Keyes v. School District No. 1, 413 U.S. 189 (1973) (public school segregation); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (Rule 10b-5 violation); United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978) (criminal anti-trust violation); United States v. Grinnell Corporation, 384 U.S. 563 (1966) (violation of Section 2 of the Sherman Act); United States v. LaSalle National Bank, 437 U.S. 298 (1978) (IRS information demands); National Labor Relations Board v. Great Dane Trailers, 388 U.S. 26 (1967)

[unfair labor practices under Section 8 (a)(3)]. See also, Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

In requiring significant legal consequences to turn on the culpability of a defendant's mental state, this Court has launched courts and litigants alike on a frustrating, expensive and, often, fictive search for culpable scienter. Especially in the area of constitutional law, where defendants are generally public entities whose policies have evolved over time as the net product of many, often conflicting, individual views, the fictive search for scienter has resulted in a jurisprudence of equality which is unpredictable, enormously expensive to administer and arbitrary in result. However, whatever the wisdom of seeking to build a constitutional theory of equality on culpable scienter, this Court seems firmly bent upon an attempt. If such an attempt is to have an opportunity to succeed, two issues which are central to any scienter-based jurisprudence must be resolved. First, it is necessary to define with precision the

contours of those mental states which are deemed sufficiently culpable to warrant the issuance of prospective and/or retrospective relief. Second, it is necessary to formulate evidentiary rules governing proof of the required culpable mental state which are both fair and capable of uniform administration.

Amici will urge in Point IIA, infra, that this Court, in defining the requisite degree of culpable scienter necessary to trigger prospective relief in favor of racial minorities under the equal protection clause, should adopt a negligence, or, at most, a recklessness standard. This Court has explicitly reserved judgment on analogous issues in the area of securities regulation. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976).¹

1. See generally, Bucklo, The Supreme Court Attempts to Define Scienter Under Rule 10b-5: Ernst & Ernst v. Hochfelder, 29 Stan.L.Rev. 213 (1977); Note, Scienter's Scope and Application in Rule 10b-5 Actions: An Analysis in Light of Hochfelder, 52 Notre Dame Lawyer 925 (1977); Comment, Scienter and SEC Injunctive Suits, 90 Harv.L.Rev. 1018 (1977); Note, The Scienter Requirement in SEC Injunctive Enforcement of Section 10(b) After Ernst & Ernst v. Hochfelder, 77 Col.L.Rev. 419

Amici will also urge in Point IIB, infra, that once a member of a racial minority has produced sufficient evidence from which a reasonable finder of fact may infer the existence of culpable scienter, the governmental defendant should bear all evidentiary burdens on the scienter issue.

As a pre-condition to a discussion of the appropriate burden of proof rules, a consistent terminology must be adopted. Understandably, attempts by the lower federal courts to formulate evidentiary

(1977). Similar issues have arisen in the law of torts, Prosser, Law of Torts § 107 at pp.700-710; Keeton, Fraud: The Necessity of Intent to Deceive, 5 UCLA L.Rev. 585 (1958); and have been the subject of substantial comment in the criminal law area. E.g., United States v. Dixon, 419 F.2d 288 (D.C. Cir. 1969) (discussing authorities). See generally, H.L.A. Hart, Punishment and Responsibility (1968) at 136-157. For similar issues in the areas of labor and anti-trust law, see generally, Christensen and Svanoie, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968); Report to the President and the Attorney General of the National Commission for the Review of Anti-Trust Law and Procedures (1979) (reproduced in B.N.A. Anti-Trust and Trade Regulation Reporter (Jan. 18, 1979).

ground rules in the wake of Washington v. Davis have resulted in substantial variations in terminology which impede careful analysis. For example, the term "presumption" has been variously used to mean permissible inference, compulsory inference, artificial inference, and shift in the burden of production. The concept of "prima facie case" has been loosely used to mean at least three things: a set of facts which, if unrebutted, would permit (but not compel) a finder of fact to find intentional racial discrimination; a set of facts which, if unrebutted, would compel a finder of fact to find intentional racial discrimination; and a set of facts from which racial discrimination must be inferred, regardless of rebuttal.

Orthodox evidentiary analysis divides the burden of proof into two parts: production burden and persuasion burden. E.g., James, Burdens of Proof, 47 Va.L.Rev. 51 (1961); 9 Wigmore, §§2485-2486 (3d ed. 1940). The production burden is that quantum of evidence needed to permit a reasonable finder of fact to infer the existence of the fact at issue--in this

case the presence or absence of culpable scienter. Most courts have followed an assumption that plaintiffs bear the inertial production burden on significant factual aspects of their case. Most courts have also recognized that a plaintiff may introduce highly persuasive evidence which, if unrebutted, would compel a reasonable finder of fact to infer the existence of the fact at issue. Under such circumstances, the production burden may be said to have shifted to the defendant. Thus, it is possible for a plaintiff saddled with an initial production burden on the issue of culpable scienter to (a) fail to meet it and suffer a directed verdict; (b) satisfy it and pass to a decision by the finder of fact under a defined persuasion burden; or (c) shift it and gain a directed verdict in the absence of rebuttal evidence. Once a plaintiff has satisfied an initial production burden, a defendant may (a) rest and take his chances that the finder of fact will rule in his favor; or (b) introduce evidence designed to persuade the finder of fact of the non-existence of the fact

at issue. If a plaintiff has shifted the production burden, a defendant must introduce evidence or suffer a directed verdict. Once such a defendant has rested, the court must determine whether the shifted production burden has been satisfied. If a judge finds that the production burden has been satisfied, he or she must remit the issue to the finder of fact under an appropriate persuasion burden. Production burdens, thus, are nothing more than judge-operated tools to determine when a factual issue is sufficiently in doubt to warrant remission to the formal fact-finding process.

Persuasion burdens exist because in law, as in baseball, no ties are possible. It is, therefore, necessary to decide how ties should be broken when the finder of fact is in doubt about the existence of the fact at issue. The degree of certainty which a finder of fact must experience in order to return a finding is called the persuasion burden. While the initial production burden has been routinely allocated to proponents of a given fact, courts have demonstrated considerably

greater flexibility in allocating the risk of a tie after an initial production burden has been satisfied.² The question of whether a member of a racial minority seeking prospective relief or the government should bear the risk of a tie on the issue of culpable scienter in a case in which the plaintiff has initially satisfied a production burden was resolved in favor of minority plaintiffs in Keyes v. School District No. 1, 413 U.S. 189 (1973), and Castaneda v. Partida, 430 U.S. 482 (1977).

Finally, once the persuasion burden has been allocated, its size must be selected from among three traditional alternatives: preponderance of the evi-

2. Davis v. United States, 160 U.S. 469 (1895); Leland v. Oregon, 343 U.S. 790 (1952) (insanity defense); Patterson v. New York, 432 U.S. 197 (1977) (affirmative defense of extreme emotional disturbance); N.L.R.B. v. Great Dane Trailers, 388 U.S. 26 (1967) (employer has burden of persuasion on business justification for unfair labor practice); United States v. Grinnell Corp., 236 F.Supp. 244 (D.R.I. 1964), aff'd except as to decree, 384 U.S. 563 (1966) (monopoly). See also Speiser v. Randall, 357 U.S. 513, 525 (1958); Keyes v. School District No. 1, 413 U.S. 189 (1973); 9 Wigmore §§2485, 2486 (3d ed. 1940).

dence; clear and convincing evidence; or proof beyond a reasonable doubt. Thus, whatever the precise contours of culpable scienter, orthodox evidentiary analysis provides this Court with the tools to fine-tune the mechanism of proof in order to advance the policies of racial fairness which lie at the core of the equal protection clause without tumbling down the slippery slope described by Mr. Justice White in Washington v. Davis, 426 U.S. 229, 248 (1976). By careful definition of the quantum of evidence needed to satisfy an initial production burden on the issue of culpable scienter and sensitive allocation of the resulting persuasion burden, this Court may have both racial fairness and a jurisprudence of equality which is not uncontrollably overbroad. Moreover, such an analysis permits the Court to enunciate fair and efficient ground rules for proving scienter in equal protection cases without resorting to questionable concepts such as ill-defined prima facie cases and fictional presumptions.

Although amici believe that it would be desirable to begin the task of defining culpable scienter in an equal protection context and setting forth the ground rules for its proof as quickly as possible, this case may be resolved without considering the broader issues. This Court has long noted the existence of an affirmative duty to dismantle dual school systems which were operated on an intentionally segregated basis at any time on or after the date of this Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954) (Brown I). E.g., Green v. Board of Ed., 391 U.S. 430 (1968). Whatever the definition of culpable scienter and whatever the allocation of burdens of proof as a general matter, in the narrow context of a failure to have carried out the affirmative duty to dismantle an intentionally maintained dual school system, all evidentiary burdens must be borne by the defendants. See Point I, infra.

- I. DEFENDANTS HAVE BREACHED THEIR AFFIRMATIVE DUTY TO DISMANTLE SCHOOL SYSTEMS FOUND TO HAVE BEEN INTENTIONALLY OPERATED ON A SEGREGATED BASIS AT THE TIME OF THIS COURT'S DECISION IN BROWN V. BOARD OF EDUCATION. THE ISSUANCE OF SYSTEMWIDE RELIEF WAS BOTH NECESSARY AND APPROPRIATE TO COMPEL COMPLIANCE WITH DEFENDANTS' AFFIRMATIVE OBLIGATION TO DISMANTLE THEIR DUAL SYSTEMS OF PUBLIC EDUCATION.

In the years which followed Brown v. Board of Education, 347 U.S. 483 (1954), this Court confronted a series of issues raised by the attempt to make the promise of Brown a reality for black children. Initial response to Brown in many communities took the form of violence and defiance under the pretext of interposition. This Court responded with Cooper v. Aaron, 358 U.S. 1 (1958). More sophisticated opposition to Brown succeeded in closing certain public schools rather than desegregating them. This Court responded with Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964). Yet more sophisticated opposition to Brown resulted in pupil transfer plans which permitted individual white parents to

frustrate school desegregation. This Court responded with Goss v. Board of Education, 373 U.S. 683 (1963). Finally, when freedom of choice plans hindered the full implementation of Brown, this Court responded with Green v. County School Board, 391 U.S. 430 (1968). With the enunciation in Green of an affirmative duty to dismantle pre-existing dual systems "root and branch," this Court provided the doctrinal basis for genuine implementation of Brown. See also, Raney v. Board of Education, 391 U.S. 443 (1968), and Monroe v. Board of Commissioners, 391 U.S. 450 (1968). As Mr. Justice Brennan noted for the Court in Keyes v. School District No. 1, 413 U.S. 189 (1973):

" [W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in Brown v. Board of Education, the State automatically assumes an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system,' that is, to eliminate from the public

schools within their school system 'all vestiges of state-imposed segregation.'" 413 U.S. at 200 [citations omitted].

In the instant cases, plaintiffs have proven that a dual system of education was intentionally imposed upon black children by defendants on or about the date on which Brown was decided.³ Accordingly, under Green and its progeny, defendants automatically assumed an affirmative duty to eliminate racial segregation "root and branch" from the schools under their direction and control. Although defendants have labored under

3. To be sure, the dual systems operating in both Dayton and Columbus in 1954 were not compelled by statute. Rather, they were imposed by the administrative decisions of school officials. No distinction of legal consequence may, however, be drawn between public school segregation mandated by statute and public school segregation mandated by administrative fiat. Nor is there any serious question as to the existence of the intentionally maintained dual systems in 1954. Assuming an allocation of the evidentiary burdens most favorable to the defendants, intentionally maintained dual systems have been clearly established. Pennick v. Columbus Board of Education, 583 F.2d 787, 798-99 (6th Cir. 1978); Brinkman v. Gilligan, 583 F.2d 243, 247-49 (6th Cir. 1978).

such an affirmative duty for a quarter of a century, the schools under their direction and control remain substantially segregated. This case raises the question of whether defendants' failure to have integrated the public schools in Dayton and Columbus constituted a breach of the affirmative duty to root out the vestiges of the dual systems which existed in 1954 and whether, once a breach of duty is found, federal courts possess power to grant relief compelling defendants to carry out their duty after twenty-five years of failure.

A. The Nature of the Affirmative Duty To Eliminate Dual Systems Imposed Upon Defendants by Green v. County School Board

Having been found guilty of operating an intentionally segregated school system in 1954, defendants are under an affirmative duty to integrate. Such an affirmative duty may take one of three forms.

First, defendants may be under an absolute duty to succeed in integrating the schools in question. Under such an "absolute" definition of the affirmative

duty imposed by Green, defendants only excuse for non-performance would be a showing of impossibility. Given the formulation of the successful desegregation plan which is in effect in Dayton this year and given the formulation of a plan which, but for this Court's stay, would have successfully desegregated the Columbus schools, no claim of impossibility may be seriously advanced.

Second, defendants may be under a duty to do nothing more than to refrain from intentionally hindering the desegregation of the schools in question. Such a limited definition of the affirmative duty imposed by Green would, however, add nothing to the already existing duty imposed by Brown I. Thus, while defendants' affirmative duty may not rise to the "absolute" level suggested by the Sixth Circuit,⁴ neither does it sink to the level of

4. The Sixth Circuit in Pennick suggested that the Columbus defendants' failure to have produced a unitary system was itself a violation of Green, without any necessity for additional proof. Pennick v. Columbus Board of Educ., *supra* at 800. However, the Sixth Circuit did not rest its decision on such a broad reading of Green. Rather, it considered defendants' conduct and found it both purposive and reckless in failing to carry out duties imposed by Green.

redundancy suggested by defendants.

Rather, a third possible definition of the affirmative duty exists which imposes meaningful obligations on the defendants short of imposing an absolute duty to succeed. Under such a definition, defendants would be obliged under Green to utilize due care in evolving and implementing plans to eliminate the vestiges of a dual system. Failure to conform to reasonable standards of competence in formulating desegregation remedies would constitute a breach of duty.⁵ Measuring the conduct of defendants in perpetuating segregation against the standard of a hypothetical reasonable Board bent on eliminating segregation, it is clear beyond doubt that defendants' feeble gestures toward integration fell far below an acceptable level of competence and commitment.

5. Cases in the lower federal courts which seek to apply the Green standard appear, at a minimum, to impose a duty of active care and minimum competence in formulating effective integration plans. E.g. Adams v. Matthews, 403 F.2d 181 (5th Cir. 1968); Hall v. St. Helena Parish School, 417 F.2d 801 (5th Cir.) (cert. denied, 396 U.S. 904 (1969)).

B. The Procedural Ground Rules for Proving Breach of Defendants' Affirmative Duty To Eliminate Vestiges of Dual Systems of Public Education

If defendants' affirmative duty under Green is defined as a duty of due care in eliminating segregation, no substantial issue of proof would exist, since defendants' breach of such a duty of due care (whether defined as negligence or recklessness) is so flagrant that under any system of proof its existence must be found. However, if defendants' duty under Green is defined narrowly to encompass merely a duty to refrain from purposeful activity designed to frustrate the elimination of a dual system, serious issues of proof may arise.⁶ As this Court noted in Green,

6. Given the record in both the Dayton and Columbus cases, even if one assumes (incorrectly, amici believe) that plaintiffs bear both the production and persuasion burdens on the issue of purposeful failure to dismantle pre-existing dual school systems, plaintiffs have clearly met their evidentiary burdens. By engaging in a series of actions, including site selection, attendance zone design, staff assignment and pupil transfers, defendants took action which they knew would perpetuate the very dual system they were under an affirmative duty to dismantle. Plaintiffs' proof of such

proof of the maintenance of a dual school system on or after the date of Brown I, coupled with proof of a continuing pattern of segregated schools, satisfies plaintiffs' production burden and shifts the production burden to the defendants. 391 U.S. at 439. Defendants in both the Dayton and Columbus cases have attempted to satisfy their shifted production burdens by arguing that the continuing pattern of segregated schooling in both cities is attributable to a combination of residentially segregated housing patterns and uniform adherence to a neighborhood school policy. In effect, defendants argue, first, that they acted in good faith in failing to desegregate the schools in question and, second, that the current segregation of the Columbus and Dayton schools has not been caused by their actions. Plaintiffs have countered by demonstrating a series of actions

knowing activity taken in the teeth of an affirmative duty to erase all vestiges of the pre-existing dual system would compel any reasonable finder of fact to conclude that defendants had purposefully breached their duty under Green. Compare, United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978).

tending to perpetuate racial segregation which run counter to (or are not compelled by) a neighborhood school policy. In effect, plaintiffs argue that proof of a series of acts tending to perpetuate segregation which run counter to (or are not compelled by) a neighborhood school policy negates any inference that defendants were motivated by a neutral desire for neighborhood schools. Given plaintiffs' proof, defendants' attempt to satisfy their shifted production burden is perilously weak, even if one assumes the persuasion burden remains with the plaintiff. Cf., Castaneda v. Partida, 430 U.S. 482 (1977). Moreover, since defendants are attempting to explain their failure to have carried out the terms of an affirmative constitutional duty mandated by Green, they should bear the risk of non-persuasion as well. Whenever a party appears to have engaged in unconstitutional activity, but seeks to escape liability by establishing one or another excusing condition, this Court has uniformly placed both the production and persuasion burdens on the party seeking

to avoid the consequences of putatively unconstitutional behavior. E.g., Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Carey v. Piphus, 435 U.S. 247 (1978); see also, Wood v. Strickland, 420 U.S. 308 (1975).

Defendants' attempt to avoid liability for ignoring the mandate of Green by alleging lack of any purposeful intent to frustrate integration is precisely analogous to the good faith defense routinely recognized by this Court in constitutional cases. E.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975). It is, of course, clear that a defendant asserting such a good faith defense bears both the production and persuasion burdens on the issue of "subjective" scienter. Moreover, it is equally clear that an "objective" duty of due care is placed upon such a defendant. Wood v. Strickland, 420 U.S. 308, 321 (1975). Defendants in the instant case are unable to satisfy a persuasion burden on either the "subjective" or "objective" elements of their attempt to assert a good faith defense to a charge of having

breached their affirmative duty under Green. Subjectively, the proven commission of segregative acts running contrary to a neighborhood school policy precludes any reasonable finder of fact from determining that defendants have proved "good faith" by a preponderance of the evidence. Objectively, the failure to have evolved a plan to reduce segregation in the schools despite the passage of twenty-five years causes defendants' acts to fall well below the minimal level of competence discussed in Wood v. Strickland, *supra*. Thus, defendants' attempt to avoid Green by alleging good faith must fail.⁷

In addition, defendants attempt to avoid the entry of systemwide relief by

7. Courts consistently have limited the use of the good faith defense to actions for retrospective relief. E.g., Wood v. Strickland, *supra*; Scheuer v. Rhodes, 416 U.S. 232 (1974). The good faith defense has never been recognized where the relief requested was solely injunctive. O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971). Since plaintiffs in this case request only prospective, equitable relief, serious doubt exists as to whether a good faith defense is available.

alleging that their acts did not actually cause the current segregation of the Dayton and Columbus schools. Rather, they argue, factors such as economics, residential segregation and individual choice have "caused" the schools in Dayton and Columbus to remain segregated. Such a defense is precisely analogous to a causation defense articulated by this Court in recent years. E.g., Mt. Healthy School District Board of Education v. Doyle, *supra*; Carey v. Piphus, *supra*; Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-271 n.21 (1977). See also, Chapman v. California, 386 U.S. 18 (1967). A defendant asserting such a causation defense bears both the production and persuasion burden with respect to its application. Thus, parties seeking to avoid the consequences of a constitutional flaw in a criminal case under the rubric of harmless error are required to prove beyond a reasonable doubt that the constitutional flaw did not affect the outcome of the case. Chapman v. California, 386 U.S. 18 (1968).

Parties seeking to avoid liability for a dismissal based partially on protected First Amendment activity are required to prove that the dismissal would have occurred even in the absence of the First Amendment activity. Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977). Parties seeking to avoid liability for actions which failed to comply with standards of procedural due process are required to prove that a hearing could not have altered the outcome. Carey v. Piphus, supra. Finally, parties seeking to avoid liability after being found guilty of purposeful racial discrimination in violation of the equal protection clause are required to prove that the identical activity would have taken place in the absence of defendants' racially motivated conduct. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270-271 n.21 (1977).

The legal status of the defendants in this case tracks the hypothetical defendant described by the Court in Arlington Heights. In Arlington Heights, the hypothetical defendant violated a constitutional norm, but sought to avoid liability by arguing that his violation did not cause plaintiff's

injury. This Court, quite properly, assigned both the production and persuasion burden to the defendant. In the instant cases, defendants violated a constitutional norm by maintaining dual school systems in violation of Brown I and Green. They seek to avoid liability by arguing that their violation did not cause plaintiffs' current injury. Rather, they argue, plaintiffs' injury was caused by demographic patterns beyond the defendants' control. In the instant cases, as in Arlington Heights, the burdens of production and persuasion on defendants' exculpatory theory should be borne by defendants. See also, Keyes v. School District No. 1, 413 U.S. 189 (1973); Evans v. Buchanan, 582 F.2d 750, 764-766 (3d Cir. 1978). Given defendants' numerous segregative acts demonstrated by plaintiffs, defendants have clearly failed to prove by a preponderance, much less by a clear and convincing evidence, that the continued segregation of the Dayton and Columbus schools is not attributable to a failure to carry out affirmative obligations under Green. Accordingly, the

issuance of systemwide relief designed to effectuate the dismantling of the dual system was entirely appropriate.

II. DEFENDANTS ARE GUILTY OF CULPABLE BEHAVIOR IN KNOWINGLY OPERATING RACIALLY SEGREGATED PUBLIC SCHOOLS. FEDERAL COURTS POSSESS UNQUESTIONED POWER TO ORDER SYSTEMWIDE RELIEF TO REDRESS THE CONSEQUENCES OF DEFENDANTS' CULPABLE BEHAVIOR.

In Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), this Court ruled that the disproportionate racial impact of a governmental act, standing alone, is not sufficient to constitute a violation of the equal protection clause. In addition to disparate racial impact, this Court ruled, a degree of mental culpability must accompany the challenged act in order to trigger a finding that the equal protection clause has been violated. However, in identifying a culpable mental state as an element of equal protection violation, this Court has taken merely the first step toward a scienter-based jurisprudence of equality. At least two additional issues remain for the Court's consideration:

(1) What is the precise degree of

mental culpability which will give rise to a violation of the equal protection clause? Does reckless or negligent activity which causes disproportionate injury to members of a racial minority violate the equal protection clause?

(2) How are the burdens of proof on the issue of mental culpability to be allocated?

A. The Nature of the Culpable Mental State Required To Justify Prospective Relief Under the Equal Protection Clause.

In Washington v. Davis and Arlington Heights this Court considered only two possible mental states: purposeful malice and inadvertent innocence. While such a bi-polar analysis is helpful in deciding whether a defendant's mental state is at all relevant to the decision of an equal protection case, it is far too rigid to serve as a guide for determining the precise point on a continuum of culpability which should justify a grant of relief. Since, ordinarily, mental states (especially the complex of attitudes which coalesce into the "mental state" of a

government entity-defendant) do not neatly divide into the extremes of the bi-polar model, it is necessary to identify and to consider intermediate or equivalent culpable mental states, such as recklessness and negligence, which encompass neither purposeful malice nor inadvertent innocence. In conducting such an inquiry into intermediate forms of mental culpability, this Court would not be engaged in a task unique to constitutional law. Indeed, wherever significant legal consequences turn on the culpable mental state of a defendant, it has proven necessary to explore the effect of a finding of an intermediate culpable mental state, such as recklessness or negligence.

In the area of the criminal law, courts, legislators and academics have grappled with the appropriate legal consequences which should flow from reckless or negligent, as opposed to purposive or knowing, behavior by a criminal defendant. E.g. United States v. United States Gypsum Co., 98 S. Ct.

2864 (1978); United States v. Dixon, 419 F.2d 288 (D.C. Cir. 1969); ALI Model Penal Code § 2.02 (Proposed Official Draft) (1962); H.L.A. Hart, Punishment and Responsibility, 136-157 (1968); Packer, Mens Rea in the Supreme Court, 1962 Sup. Ct. Rev. 109; Perkins, The Criminal Law 61 (1957); Michael and Wechsler, A Rationale of the Law of Homicide, 37 Col. L. Rev. 701 (1937); Wechsler, Codification of the Criminal Law in the United States: The Model Penal Code, 68 Col. L. Rev. 1425 (1968). Although substantial controversy continues over the role of negligence in the criminal law, a discernible tendency exists to uphold the imposition of criminal sanctions on individuals (especially government officials) whose conduct has recklessly or negligently caused harm of a constitutional dimension, without regard to the purely subjective state of mind of the actor. Compare, United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) with United States v. Barker, 546 F.2d 940

(D.C. Cir. 1976). See also, United States v. McLean, 528 F.2d 1250 (2d Cir. 1976). As H.L.A. Hart has argued, even in the context of the criminal law, negligent or reckless behavior by a defendant which inflicts unnecessary suffering on individuals may be a culpable mental state warranting the imposition of criminal sanctions. H.L.A. Hart, Negligence, Mens Rea and Criminal Responsibility in Punishment and Responsibility (1968) at pp. 136-157; see also, Gross, A Theory of Criminal Justice (1978) at pp. 419-423; Packer, Mens Rea in the Supreme Court, 1962 Sup. Ct. Rev. 109.

Similarly, in the area of securities regulation, this Court has explicitly reserved judgment on the related questions of whether reckless conduct constitutes sufficient "scienter" to give rise to a retrospective liability for violating Rule 10b-5 and whether negligent conduct can justify prospective injunctive relief. Ernst & Ernst v. Hochfelder, 425 U.S.

185, 194 n. 12 (1976). The lower federal courts have been virtually unanimous in finding recklessness to be a sufficiently culpable mental state to give rise to retrospective sanctions under Rule 10b-5. E.g., Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1977); Coleco v. Berman, 567 F.2d 569 (3d Cir. 1977); Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38 (2d Cir. 1978); S.E.C. v. Commonwealth Chemical Securities, 574 F.2d 90 (2d Cir. 1978); Nelson v. Serwold, 576 F.2d 1332 (9th Cir. 1978); Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978); Berdahl v. S.E.C., 572 F.2d 643 (8th Cir. 1978); see generally, S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 868 (2d Cir. 1968) (en banc) (Friendly, J. concurring). But see, S.E.C. v. American Realty Trust, 429 F.Supp. 1148, 1171 n. 8 (E.D.Va. 1977); Utah State University v. Bear Stearns & Co., 549 F.2d 164 (10th Cir. 1977). For perceptive discussions of the issue at the district court level, see,

Steinberg v. Carey, 439 F. Supp. 1233 (S.D.N.Y. 1977) (Weinfeld, J.); Valente v. Pepsico, Inc., 454 F. Supp. 1228 (D. Del. 1978). Moreover, the lower federal courts have also generally held that negligence constitutes a sufficiently culpable mental state to give rise to prospective injunctive relief under Rule 10b-5. S.E.C. v. Aaron, ___ F.2d ___ (2d Cir. 1979); S.E.C. v. Arthur Young & Co., ___ F.2d ___ (9th Cir. 1979); S.E.C. v. Universal Major Industries Corp., 546 F.2d 1044 (2d Cir. 1976); S.E.C. v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976); Nassar & Co. v. S.E.C., 566 F.2d 790, 794 (D.C. Cir. 1977) (Leventhal, J. concurring). But see, S.E.C. v. Blatt, 583 F.2d 1325 (5th Cir. 1978). Thus, in securities regulation, as in criminal law, our courts have recognized that a failure to exercise due care constitutes a sufficiently culpable mental state to warrant the imposition of scienter-based liability.

In the area of constitutional

litigation, in mapping the contours of the good faith defense available to government officials sued for retrospective damages, this Court has been careful to identify a mental state consistent with recklessness or negligence and to predicate liability upon it. E.g. Wood v. Strickland, 420 U.S. 308 (1975). See also, Estelle v. Gamble, 429 U.S. 97 (1976); Monroe v. Pape, 365 U.S. 167, 187 (1961).

In the labor law area, since this Court's decision in NLRB v. Great Dane Trailers, 388 U.S. 26 (1967), reckless or negligent employer conduct which is "inherently destructive" of employee rights exhibits a sufficiently culpable mental state to give rise to an unfair labor practice under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. E.g. Kaiser Engineering v. NLRB, 538 F.2d 1379 (9th Cir. 1976); Knuth Bros. Inc., 229 N.L.R.B. No. 176 (1977); W.R. Grace & Co., 230 N.L.R.B. No. 037 (1977). Both the courts and the NLRB have recognized that a negli-

gent or reckless failure to consider the foreseeable consequences of an employer's actions on employee rights constitutes a sufficiently culpable mental state to impose liability. For the history of this Court's treatment of culpable mental state in the labor law area see, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); Radio Officers Union v. NLRB, 347 U.S. 17, 55 (1954) (Frankfurter, J. concurring); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961) (Harlan and Stewart, JJ. concurring); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Burnup & Sims, Inc. 379 U.S. 21 (1964); American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

For similar issues in the anti-trust area, see, e.g. United States v. United States Gypsum Co., 98 S. Ct.

2864 (1978); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Grinnell Corporation, 384 U.S. 563 (1966), aff'g, except as to decree 236 F. Supp. 244 (D.R.I. 1964) (Wyzanski, J.). See generally, Hawk, Attempts to Monopolize - Specific Intent as Anti-Trust's Ghost in the Machine, 58 Cornell L. Rev. 1121 (1973); Smith, Attempt to Monopolize: Its Elements and Their Definition, 27 Geo. Wash. L. Rev. 227 (1958); Report to the President and the Attorney General of the National Commission for the Review of Anti-Trust Laws and Procedures (1979).

For similar issues in the general law of torts, see e.g. Ultra Mares Corp. v. Touch, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931); State Street Co. v. Ernst, 278 N.Y. 104, 112, 15 N.E.2d 416, 418-19 (1938). See also, Keeton, Fraud: The Necessity of an Intent to Deceive, 5 U.C.L.A. L. Rev. 585 (1958); Goodhart, Liability for Innocent but Negligent Misrepresentations, 74 Yale L.J. 286 (1964); see generally, Prosser, The Law

of Torts at pp. 700-10.

In each of the areas of the law in which scienter has been deemed a precondition to liability, our courts have held that prospective relief may be granted upon a showing of negligent or, at most, reckless behavior. Indeed, recklessness and negligence have often been deemed a sufficiently culpable mental state to warrant the imposition of retrospective (even criminal) sanctions. As the Chief Justice noted in United States v. United States Gypsum Company, 98 S. Ct. 2864 (1978), the decision to recognize a negligence-recklessness definition of scienter or to insist upon a purposive definition turns on the primary end of the law in question. Those legal norms which are principally designed to punish or to stigmatize persons for engaging in morally reprehensible conduct require a showing of evil purpose. Those legal norms which are principally designed to regulate rather than punish require merely a showing that a defendant

has dropped below an acceptable standard of behavior. 98 S. Ct. at 2875-76. Since attempts to obtain prospective relief will almost always involve "regulation" as opposed to "punishment", the consistent acceptance of negligence-recklessness as sufficiently culpable scienter to warrant prospective relief is hardly surprising. Especially in the context of a request for prospective relief under the equal protection clause, this Court's emphasis should be on stimulating an acceptable standard of official behavior, as opposed to imposing punishment. Accordingly, while strict adherence to a subjectively oriented requirement of purposive activity may be appropriate in cases seeking to impose retrospective sanctions for morally repugnant behavior, no jurisprudential basis exists to insist upon purposive - as opposed to reckless or negligent - conduct in cases seeking prospective relief in an Equal Protection context. No basis exists for tolerating the reckless or negligent

infliction of injury on vulnerable members of a racial minority by a government entity which, if not purposively malicious, is culpably indifferent. Moreover, given the records below, no reasonable finder of fact could fail to find that defendants acted with reckless disregard for and deliberate indifference toward black children confined to ghetto schools in Columbus and Dayton.

B. The Burdens of Proving Culpable Mental State.

If this Court properly determines that the equal protection clause is violated by negligent or reckless infliction of disproportionate harm on members of racial minorities, the task of evolving equitable and efficient ground rules for proving culpable scienter would be substantially eased. While difficult questions would, no doubt, arise in evolving and applying a standard of care designed to minimize the negligent or reckless infliction of harm on members of racial minorities,

the task of applying reasonableness in an Equal Protection context should prove no more difficult than similar tasks undertaken by this Court in other areas of the law. E.g. Continental T.V. Inc. v. G.T.E. Sylvania Inc., 433 U.S. 36 (1977), overruling United States v. Arnold, Schwinn, & Co., 388 U.S. 365 (1967); Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1, 2-3, 37-38 (1978); Bucklo, The Supreme Court Attempts to Define Scierter Under Rule 10b-5, 29 Stan. L. Rev. 213 (1977). Indeed, in insisting upon an objective standard as a check on the "good faith" defense, this Court has already committed itself to defining the contours of a reasonable standard of care applicable to virtually all government officials. Estelle v. Gamble, 429 U.S. 97 (1976); Wood v. Strickland, 420 U.S. 308 (1975); see also, United States v. Ehrlichman, 546 F.2d 910 (D.C.Cir. 1976); United States v. Barker, 546 F.2d 940 (D.C.

Cir. 1976). The allocation of the production and persuasion burden would, under such circumstances, take on far less significance, since the parties would not be asked to prove the unprovable.

If, however, this Court insists upon adopting a purely subjective "purpose" test in Equal Protection cases, the size and placement of the burdens of proof become critical because it may well be all but impossible for any party to satisfy them.⁸ In

8. The inordinate importance of the burden of proof decision casts serious doubt on the wisdom of a purely subjective "purposive" standard. Whenever a fact is so difficult to prove that allocation of the burden of proof, in effect, decides the merits, the "factual" determination is in reality a legal fiction. Respect for law is hardly advanced by permitting something as important as equality under the law to turn on such a legal fiction.

criminal cases*, the due process clause governs the allocation and size of the persuasion burden, leaving to the courts substantial latitude in allocating the production burden. E.g. Davis v. United States, 160 U.S. 469 (1895). See generally, In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977). In most civil contexts, on the other hand, courts retain the power and responsibility to define and allocate the production and the persuasion burdens. E.g. Castaneda v. Partida, 430 U.S. 482 (1977); Keyes v. School District No. 1, 413 U.S. 189 (1973); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967). See generally, Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, 12 Stan. L. Rev. 5 (1959). Modern analysis has suggested that the allocation and definition of the burdens of proof are governed by three factors: (1) the degree of difficulty anticipated in proving the fact at issue; (2) the relative ease

of access to the evidence; and (3) the direction of error displacement which the legal system wishes to affix to a given fact-finding process. See, e.g., Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L. J. 1299 (1977); McBaine, Burden of Proof: Degrees of Belief, 32 Cal. L. Rev. 242 (1944); 9 J. Wigmore §§ 2485-2486 (3d Ed. 1940). Whether one approaches the burden of proof issue in this case from the perspective of difficulty of proof, relative ease of access to the evidence or displacement of error, the burdens of proof should be borne by the defendants.

As this Court has repeatedly noted, proving the presence or absence of purposeful racial animus is an extraordinarily difficult task. E.g. Village of Arlington Heights v. Metropolitan Housing Development Corp., supra; Keyes v. School District No. 1, supra. The subjective motivation of actors in our legal system has consistently proven an elusive and baffling quarry.

Moreover, when the subjective motivation at issue is not that of an individual, but encompasses the collective motivation of a public body which consists over time of numerous individuals with varying motives, the search for a unified subjective purpose takes on an artificial cast. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 319 (1978) (Stewart, Burger, Rehnquist and Stevens, JJ. dissenting); United States v. O'Brien, 391 U.S. 367 (1968); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205 (1970); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95. See also, Hawk, Attempts to Monopolize - Specific Intent as Anti Trust's Ghost in the Machine, 58 Cornell L. Rev. 1121 (1973). Finally, the difficulty of establishing purposive racial animus by an individual (to say nothing of a government body) is exacerbated by the happy fact that racial animus is currently perceived

as socially unacceptable. Put bluntly, subjective bigotry - especially in government officials - is uniquely difficult to prove precisely because bigots are not encouraged to advertise their true feelings. Indeed, many persons whose actions are affected by racial prejudice are not even conscious of the racially tinged roots of their behavior.

If this Court insists that the right of racial minorities to equal protection of the law turns on a search for such an elusive phenomenon, no doubt exists that defendants enjoy a decided advantage in access to the relevant evidence. Defendants will routinely have access to the raw material of decision-making. Moreover, proof concerning the existence of neutral explanations for racially disproportionate practices will rarely, if ever, be available to a plaintiff, but will be routinely available to a defendant.

Even more importantly, to the extent our fact-finding process errs

in the area of racial animus, it should err on the side of the prospective dis-establishment of government policies which gratuitously inflict harm on vulnerable racial minorities.⁹ Thus, if error is to be displaced, it should be displaced in the direction of ending the segregation of black children in racially identified schools. Traditionally, our legal system has effected such a displacement of error by a sensitive allocation of the persuasion burden to favor deeply felt social goals.

Given the powerful arguments in favor of imposing both burdens of proof on a government defendant in an equal protection case, it would be reasonable

9. No question of retrospective sanctions is raised in this case. Whether the burden of proof in a retrospective sanction case should differ from the burden in a prospective case may be left to another day. Compare, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) with S.E.C. v. Aaron, ___ F.2d ___ (2d Cir. 1979).

to impose both the initial production burden and the ultimate persuasion burden on the issue of scienter on the defendants. However, amicus believes that an equitable and easily administered allocation of burdens is illustrated by the less drastic approach suggested by this Court in Castaneda v. Partida, 430 U.S. 482 (1977) and Keyes v. School District No. 1, 413 U.S. 189 (1973). Under such an allocation, plaintiffs would bear an initial production burden on the issue of purposeful discrimination. Once such an initial production burden were satisfied, both a shifted production burden and the persuasion burden would be borne by the defendants. See generally, Davis v. United States, 160 U.S. 469 (1895).

1. The Nature of Plaintiffs' Initial Production Burden

Orthodox evidentiary analysis defines plaintiffs' initial production burden as the obligation to produce evidence from which a reasonable finder of fact may determine that it is more

likely than not that the contested fact (scienter) exists.¹⁰ Where plaintiffs in a Northern school desegregation case demonstrate (1) the existence of racially segregated schools; and (2) the fact that defendants knew that the consequences of their policies would be the maintenance of a segregated school

10. Such a definition assumes that the initial persuasion burden rests with the plaintiff as well. Since the production burden is not, strictly speaking, a fixed quantum of evidence, but rather varies as a function of the persuasion burden, a change in the size or allocation of the persuasion burden exerts an automatic effect upon the quantum of evidence required to satisfy a production burden. E.g. McNaughton, Burden of Production of Evidence: A Function of the Burden of Persuasion, 68 Harv. L. Rev. 1382 (1955). See generally, United States v. Taylor, 464 F.2d 240 (2d Cir. 1972); United States v. Melillo, 275 F. Supp. 314 (E.D.N.Y. 1967). Thus, were the persuasion burden placed on the defendant as an initial matter, plaintiffs' initial production burden would be lower. Plaintiffs' initial production burden should, however, be measured as if the persuasion burden were on the plaintiff, since, under the model suggested by amici, no persuasion burden shift occurs until an initial production burden has been satisfied.

system, a reasonable finder of fact may infer the existence of culpable scienter by a preponderance of the evidence. Thus, proof that an existing condition of racial segregation was the foreseeable consequence of defendants' past actions satisfies plaintiffs' production burden on the issue of culpable scienter. Precisely such a "foreseeable consequences" test has been approved by this Court in a variety of contexts as sufficient to satisfy a production burden on the issue of scienter. E.g. United States v. United States Gypsum Co., 98 S. Ct. 2864 (1978) (criminal anti-trust); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) (unfair labor practice). See also, Arthur v. Nyquist, 573 F.2d 174 (2d Cir. 1978); United States v. Texas Educational Agency, 564 F.2d 162 (5th Cir. 1977); Hart v. Community School Board of Educ., 512 F.2d 37 (2d Cir. 1975). See generally, Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,

86 Yale L. J. 317 (1976); Schwemm, From Washington v. Davis to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. of Ill. Law Forum 961. See generally, Washington v. Davis, *supra*, at 253 (Stevens, J. concurring). In the instant case, plaintiffs not only proved the two elements minimally necessary to satisfy their production burden, they introduced substantial direct evidence of racial animus by proving a pattern of activity explainable only in terms of racial animus.¹¹ Cf. Gomillion v. Lightfoot, 364 U.S. 339 (1960). With the clear satisfaction of plaintiffs' production burden, the definition and allocation of the persuasion burden becomes critical.

11. Brinkman v. Gilligan, 583 F.2d 243, 254, 256 (6th Cir. 1978); Pennick v. Columbus Board of Education, 583 F.2d 787, 805, 809 (6th Cir. 1978).

2. The Nature of Defendants' Persuasion Burden

The persuasion burden instructs the finder of fact as to the proper disposition of doubtful cases. Where, as here, plaintiffs seeking prospective relief have satisfied an initial production burden by introducing evidence which would permit a reasonable finder of fact to infer culpable scienter, doubts should be resolved in favor of disestablishing conduct which is gratuitously harmful to racial minorities. See, *supra* at 53. Keyes v. School District No. 1, 413 U.S. 189 (1973); Castaneda v. Partida, 430 U.S. 482 (1977); NLRB v. Great Dane Trailers, 388 U.S. 26 (1967); United States v. Grinnell Corp., 384 U.S. 563 (1966), *aff'g except as to decree*, 236 F. Supp. 288 (D.R.I. 1964). Thus, once an initial production burden on the scienter issue has been satisfied, a defendant seeking to avoid prospective relief must persuade the finder of fact that it is more likely than not that cul-

pable scienter did not exist.¹²

12. Similar concerns for error displacement in the fact finding process and allocation of the risk of uncertainty have resulted in placing persuasion burden on defendants in many environmental cases. E.G. In Re Con. Edison of New York (Indian Point 2) 6 A.E.C. 751 (Sept. 25, 1973); see generally Trubeck, Allocating the Burden of Environmental Uncertainty: The NRC Interpretation of NEPA's Substantive Mandate, 1977 Wisc. L. Rev. 747. Proof of potential environmental harm is either non-existent or uncertain, or if in existence, is frequently unavailable to plaintiffs. Without the shifted burdens plaintiffs would be required to persuade a fact finder that some quantity of damage to health or the environment will occur unless enjoined. Under properly allocated burdens, however (e.g. In Re Con Edison Indian Point 2) when plaintiff satisfies an initial production burden by presenting sufficient evidence to raise a serious question as to potential environmental harm, the production and persuasion burdens are placed on the proponent of the environmental risk to prove that it is more likely than not either that no environmental harm will occur or that there is some excusing condition, i.e. necessity and no feasible alternative.

3. The Shift of the Production Burden to Defendants

The combination of a plaintiff's evidence and the shift in the persuasion burden to the defendant creates the possibility of a shift in the production burden to the defendant in an appropriate case. Where plaintiffs' initial evidence makes it impossible for a defendant to satisfy his persuasion burden on the issue of culpable scienter in the absence of rebuttal, defendants are saddled with a classically shifted production burden. E.g. Castaneda v. Partida, supra; Keyes v. School District No. 1, supra.

Defendants' attempt to satisfy such a shifted production burden will generally take the form of demonstrating that factors unrelated to racial animus motivated the acts in question. Plaintiffs will generally seek to weaken such an inference of benign scienter by demonstrating segregative acts which do not fit within defendants' neutral explanation. At the close of the evidence, the Court must determine whether

defendants have satisfied their shifted production burden by introducing evidence from which a reasonable finder of fact could infer that it is more likely than not that benign, as opposed to culpable, scienter existed. To the extent the Court finds that a defendant has satisfied a shifted production burden, the issue must then be decided by the finder of fact under the appropriate persuasion burden.¹³

13. In the Columbus case, the District Court found that each party had satisfied its production burden and then found that defendant had failed to satisfy its shifted persuasion burden. Pennick v. Columbus Bd. of Educ., 583 F.2d 787, 801 (6th Cir. 1978). In the Dayton case, the District Court found that plaintiff had satisfied a production burden, but erred in continuing to place the persuasion burden on the plaintiff. When the Sixth Circuit correctly placed the persuasion burden on the defendant, it properly ruled that no reasonable finder of fact could deem defendants' persuasion burden satisfied. Brinkman v. Gilligan, 583 F.2d 243, 252, 258 (6th Cir. 1978).

4. Castaneda v. Partida and Keyes v. School District No. 1 as Evidentiary Models.

Amici has argued that satisfaction of a production burden by a plaintiff alleging purposeful racial discrimination should act to shift the persuasion burden (as well as the production burden in many cases) on the issue of culpable scienter in an equal protection case to the defendant. This Court has never comprehensively considered the appropriate allocation of the burdens of proof in cases alleging unconstitutional racial discrimination. However, in two recent cases the Court has appeared to apply the evidentiary analysis urged by amici.

In Castaneda v. Partida, supra, a habeas corpus petitioner challenged the constitutionality of the Grand Jury selection process in Hidalgo County, Texas, alleging that Mexican-Americans were substantially underrepresented on the panels. As the decisions of this Court made clear, in order to prevail, the petitioner was obliged to demonstrate the intentional exclusion of racial

minorities from the Grand Jury process. Thus, the issue of scienter was squarely posed.

In support of his contention, the petitioner in Castaneda produced statistical evidence demonstrating that while Hidalgo County was 79 percent Mexican-American, minority representation on Grand Jury panels approximated only 40 percent. Both the district court and this Court found that such evidence of disproportionate racial impact satisfied petitioner's production burden on the issue of scienter. In other words, a reasonable finder of fact could infer from the pattern of underrepresentation that it was more likely than not the result of purposeful exclusion of Mexican-Americans.

Respondents in Castaneda produced virtually no evidence tending to rebut the inference of scienter which flowed from petitioner's statistics. Under such circumstances, this Court reversed a finding of fact by the trial court that scienter did not exist. Although

this Court did not explicitly describe its allocation of the persuasion burden in Castaneda, its action in reversing the trial court's finding of fact reveals that the persuasion burden was allocated to the government. If the persuasion burden were deemed to rest with petitioner in Castaneda, this Court's reversal of the district court's finding of fact could be explained only by a finding that, based on petitioner's raw statistics, no reasonable finder of fact could fail to find that it was more probable than not that culpable scienter existed. While such a reading of Castaneda is possible, it is a highly strained one.¹⁴ If, however, the persuasion burden is deemed to rest with the respondents in Castaneda, this

14. Unless, of course, the culpable scienter at stake in Castaneda was negligent or reckless behavior rather than purposive exclusion.

Court's reversal is explained by a finding that, given respondents' failure to present persuasive rebuttal evidence, no reasonable finder of fact could find that it was more probable than not that purposive discrimination did not exist. Thus, this Court appears to have ruled in Castaneda, that once an initial production burden on the issue of purposive discrimination has been satisfied, ties should be broken in favor of disestablishing practices which inflict gratuitous harm on racial minorities.

In Keyes v. School District No. 1, supra, plaintiffs alleged systemwide racial segregation in the Denver public schools. Not surprisingly, the Keyes proof pattern is similar to the records in both the Dayton and Columbus cases. In each, plaintiffs demonstrated widespread racial segregation, coupled with a showing that defendants' policies in the areas of site selection, attendance zones, pupil transfers and staff assignments had had the foreseeable consequences of maintaining a segregated

system. In addition, in each, plaintiffs presented direct evidence of purposeful racial segregation in a significant segment (but not the entire) system. In Keyes, although the terminology is not precise, this Court clearly ruled that plaintiffs had satisfied their production burden on the issue of scienter. In other words, plaintiffs' evidence was sufficient to permit a reasonable finder of fact to infer that it was more likely than not that the systemwide segregation in the Denver schools was the result of purposive activity. Once the threshold production burden was satisfied, this Court explicitly shifted the persuasion burden on the scienter issue to the defendants. In Keyes, this Court used the phrases "presumption" and "prima facie case" to describe its shift of the persuasion burden. As the briefs of the parties reveal, the ambiguity inherent in such phrases renders their use questionable.¹⁵

15. The impact of true presumptions on the persuasion burden has been the subject of substantial debate. However, the inferential

Rather, it would be preferable to announce explicitly that once a production burden on systemwide scienter has been satisfied, the defendants bear the risk of a tie.

5. Application of the Evidentiary Model to the Dayton and Columbus Cases

(a) Satisfaction of Plaintiffs' Initial Production Burden

Plaintiffs in both the Dayton and Columbus cases offered three types of evidence in satisfaction of their initial production burden. First, they demonstrated the current racial segregation of the school systems in both cities. Brinkman v. Gilligan, 583 F.2d 243, 254 (6th Cir. 1978); Pennick v.

15. cont'd.
process described in Keyes is not a presumption in the accepted sense of the term. Where an inference from a basic fact to an inferred fact is compelling, the artificial stimulus of a presumption is unnecessary to allow it. The process described in Keyes is closer to a permissible inference, with the persuasion burden resting on the defendant. Moreover, "prima facie case" has been used to mean so many things as to be virtually meaningless.

Columbus Bd. of Education, 583 F.2d 787, 800-01 (6th Cir. 1978). Second, they demonstrated a series of acts taken by the defendants which had the inevitable and foreseeable consequences of increasing or perpetuating racial segregation in the schools. Brinkman v. Gilligan, supra, at 252, 254, 257; Pennick v. Columbus Bd. of Educ., supra at 802, 804, 808. Finally, they demonstrated acts having a substantial segregative effect which could not logically be explained by adherence to a racially neutral policy. Brinkman v. Gilligan, supra, at 254, 256; Pennick v. Columbus Bd. of Educ., supra, at 805, 809. Such evidence, especially when coupled with proof that an intentionally maintained dual system of segregated schools had existed as of this Court's decision in Brown I, unquestionably satisfied a production burden on the issue of culpable scienter. Indeed, similar evidence was deemed sufficient by this Court in United States v. United States Gypsum Co.,

98 S. Ct. 2864 (1978) to satisfy the more formidable production burden borne by the prosecution in a criminal case.

(b) Defendants' Attempt to Satisfy a Shifted Production Burden

Defendants, faced with plaintiffs' initial showing, sought to rebut the inference of culpable scienter by arguing that their actions were motivated by adherence to a racially neutral neighborhood schools policy. However, their attempt to rebut the inference of scienter was severely weakened by plaintiffs' demonstration that a number of the segregative acts at issue ran counter to (or were not compelled by) a neighborhood school policy. Since the quantum of evidence needed to satisfy a production burden is a function of the persuasion burden, the allocation of the persuasion burden was the critical factor.

(c) Allocation and Attempted Satisfaction of the Persuasion Burden

In Pennick, the district court apparently allocated the persuasion burden to the defendants.¹⁶ In Brinkman, the district court allocated it to the plaintiffs. Predictably, each court found that the party saddled with the persuasion burden had failed to satisfy it. Equally predictably, when the Sixth Circuit in Brinkman correctly allocated the persuasion burden to the defendants, it ruled that, given the Brinkman plaintiffs' evidence and the weakness of defendants' rebuttal, no reasonable finder of fact could deem it satisfied. Accordingly, it treated the Brinkman defendants as having failed to satisfy a shifted production

16. In Pennick, the district court appears to have made alternative findings of scienter in the event the persuasion burden is found to rest with the plaintiffs.

burden,¹⁷ in much the same manner as this Court treated the respondents in Castaneda v. Partida, supra. In allocating the persuasion burden to the defendants and in ruling that their rebuttal evidence was clearly insufficient to meet it, the Sixth Circuit in Brinkman correctly applied the teachings of this Court. As amici have argued,

17. Since the district court in Pennick ruled that defendants failed to carry their persuasion burden, no necessity exists to decide whether the Columbus defendants satisfied their shifted production burden. Alternatively, the district court in Pennick ruled that plaintiffs had satisfied a persuasion burden on culpable scienter on a systemwide basis. Thus, regardless of the allocation of the evidentiary burdens, the Columbus case must be affirmed, unless this Court wishes to overturn the careful factual findings of a lengthy trial.

where the factual issue of scienter is so elusive--and close--that neither party can satisfy a persuasion burden with respect to it - this Court has directed that ties be broken in favor of the granting of prospective relief aimed at making the promise of racial equality a reality.

III. THE FOURTEENTH AMENDMENT IMPOSES AN AFFIRMATIVE OBLIGATION UPON ALL SCHOOL DISTRICTS TO OPERATE RACIALLY INTEGRATED SCHOOLS WITHIN THEIR DISTRICTS TO THE MAXIMUM EXTENT FEASIBLE.

In addition to the evidentiary matters discussed herein, Amici believe that it also is necessary to address squarely the substantive rights at issue in these cases. In our view, it is the very condition of segregation which offends the Fourteenth Amendment.

This Court has never held that the Fourteenth Amendment permits a state to be in the business of operating racially segregated facilities. Amici submit, quite to the contrary, that the Fourteenth Amendment prohibits the maintenance of racially segregated state facilities, including of course racially segregated public schools within a school district. To the extent that racially segregative intent (as opposed to racially discriminatory intent) is necessary for segregation to offend the Fourteenth Amendment, that intent is supplied by the intent to operate racially segregated schools and to compel children to attend those segregated

schools. There must not be "black" schools and "white" schools; rather, to the maximum extent feasible, there must be just schools attended by children of all races. Green v. County School Board of New Kent County, 391 U.S. 430, 442 (1968).

A racially segregated school is a school that is racially identifiable with respect to student composition, that is, a school in which the student enrollment of one race is so disproportionate as realistically to isolate those students from students of the other race in the school system and thus to deprive them of a racially integrated educational experience. Racially segregated schools, as so defined, are something very different from racially imbalanced schools, i.e., schools in which the black-white ratio departs from the black-white racial composition of the district as a whole. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 23-24 (1971). The Fourteenth Amendment, of course, does not require racially balanced schools. Id.; Milliken v. Bradley, 418 U.S. 717, 746

(1974). But it does require that there be racially integrated schools within a school district, to the maximum extent feasible. In both Dayton and Columbus, the overwhelming majority of the schools are racially identifiable schools. It is this condition of segregation that offends the Fourteenth Amendment.

The present cases, like all others that have come before this Court since Brown v. Board of Education, 347 U.S. 483 (1954), have been predicated on a showing of de jure segregation, that is, on a showing that the racially segregated character of the school system was the result of intentional segregatory action. In Brown and the other cases coming from states where segregation was required by state law, the racially segregated character of the school system was, of course, attributable to those laws and could be conveniently referred to as de jure. This Court has required that school districts eliminate dual school systems mandated by state law by achieving the "greatest possible degree of actual desegregation, taking into account the practicalities of

the situation." Davis v. Board of School Commissioners, 402 U.S. 33, 37 (1971).

The existence of school segregation in those states where segregation was not required by state law has been no less extensive than in the states where it was so required. See generally, U.S. Comm. Civil Rights, Racial Isolation in the Public Schools (1967). Legal challenges to such segregation, however, were frequently framed with reference to the situation existing in states where segregation was required by state law, and when they were first made, the lower federal courts developed a distinction between de jure and de facto segregation. Under this distinction, intentional segregative acts on the part of the school board were analogized to state laws mandating racially segregated schools, and unless it could be shown that the existing school segregation was produced by such acts, that segregation was characterized as de facto rather than de jure and was held to be constitutionally permissible. See, e.g., Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S.

847 (1967); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964). As a result, plaintiffs seeking school desegregation in school districts located in states where school segregation had not been required by state law, attempted to show the commission of intentionally segregative acts on the part of the school board, so as to bring the resulting segregation within the framework of the de jure-de facto distinction. In the first such case to reach this Court, Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), the plaintiffs thought and thus conceded that they had to prove that the segregated schooling was "brought about or maintained by intentional state action." 413 U.S. at 198. As this Court there stated:

"We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have

committed acts constituting de jure segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." 413 U.S. at 212.

Insofar as this Court alluded to the so-called de jure-de facto distinction in Keyes, it did so in relation to the plaintiff's theory of the case, and in the context of holding that once intentional segregation had been proved with respect to a substantial portion of the school system, the school board had the burden of showing that its actions as to the other segregated schools in the system were not also motivated by segregative intent. 413 U.S. at 208-209. This Court did not hold in Keyes, therefore, that segregation resulting from the "neutral" application of the "neighborhood school policy" without a showing of "segregative intent" was constitutional.

Although this Court has subsequently cited Keyes for the proposition that the existence of racially segregated schools within a school district is not unconstitutional absent a showing of segregative intent, see Washington v. Davis, 426 U.S. 229, 240 (1976), Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 (1977), and has stated that the existence of predominantly black and predominantly white schools, without more, does not offend the Fourteenth Amendment, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971), it has never so held in a case where the question was squarely presented. It has never upheld the constitutionality of so-called de facto segregation and has never addressed the question left open in Keyes, of whether a neighborhood school policy of itself can justify the existence of racially segregated schools in the absence of intentionally segregative acts. More significantly, it has never considered the fundamental question of whether the Fourteenth Amendment requires a school district to operate racially integrated schools within its

boundaries, to the maximum extent feasible.

The Fourteenth Amendment's requirement obligating a school district to operate racially integrated schools within its boundaries, to the maximum extent feasible, provided the rationale for the original school segregation decisions in Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954). The rationale of those decisions, carried over to segregation existing in school districts located in states where it was not required by state law, renders the maintenance of racially segregated schools unconstitutional without regard to whether their racially segregate character was produced by "segregative intent." The gravamen of the Fourteenth Amendment violation is the maintenance of racially segregated schools. The relevant "intent" is the "intent" to operate racially segregated schools and to compel children to attend these schools. What very often has "caused" these schools to become racially segregated schools is the action of a school board, an agency of the state, in using assignment practices--including

an alleged neighborhood school policy-- with the knowledge that because of existing patterns of residential racial segregation, the board will produce racially segregated schools.¹⁸ This intent is every bit as onerous as a state law achieving the same result. As Justice Powell has stated: "Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle." Keyes v. School District No. 1, 413 U.S. 189, 227 (1973) (Powell, J., concurring). The existence of racially segregated schools, therefore, results from "intentional" school board action, and the question is whether the Fourteenth Amendment permits a school board to operate racially segregated schools, or whether it requires that

18. The amici do not address the question of whether governmental responsibility for existing patterns of residential racial segregation renders the resulting school segregation unconstitutional and subject to redress. See Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), aff'd mem., 423 U.S. 963 (1975); United States v. Board of School Commissioners of the City of Indianapolis, 573 F.2d 400 (7th Cir. 1978).

it operate racially integrated schools within its boundaries, to the maximum extent feasible. Amici submit that the Fourteenth Amendment makes the choice in favor of racial integration.

First, the strong value of racial equality embodied in the Fourteenth Amendment's Equal Protection Clause, see the discussion in Regents of the University of California v. Bakke, 98 S.Ct. 2733, 2747-2750 (1978), precludes a state from being in the business of racial segregation and from operating any of its facilities on a racially segregated basis, absent the most compelling and cogent justification for so doing. The teaching of Brown, Bolling and their progeny is precisely that the state cannot be in the business of racial segregation, and in fact cannot be involved in any way in the operation of racially segregated facilities. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Evans v. Newton, 382 U.S. 296 (1966). As this Court stated in Bolling: "Segregation in public education is not reasonably related to any proper governmental objective." 347 U.S. at 500.

The only difference between the school segregation involved in Brown and Bolling and the school segregation involved in some northern and western school districts is that the former was mandated by state law while the latter exists in part because of an alleged application of a neighborhood school policy. This difference is without constitutional significance. At best a neighborhood school policy advances a school board's interest in "administrative convenience," but, as this Court has noted, equal protection principles recognize higher values than "speed and efficiency." Frontiero v. Richardson, 411 U.S. 677, 690 (1973). If "administrative convenience" does not justify the use of gender-based classifications, a fortiori it does not furnish a compelling and cogent justification for the maintenance of racially segregated schools.

The question left open in Keyes, therefore, must be answered in the negative "A 'neighborhood school policy' [will not] of itself justify racial or ethnic concentrations [even] in the

absence of a finding that school authorities have committed acts constituting de jure segregation." 413 U.S. at 212. A school board, as an agency of the state, cannot be in the business of racial segregation without compelling and cogent justification; the administrative convenience, if any, served by a neighborhood school policy, is not a compelling and cogent justification for the operation of racially segregated schools.

Second, and perhaps even more importantly, the maintenance of racially segregated schools is a denial of equal educational opportunity on grounds of race to the children, black and white, who are required to attend them, because it deprives them "of the benefits that they would receive in a racially integrated school system." Brown v. Board of Education of Topeka, 347 U.S. 483, 494 (1954). In Brown, this Court focused on the harm caused to black children by required attendance at racially segregated schools. It emphasized the necessity for interracial associations in the educational

process,¹⁹ and the importance of those "intangible qualities which are incapable of objective measurement." 347 U.S. at 493. The necessity for interracial associations in the educational process and the importance of "intangible qualities which are incapable of objective measurement" has consistently been recognized by this Court, from Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), through Brown to Bakke. In addition, in Brown, this Court made clear that racial segregation in the schools was not simply the mutual separation of the races but the segregation of the racial minority by and from the dominant white majority, thus denoting the inferiority of the racial minority. This official declaration of racial inferiority and stigmatization had adverse psychological consequences for black children, which affected their

19. White children similarly suffer the loss of interracial associations by being compelled to attend racially segregated white schools. See the discussion in Hart v. Community School Board, 383 F.Supp. 699, 740 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975).

motivation to learn in the school setting. As the Court concluded: "Separate educational facilities are inherently unequal," and deprive minority children "of the benefits they would receive in a racially integrated school system." 347 U.S. at 495.

While this Court in Brown was dealing with school segregation required by state law, it did not indicate that the harm to minority students caused by attendance at racially segregated schools would be any less if the segregation resulted from a school board's segregated neighborhood school policy. And, of course, it is not. The intangible qualities of racially integrated education and the benefits of interracial associations during the educational process are lost at any segregated school, regardless of how its segregated character came into being. Similarly, feelings of inferiority and the resulting impairment of motivation to learn exist whenever black children are assigned to segregated black schools. School children do not understand what even to the courts is the sometimes elusive distinction

between de jure and de facto segregation. Black children know that they are attending a school where most or all of the other children are black and they know that they are required by the state to attend that school.²⁰ They know that they are segregated from white children who attend different schools in the same district, sometimes in fairly close proximity to the schools that black children are attending. As the United States Commission on Civil Rights has observed, following a detailed and comprehensive study of the effects of racial isolation in the public schools:

"The central truth which emerges from this report and from all of the Commission's investigations is simply this: Negro children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of

20. In Brown, this Court noted the harmful effects of "segregation [that] has the sanction of law." 347 U.S. at 494. To the black child, segregation has the "sanction of the law" when that child is required to attend a black school, regardless of whether state law requires that school to be racially segregated.

such segregation may be..." U.S. Comm. Civil Rights, Racial Isolation in the Public Schools, 193 (1967).

Where official governmental action causes specific and identifiable injury to children because of their race, the genesis of that injury must be irrelevant. It is constitutionally irrelevant whether the segregated schools came into being because a school board intended them to be segregated by manipulating a neighborhood school policy or because it knew they would be segregated as a result of its adoption of such a policy. Either way, the school board is fully aware of the specific and identifiable injury that it is inflicting on children required to attend racially segregated schools.²¹

21. As the California Supreme Court has observed: "[a]lthough a school board's establishment of and adherence to a 'neighborhood school policy' may on its face represent the implementation of a 'neutral,' constitutionally permissible classification scheme, the effect of such state action has invariably been to inflict a 'racially specific' harm on minority students when such a policy actually results in segregated education." Crawford v. Board of Education of City of Los Angeles, 17 Cal.3d 280, 295 (1976). The California Supreme Court has interpreted the equal protection clause of the California Constitution in substantially the same manner as amici contend that this Court should interpret the Equal Protection Clause of the federal Constitution.

Either way, the children are being denied equal educational educational opportunity. Either way, the children are being denied the benefits they would receive in a racially integrated school system. Either way, they are being denied equal protection of the laws.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

As this Court held in Brown, education is not "made available to all on equal terms," when it is racially segregated. The Fourteenth Amendment, it is submitted, requires school boards to make education available on equal terms by operating racially integrated schools to the maximum extent feasible.

Conclusion

For the reasons stated herein the judgments of the United States Court of Appeals for the Sixth Circuit in No. 78-610 and No. 78-627 should be affirmed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION *et al.*,
Petitioners,
v.

GARY L. PENICK *et al.*,
Respondents.

No. 78-627

DAYTON BOARD OF EDUCATION *et al.*,
Petitioners,
v.

MARK BRINKMAN *et al.*,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR THE
NATIONAL EDUCATION ASSOCIATION
AND THE LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
AS AMICI CURIAE

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On Writs of Certiorari to the United States
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BRIEF FOR THE
NATIONAL EDUCATION ASSOCIATION
AND THE LEAGUE OF WOMEN VOTERS
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AS AMICI CURIAE

INTEREST OF AMICI¹

1. *The National Education Association* (NEA) is an independent, voluntary organization of educators, open to any person who is actively engaged in the profession of teaching or other educational work, or any person interested in advancing the cause of education. NEA presently is the largest professional organization in the nation. Pursuant to the terms of its charter, 34 Stat. 805 (1906), NEA's purpose is "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States."

A major interest and objective of NEA is to secure equality of education and sound education for children of all races. It is convinced that segregated education is not only inherently unequal, but adversely affects the quality of education afforded to all students, not least by denying them adequate preparation for living and working in a society in which they must deal with persons not of their own race. Accordingly, NEA is committed to the goal of full and effective desegregation of all school systems in the country.

Reflecting these concerns, NEA has adopted a resolution providing in part:

"The National Education Association believes it is imperative that full integration of the nation's schools be effected.

"The Association recognizes that acceptable integration plans will include affirmative action programs and a variety of devices such as geographic realignment, pairing of schools, grade pairing, satellite and magnet schools. Some arrangements may require bussing of students in order to comply with estab-

¹ The parties have consented to the filing of this brief and their letters of consent have been tendered to the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

lished guidelines adhering to the letter and spirit of the law." 1978-79 *NEA Handbook for Local, State, and National Associations*, p. 236.

In addition, NEA has participated as an amicus in numerous cases in this Court involving issues of school desegregation.²

2. *The League of Women Voters of the United States* (LWVUS) is a non-partisan, tax-exempt, non-profit membership corporation organized under the laws of the District of Columbia, with a current membership of 131,000 in 1,350 state and local Leagues in each state, the District of Columbia, Puerto Rico, and the Virgin Islands. Since its inception in 1920, the LWVUS' purpose has been to promote political responsibility through informed and active participation of citizens in government. In pursuance of its purpose, the LWVUS has articulated several guiding principles: the LWVUS believes, among other things, that no person or group should suffer legal, economic or administrative discrimination, and that responsible government should be responsive to the will of the people.

Under LWVUS' national position in support of equal access to education, the League has a long-standing commitment to school desegregation. At the national level, it has supported federal efforts designed to assist in the implementation of school desegregation plans, and it has opposed actions that would restrict the courts' and agencies' authority to fashion remedies. At the local level, Leagues have worked to promote peaceful school desegre-

² See, e.g., *Pasadena City Board of Education et al. v. Spangler*, 427 U.S. 424 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973); *Richmond School Board v. State Board of Education*, 412 U.S. 92 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); and *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

gation in a variety of ways including serving on advisory committees; working with local government, the media and parents; promoting human relations activities; and supporting amicus briefs, among others.

League efforts have focused not only on promoting voluntary integration efforts but also on helping to implement court-ordered plans where they become the means of effecting school desegregation.

The present cases raise important questions concerning the extent to which school officials must remedy school segregation to which both they and other public officials have contributed. In light of amici's commitment to the goal of desegregation, they are vitally interested in the determination of these questions. In addition, amici believe they can be of service by bringing to the attention of the Court common law tort principles bearing on the issues at bar.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), this Court said that in fashioning a remedy for possible constitutional violations by the Dayton Board, the district court

"must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Id.* at 420.

The applicability and meaning of this directive is the subject of sharp disagreement among the lower courts and the parties here.

In *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973), this Court recognized that proof of an intentionally segregative policy affecting a substantial portion of the school district will support a finding by the trial court of the existence of a dual system, absent a showing that the district is divided into clearly unrelated units. 413 U.S. 189, 201-203. The Court said that

"In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' *Brown II*, *supra*, at 301." 413 U.S. at 203.

In *Dayton I*, this Court, reaffirming the conclusion of *Keyes*, said that if there is a "systemwide impact" there may be a "systemwide remedy." 433 U.S. 406, 420.

In our view, plaintiffs in each case at bar have demonstrated that the school board had indeed pursued an intentionally segregative policy in a substantial portion of the school district, and that a systemwide remedy was appropriate. In light of the plaintiffs' extensive and persuasive arguments we do not propose to repeat those contentions here. Our brief concentrates on the prin-

ciples which we believe should guide this Court's decision if it were to conclude in either case, as it concluded in *Dayton I*, that the school board's violations were not systemwide.

In *Dayton I*, this Court said that the limited findings before it indicated only three possible and "relatively isolated" instances of unconstitutional action. With respect to the remedy, the Court assumed that it was possible to determine "how much incremental segregative effect these violations had on the [current] racial distribution of the Dayton school population. . . ." 433 U.S. 406, 420.

We question the validity of that assumption. Even though violations are "isolated," they are likely to affect significantly the racial composition of residential areas, which in turn results in additional school segregation. Where violations have had such a reciprocal effect, it may well be impossible to quantify the percentage of the total amount of segregation attributable to the school board as compared with other sources. Equally forbidding is the prospect of trying to count the number of children now attending segregated schools because of (a) the board's unconstitutional acts; (b) the acts of other persons or entities that were prompted by the board's violations; and (c) the acts of persons or entities that were independent of the board's violations. Thus, we urge that the "incremental segregative effect" concept should be abandoned in cases involving "isolated" violations because it will generally be impossible for a trial court to determine the "incremental segregative effect" of such violations.

Should this view be rejected, then we urge the Court to conclude that common law tort principles should be applied by the lower courts in determining, on a case-by-case basis, whether it is feasible to apportion responsibility for the current school segregation between the board and other causes of segregation. *Dayton I* surely

did not rule that the incremental segregative effect of a board's violations must be separated from all other school segregation when it is impossible to do so on a rational basis. In determining the feasibility of apportioning segregation among its causes, common law tort principles provide helpful guides. Since school desegregation cases usually arise under Section 1983 of Title 42,³ application of tort principles is particularly appropriate. That section, as this Court recently observed, is "intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution."⁴

At common law, the burden is on the defendant tortfeasor either to demonstrate a fair and reasonable basis for apportioning liability between himself and others or to make the plaintiff whole. See pp. 10-13, *infra*. Moreover, a tortfeasor is held liable for all foreseeable consequences of his conduct. The tortfeasor cannot escape liability on the ground that an intervening force has combined with and superseded or attenuated the effects of his tortious conduct if the intervening force was foreseeable. The same principles should prevent a school board from escaping liability for current segregation on the ground that residential segregation is an attenuating or superseding cause, if increased residential segregation was a foreseeable risk of the intentional segregative acts of school officials. See pp. 13-16, *infra*.

³ See *Brown v. Board of Education*, 347 U.S. 483 (1954); *Green v. County School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973). See also cases cited in *Monell v. Department of Social Services*, 436 U.S. 658, 663 n. 5 (1978).

⁴ *Carey v. Piphus*, 435 U.S. 247, 253 (1978), relying on *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972); *Monroe v. Pape*, 365 U.S. 167, 182 (1961); *id.* at 225-234 (Frankfurter, J., dissenting in part).

In apportioning responsibility for current school segregation, courts will also be confronted with the problem of what to do about the school segregation caused by public officials other than school authorities. In the cases at bar, both district courts found that public housing authorities and other state agencies have produced part of the residential segregation that now contributes to school segregation in Dayton and Columbus.⁵ Such school segregation is state-imposed within the meaning of the Fourteenth Amendment and should be remedied by school authorities because they have jurisdiction to do so and have themselves wrongfully contributed to the unconstitutional condition. See pp. 16-18, *infra*.

ARGUMENT

I. WHERE SCHOOL SEGREGATION RESULTS FROM MULTIPLE CAUSES, INCLUDING PURPOSEFUL SEGREGATION BY SCHOOL OFFICIALS, COMMON LAW TORT PRINCIPLES REQUIRE THAT FULL LIABILITY BE ALLOCATED TO THE BOARD UNLESS THE BOARD DEMONSTRATES A FAIR AND REASONABLE BASIS FOR APPORTIONING THE SEGREGATION AMONG ITS CAUSES.

The decisions made in the wake of *Dayton I* by Judge Rubin in *Dayton* and Judge Duncan in *Columbus* demonstrate a need for this Court to refine or reject the incremental segregative effect concept. In *Dayton*, Judge Rubin held that plaintiffs had the burden of proving incremental segregative effect and dismissed the complaint because plaintiffs failed to carry the burden. 446 F. Supp. at 1236. In *Columbus*, Judge Duncan found that "it is not now possible to isolate [housing segregation and school

segregation] and draw a picture of what Columbus schools or housing would have looked like today without the other's influence. I do not believe that such an attempt is required." 429 F. Supp. at 259. By implication, Judge Duncan also held that the burden of demonstrating the incremental segregative effect is upon defendants. On appeal, the Sixth Circuit took a third view. It concluded that "incremental segregative effect" is a description of the manner in which segregation occurs in a northern school system rather than a legal standard for determining how much school segregation must be remedied. *Brinkman v. Gilligan*, 583 F.2d 243, 257 (1978); *Penick v. Columbus Board of Education*, 583 F.2d 787, 814 (1978).

If this Court concludes that "incremental segregative effect" is a legal standard that is applicable to the cases at bar, it should refine the standard in a manner consistent with traditional principles of the common law of torts. As we show below, in the law of torts, courts have developed principles for limiting a defendant's liability for damages by allocating liability to various sources or causes of the harm suffered by plaintiff. Pursuant to common law, however, this allocation is appropriate only if the defendant is able to establish a fair and reasonable basis for apportioning the harm. In the event the defendant fails to make such a showing, he cannot escape liability for the combined harm caused by him and other forces.

⁵ *Penick v. Columbus Board of Education*, 429 F. Supp. 229, 259 (S.D. Ohio 1977); *Brinkman v. Gilligan*, 446 F. Supp. 1232, 1236 (S.D. Ohio 1977).

A. Where A School Board Has Engaged In Intentional Acts Of School Segregation, Liability For The Current Segregation May Be Allocated Between The Board And Other Sources Of That Segregation Only If The Board Demonstrates The Existence Of A Fair And Reasonable Basis For Apportioning The Harm.

1. *Common Law Principles of Allocating Liability by Apportionment of Harm.* In tort law, the burden of proving that defendants' tortious conduct has caused the harm to plaintiff is ordinarily on the plaintiff. *Restatement of Torts, Second*, § 433B(1). An exception to this rule is made, however, when the tortious conduct of two or more actors combines to bring about the harm to the plaintiff. Section 433B ¶ 2 of *Restatement of Torts, Second*, provides:

"Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."^{*}

The reason for this exception is rooted in considerations of justice and fairness. As the draftsmen of the *Restatement* explain, the burden of proof as to apportionment of harm is shifted in recognition of

"the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has in-

^{*} See also *Restatement of Torts, Second*, § 433B ¶ 3:

"Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm."

E.g., Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (plaintiff struck by a single birdshot fired by one of two negligent hunters).

flicted has combined with a similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned." *Restatement of Torts, Second*, § 433B, Comment d.

Thus, "the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing full responsibility" for the harm. *Restatement of Torts, Second*, § 433B(c). *Cf. Bigelow v. RKO Radio*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his wrong has created."). See also *Armstrong v. O'Connell*, No. 65-C-173 (E.D. Wis., decided Feb. 8, 1979) (slip op.) p. 25.

In tort law, allocation of damages according to the harm caused by a particular defendant and others is permissible only if:

"(a) there are distinct harms,[†] or

"(b) there is a reasonable basis for determining the contribution of each cause to a single harm." *Restatement of Torts, Second*, § 433A.

Whether there is a reasonable basis for fairly apportioning the harm among its causes may turn on the nature of the harm, the nature of its causes, or both. Where the harm is death, for example, there ordinarily is no reasonable basis for apportionment of liability. On the other hand, where the harm is stream pollution and the effluents from two or more factories are measur-

[†] The concept of "distinct harms" has no applicability here. According to the *Restatement*, when two individuals *independently* shoot the plaintiff at the same time, wounding him in the arm and the leg, it is "possible, as a logical, reasonable, and practical matter, to regard the two wounds as separate injuries, and as distinct wrongs." *Restatement of Torts, Second*, § 433A, Comment b.

able, the harm may be reasonably apportioned among the factory owners. *Restatement of Torts, Second*, § 433A, Comment *i* and *d*.

2. *Apportionment of Segregation*. If there is to be an apportionment of segregation between wrongdoing school boards and other sources, the foregoing common law principles, in our view, provide a sound basis for such apportionment.

To avoid full liability for any current school segregation to which it has contributed, a school board should be required to demonstrate that there is a fair and reasonable basis for apportioning the current school segregation between the board and other causal factors. In the words of the *Restatement*, such burden shifting is necessary to avert

"the injustice of allowing a proved wrongdoer [here the school board] who has in fact caused harm [school and residential segregation] to escape the liability merely because the harm which [it] has inflicted has combined with similar harm inflicted, by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned." *Restatement of Torts, Second*, § 433B, Comment *d*.

The common law burden shifting principles discussed above apply where the defendants' wrongdoing is mere negligence. In a school desegregation case, the defendants' wrongdoing consists of intentional segregative acts and policies designed to deprive individuals of their constitutional rights. If a negligent wrongdoer must bear full responsibility for harm he cannot apportion, the same principle should apply *a fortiori* to a school board that has engaged in intentional racial segregation.⁸

⁸ Compare W. Malone, *Ruminations On Cause-In-Fact*, 9 Stan.L. Rev. 60, 72-73 (1956).

Finally, there is a compelling reason for requiring a board to remedy current school segregation in its entirety—*i.e.*, to bear responsibility for the whole—unless it can demonstrate a fair and reasonable basis for apportioning liability. Assuming that there are circumstances in which disentangling the effects of defendants' segregatory acts would be possible, the difficulty of that task necessarily would increase with the number of demonstrated constitutional violations. It would be ironic indeed if the burden of proof were allocated in such a fashion as to absolve the perpetrator of multiple violations because the scope of his violations has made it impossible for the plaintiff to demonstrate what portion of the segregation was attributable to those violations.

B. Where Increased Residential Segregation Is A Foreseeable Risk Of A School Board's Constitutional Violations, The Board Is Liable For Current School Segregation Resulting From Such Residential Segregation.

At common law, a tortfeasor's liability for harm is not attenuated or superseded by the foreseeable⁹ intervention of other causes of the harm. Section 443 of the *Restatement of Torts, Second*, provides that

"The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about."

⁹ In many school desegregation cases, when increased segregation is a foreseeable consequence of a proposed school policy or decision, courts consider the adoption of the proposed policy or decision to be some evidence of a desire or intent on the part of the school board to bring about the foreseeable segregation. *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974). See also the *Restatement of Torts, Second*, § 8A. In this brief, we are not concerned with the interrelationship of foreseeability of harm and the intent to produce such harm.

Prosser states that the question of whether a defendant is to be relieved of liability because of an intervening cause generally has been determined

"by asking whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated. It is therefore said that the defendant is to be held liable if, but only if, the intervening cause is 'foreseeable.'" Prosser, *Law of Torts*, (4th ed. 1971), p. 272.

This proposition implies that the defendants will be held liable for the harm flowing from an "intervening cause" if the intervening cause was foreseeable. Applied to the context of school desegregation, if increased residential segregation was a foreseeable risk of the defendants' intentional acts of school segregation, defendants should be liable for any resulting school segregation.

As this Court has recognized, decisions of school officials concerning the location of schools may contribute significantly to residential segregation:

"People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods." *Swann, supra*, 402 U.S. at 20-21.

In *Keyes*, the Court noted that other school board actions, such as "the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty on racially identifiable bases" may affect the racial composition of residential neighborhoods. 413 U.S. at 202.

Thus, in the *Columbus* case, Judge Duncan specifically noted that "in Columbus, like many other urban areas,

there is often a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves." 429 F. Supp. at 259.¹⁰ "The racial identification of the school," as the district court found, "in turn tends to maintain the neighborhood's racial identity, or even promote it by hastening the [exodus of whites] in a racial transition area." *Id.* A racially identifiable school serves as a black or white semaphore for real estate dealers, potential buyers, lenders, developers and others who may make important and often racially tainted business decisions affecting the area surrounding the school.

Generally the increased residential segregation resulting from intentionally segregatory acts of a school board is reasonably foreseeable.¹¹ In analyzing the effects of a statutory dual system, Judge Wisdom has pointed out that

"Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. *Of course*, the concentration of Negroes increased in the neighborhood school. Cause and effect came together." *United States v. Jefferson County Board of Education*, 372 F.2d 836, 876 (5th Cir. 1966) (emphasis added).

¹⁰ In *Armstrong v. O'Connell*, No. 65-C-173 (E.D. Wis., decided February 8, 1979) (slip op.), the court found that "within an otherwise undifferentiated residential area, school boundaries tend to be the most meaningful boundaries in defining a neighborhood. Thus, the racial identifiability of a school helps to racially identify the neighborhood." Slip Op. at 21. See also *Evans v. Buchanan*, 393 F. Supp. 428, 436 (D. Del. 1975).

¹¹ "Foreseeability is to be determined in the light of what a reasonable man would have foreseen and is not limited to what defendant did in fact foresee, though it includes that." 2 Harper & James, *The Law of Torts*, § 20.5 at 1149 (1956).

Similarly, in *Columbus* Judge Duncan found that defendants "were aware" of the important influence that racially identifiable schools had on real estate transactions in the district. 429 F. Supp. at 249. This Court has also taken note of what must be obvious to school officials who are attempting to confine black children in one school and white children in another—namely, that their segregatory techniques

"have the *clear* effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." *Keyes, supra*, 413 U.S. at 202 (emphasis added). See also *Swann, supra*, 402 U.S. at 20-21.

In sum, where increased residential segregation is a reasonably foreseeable risk of a school board's constitutional violations, the board should be liable for current school segregation resulting from such residential segregation.

II. A SCHOOL BOARD FOUND TO HAVE COMMITTED UNCONSTITUTIONAL ACTS OF SCHOOL SEGREGATION MUST REMEDY ALL UNCONSTITUTIONAL SEGREGATION WITHIN THE BORDERS OF THE SCHOOL DISTRICT.

In most school desegregation cases, public officials in addition to school authorities will have contributed to school segregation. In *Columbus*, the district court found on the record before it that:

"Housing segregation has been caused in part by federal agencies which deal with financing of housing, local housing authorities, financing institutions,

developers, landlords, personal preferences of blacks and whites, real estate brokers and salespersons, restrictive covenants, zoning and annexation, and income of blacks as compared to whites." 429 F. Supp. at 259 (emphasis added).

The Court further determined that "[t]he interaction of housing and schools operate[d] to promote segregation in each." *Id.*

In *Dayton*, the Court found that:

"Since shortly after the 1913 flood, Dayton's black population has centered almost exclusively on the West Side of Dayton. . . . Without question the prime factor in this concentration has been housing discrimination, both in the *private and public* sector. . . . This segregated housing pattern has had a concomitant impact upon the composition of the Dayton public schools." 446 F. Supp. at 1236 (emphasis added).

The incremental segregative effect doctrine of *Dayton* I should not allow school authorities to escape their responsibility for remedying all state-imposed school segregation within their jurisdiction. This remedial principle is mandated by the Fourteenth Amendment's command that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *Swann, supra*, 402 U.S. at 18. Whatever the responsibility of an innocent school board to remedy the unconstitutional actions of its sister agencies, see *Swann, supra*, 402 U.S. at 23, when the school board itself has engaged in intentional acts of school segregation, it can and should be required to remedy all unconstitutional school segregation within the borders of the district. It is necessary to impose this responsibility on the school board because the board is the only agency with the ability or power to implement the state's school desegregation obligation. A contrary

rule would allow the State to escape its responsibilities under the Fourteenth Amendment by compartmentalizing authority and responsibilities among various agencies.

In sum, the Fourteenth Amendment should not be read to permit the harmful effects of a constitutional violation to endure because the agency liable for school segregation is impotent to remedy it, and the agency that can remedy it is not obliged to do so. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958). See *United States v. Missouri*, 363 F. Supp. 739, 748 (E.D. Mo. 1973). See also Justice Stewart's concurring opinion in *Milliken I*, *supra*, 418 U.S. at 755.

CONCLUSION

The judgments below should be affirmed because in each case, as respondents have shown, the record reveals that the constitutional violations committed by the school board have had a systemwide impact. If, however, this Court concludes that district courts must attempt to disentangle the segregatory effects of a defendant's constitutional violations from other causes of current school segregation, then the Court should make clear that unless defendants demonstrate a fair and reasonable basis for apportionment they must remedy the current school segregation in its entirety.¹²

The Court should also make clear that a wrongdoing school board is required to remedy all state-imposed school segregation within the borders of the school district,

¹² Explicit allocation of the burden of proof to defendants does not warrant remand of these cases for evidentiary hearing. Following *Dayton I*, the defendants had the opportunity to demonstrate at the remedy phase of the trials, that one or more schools or areas of the school system should not be included within the relief. See *Swann*, 402 U.S. at 26. See Penick Brief, p. 121. The Dayton board, moreover, has pointed out that "the burden of proving an absence of incremental segregative effect . . . is not an issue on which the outcome of this litigation should be deemed to turn. . . ." *Dayton Br.*, p. 45.

whether the product of school authorities, housing authorities, or other state and local public officials.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

COLUMBUS BOARD OF EDUCATION, ET AL., PETITIONERS

v.

GARY L. PENICK, ET AL.

DAYTON BOARD OF EDUCATION, ET AL., PETITIONERS

v.

MARK BRINKMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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*ON WRITS OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the evidence supports the lower courts' findings that the Columbus Board of Education and

the Dayton Board of Education adopted and maintained segregative policies with a systemwide impact.

2. Whether the systemwide impact of the violations warranted a systemwide remedy in each case.

INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibility with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The Court's resolution of the issues presented in this case would affect that enforcement responsibility. The United States has participated either as a party or as amicus curiae in most of this Court's school desegregation cases, including *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Green v. County School Board*, 391 U.S. 430 (1968); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *School Board of City of Richmond v. State Board of Education*, 412 U.S. 92 (1973); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); *Milliken v. Bradley*, 433 U.S. 267 (1977); and *Day-*

ton Board of Education v. Brinkman, 433 U.S. 406 (1977).

STATEMENT

These school desegregation cases involve the cities of Columbus and Dayton, Ohio. The city of Columbus has an area of 173 square miles and a population of more than 500,000 (Columbus Pet. App. 12). The boundaries of the school district are generally coterminous with the boundaries of the city. In 1976, the year the Columbus case was tried, approximately 96,000 students attended the Columbus public schools (*ibid.*). More than 32% of these students were black (Columbus Pet. App. 19).

The city of Dayton has a population of 245,000 (Dayton A. 34). The Dayton school district is not coterminous with the city (*ibid.*). Some parts of the city are included within other school districts, while the school district includes some parts of other townships. The population within the Dayton school district boundaries is 268,000 (*ibid.*). In 1976, approximately 45,000 students were enrolled in the Dayton public schools, slightly less than 50% of whom were black (Dayton A. 34-35).

At the times of trial, both Columbus and Dayton had a high degree of racial separation in their schools. In Columbus, about 70% of all students attended schools that were more than 80% white or 80% black (Columbus Pet. App. 18). Half of the 172 schools operated by the Columbus Board of Education were more than 90% black or 90% white

(Columbus Pet. App. 163). In Dayton 51 of the 69 public schools were virtually all-white or all-black (Dayton Pet. App. 149a-150a). In each case, plaintiffs sought to prove that these conditions of racial separation were brought about by deliberate school board actions. In each case the court of appeals concluded that plaintiffs had proved systemwide constitutional violations warranting systemwide remedies. The Columbus and Dayton school boards now challenge these conclusions. Because we believe that their petitions raise basically the same legal issues, we address both cases in a single brief.

I. COLUMBUS

A. The district court's findings of fact

This suit was filed on June 21, 1973, by a group of students attending the Columbus Public Schools, and their parents, against the Columbus Board of Education ("the Columbus Board"), its elected members, and the State Board of Education (Columbus Pet. App. 4-5).¹ The second amended complaint, styled a class action, was filed on October 22, 1974; it alleged that the Board had engaged in a systemwide policy of segregation warranting a systemwide remedy (Columbus Pet. App. 5-6). A group of inter-

¹ The Superintendent of the Columbus Public Schools, the State Superintendent of Public Instruction, the Governor, and the Attorney General were also named as defendants (Columbus Pet. App. 4). The district court found no evidence of any segregative conduct by the Governor or the Attorney General (Columbus Pet. App. 63).

vening plaintiffs made essentially the same allegations and also sought a "'system-wide' plan of desegregation" (Columbus Pet. App. 6).

After a trial lasting 36 days, the district court entered detailed findings of fact, concluding that the Columbus Board had a long-standing systemwide policy of segregating its students on the basis of race.²

The court focused first on the period before 1954 "to discover whether past acts or omissions are in any degree responsible for the admitted current racial imbalance in the Columbus schools" (Columbus Pet. App. 7). It found that the Columbus Board had formally abolished separate schools for blacks in 1881, and for a number of years assigned children to schools on the basis of geographic proximity (Columbus Pet. App. 8). In 1909, however, the Board built Champion school in a predominantly black residential district and staffed it with all black teachers (Columbus Pet. App. 8). During the 1920's and 1930's, all black teachers employed by the Board were assigned to Champion (Columbus Pet. App. 8-9). In succeeding years, the Columbus Board established several other black schools to accommodate the growing black population. For example, in 1938 the Board converted Pilgrim School, which was then a racially mixed junior high school, into an elementary school for black children (Columbus Pet. App. 9). This

² The district court also found the State Board of Education jointly liable (Columbus Pet. App. 64-67). The court of appeals remanded the case for more detailed findings by the district court on this point (Columbus Pet. App. 200-207).

change was accomplished by gerrymandering Pilgrim's attendance zones along racial lines and by replacing the school's all-white faculty with an all-black faculty (Columbus Pet. App. 9). Similarly, the teaching staffs at Felton, Garfield, and Mount Vernon, which became predominantly black schools, were converted from 100% white to 100% black (Columbus Pet. App. 9-10). The court found that by 1954 the Board had deliberately isolated most of its black students in five black schools on the near-east side of Columbus (Columbus Pet. App. 10-11). In conjunction with overt discrimination in student assignment, the Board assigned black teachers and administrators to its black schools (Columbus Pet. App. 9-10). Accordingly, the district court found that at the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Columbus Board of Education was operating a dual system (Columbus Pet. App. 11).

Turning to the period after 1954, the court found that the Board never attempted to dismantle this dual system of education (Columbus Pet. App. 61). To the contrary, the Columbus Board instead perpetuated and intensified racial separation by the following practices.

1. Faculty segregation

The court found that until 1974 the Board "generally maintained" its policy of assigning black teachers to those schools with substantial black student populations (Columbus Pet. App. 15). As the court

noted, this practice was discontinued only after a complaint was filed by the Ohio State Civil Rights Commission, and a conciliation agreement was entered in July 1974 (Columbus Pet. App. 15, 59).

2. School construction

The court found (Columbus Pet. App. 21) that of the 103 schools constructed by the Board between 1950 and 1975, 87 opened with racially identifiable student bodies, and 71 remained racially identifiable at the time of trial.³ Recognizing the Board's contention that it had followed a neutral neighborhood school policy, the court noted (Columbus Pet. App. 21) that the Board could have foreseen the probable racial composition of the new schools, and that in some instances the Board was warned that a school constructed on a proposed site would be racially identifiable. For example, before the Board constructed Gladstone in 1965, it was warned that the school

³ The court adopted the criteria of plaintiffs' expert, Dr. Gordon Foster, to determine whether a school was "racially identifiable" (Columbus Pet. App. 78-79). Racial identifiability describes the relationship between the racial composition of a particular school and the racial composition of the system as a whole. A measure of statistical variance is applied to the systemwide percentage of black pupils. Schools that have a percentage of black pupils outside this range are racially identifiable. For example, if the percentage of black pupils in the school system is 32%, and the statistical variance is + or - 15%, schools outside the range of 17% to 47% black would be racially identifiable. Dr. Foster's computations for the years 1950-1957, 1964, and 1975 appear in the appendix to the district court's opinion (Columbus Pet. App. 78-79).

would open and remain black if built on its proposed site (Columbus Pet. App. 21). The court found that the Board had ignored this warning and built Gladstone on a site that served to contain the black student population in the area south of Hudson Street; in contrast, if the Board had built Gladstone further north and readjusted its zone lines as some suggested, it would have promoted integration at three schools (Columbus Pet. App. 22).

The court did not infer segregative intent simply from the fact that the Board constructed new schools in residentially segregated areas, and it noted that in residentially segregated areas, the neighborhood school policy limits site selection (Columbus Pet. App. 25). The court found, however, that in those areas of the city with substantial black and white populations, there had been opportunities, not taken by the Board, to select sites for new schools that would have had an integrative effect (Columbus Pet. App. 25).

3. *Optional attendance zones*

The court found (Columbus Pet. App. 26-33) that the Board had established a number of optional zones to allow white students to avoid attending their predominantly black neighborhood schools. For example, for sixteen years the Board maintained the "Near-Bexley Option," which permitted students in a small white enclave on Columbus' predominantly black near-east side to attend predominantly white schools, despite the fact that they had to "traverse the City of Bexley to arrive at the option schools" (Columbus

Pet. App. 26-28). The court found that the Near-Bexley Option was a "classic example of a segregative device * * *" (Columbus Pet. App. 29). Other optional zones with obvious racial consequences and without apparent administrative justification were established between (or among) Highland and West Broad (Columbus Pet. App. 30), Highland and West Mound (Columbus Pet. App. 31-32), Franklin and Roosevelt (Columbus A. 458-464), Central and North (Columbus A. 464-466), East and Linden-McKinley (Columbus A. 466-469), the "downtown" schools (Columbus A. 478-485), Main and Livingston (Columbus A. 485-489), Linmoor and Everett (Columbus A. 492-494), Fair and Pilgrim, and Pilgrim, Eastwood and Eastgate (Columbus A. 500-503).

4. *Boundary lines*

The court found that the Board also drew boundary lines along racial lines. For example, in the Hilltop area on the west side of Columbus, there are three predominantly white schools (Burroughs, West Broad, and West Mound) and one predominantly black school (Highland) (Columbus Pet. App. 29, 32). The Board not only removed white residential areas from the predominantly black Highland zone (Columbus Pet. App. 29-32) but also maintained boundaries that served to contain the black student population in Highland when alternative boundary determinations would have fostered integration at all four schools (Columbus Pet. App. 32-33).

Even after the Board formally announced that improved racial balance was a relevant factor in its site selection and boundary determinations, this pattern continued. For instance, the Superintendent designed two alternative plans to relieve overcrowding in the integrated Mifflin School District, one of which would have maintained the original attendance area by building one new school and pairing it with the existing school. The Board rejected this integrative alternative, and instead chose to divide the area into two attendance zones, one serving the predominantly black, the other the predominantly white part of the district (Columbus Pet. App. 37). The court found the Board's attempts to show a nondiscriminatory reason for rejecting the integrative option unconvincing. It found there was no evidence supporting the Board's claim that the first plan would have required substantial transportation of students, and concluded that the Board had approved the use (which it rejected here) of primary and intermediate schools when it served other interests (Columbus Pet. App. 38).⁴

5. *Noncontiguous attendance zones*

The court also found that the Board sometimes adopted noncontiguous attendance zones when application of neutral neighborhood school principles would have resulted in greater integration. For instance,

⁴ Much of the evidence concerning boundary adjustments relates to the opening of new schools (see Columbus A. 488-527).

from 1966 to 1968 the Board bused white students from a white residential area past predominantly black Alum Crest Elementary School to predominantly white Moler Elementary (Columbus Pet. App. 34). Although the principal of Alum Crest asked a Columbus School administrator for an explanation, he never received one (Columbus Pet. App. 34). The court could "discern no other explanation than a racial one" for this situation (Columbus Pet. App. 34). The Board also assigned pupils on a noncontiguous basis to Fornof School (Columbus Pet. App. 34-35) with similar segregative effects.

6. *Failure to act*

The court found that the Board was at all times aware of the segregative consequences of its actions and fully apprised of alternatives. The court pointed out that "[v]arious segments of the community, notably black parents and civic organizations, have repeatedly and articulately vocalized concern, anger or dismay concerning both overtly segregative actions and lost integrative opportunities" (Columbus Pet. App. 50). Local civil rights organizations, a Board-sponsored advisory committee and the State Board of Education, among others, all "called attention to the problem and made certain curative recommendations" (Columbus Pet. App. 51). Yet the Board consistently failed to act on these recommendations (Columbus Pet. App. 53).

Having found widespread racial separation in the Columbus school system, the court held (Columbus

Pet. App. 60-61) that under *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the burden of proof shifted to the defendants to show that "the racial character of the school system is the result of racially neutral social dynamics or the result of acts of others for which defendants owe no responsibility." The court found (Columbus Pet. App. 60) that the result of the Board's actions segregating black students in schools on the near-east side of the city had "survived unattenuated by any acts of defendants," and that recent nondiscriminatory efforts by the Board in the areas of faculty assignments "have lessened the sting" of the Board's longstanding discriminatory policy, "but have not served to substantially remove the evil it helped create." The court found (Columbus Pet. App. 61) that the defendants had failed to show "that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions * * *."

Although the Board had argued that because of demographic trends some portion of the current segregation would have existed even in the absence of discrimination, the court found that the Board's actions had had a significant impact on housing patterns, and that "[t]he interaction of housing and the schools operate[d] to promote segregation in each" (Columbus Pet. App. 58). The court noted school authorities had no duty to "cure[] the evils of residential segregation," but it stated that they should have recognized the interaction between housing and

schools, and "certainly should not have aggravated racial imbalance in the schools by their official actions" (*ibid.*).

Based on the totality of this evidence the court concluded that the Board had not maintained a racially neutral neighborhood school policy. Instead, the court found (Columbus Pet. App. 61) that the Board had been operating a dual system at the time of the *Brown* decision in 1954, and that it "never actively set out to dismantle this dual system." "Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history," the court found it "fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion" (*ibid.*).

The effects of the Board's actions were dramatic. The court found that "those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions" of the school board (Columbus Pet. App. 73). And it emphasized (*ibid.*) that its findings concerned "the Columbus school district as a whole" since the Board's actions tending to make "black schools blacker necessarily have the reciprocal effect of making white schools whiter."

Based upon these findings, the court directed the Board to provide each black child in Columbus with an opportunity for an integrated education (Columbus Pet. App. 75). The court noted that such a plan could maintain predominantly white schools if the Board could show that the racial imbalance in those schools was not the result of its segregative policies (Columbus Pet. App. 75).

B. The district court's adoption of a remedial order

The Board first submitted a plan that desegregated all formerly black schools and continued 22 predominantly white schools (Columbus Pet. App. 102). Following this Court's decision in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), the Board submitted an amended plan which had as its purpose the desegregation of the 11 identifiably black schools that had been referred to in the district court's opinion (Columbus Pet. App. 99-102).

The district court rejected the Board's proposed desegregation plans after reexamining its findings in light of *Dayton I*. The court concluded that "[t]he *Dayton* decision stands for the proposition that an equitable remedy should not go beyond the scope of the wrong which it purports to redress," with the remedy in school desegregation cases designed to redress the "incremental segregative effect" of the actions of school officials (Columbus Pet. App. 92-93, quoting *Dayton I*, *supra*, 433 U.S. at 420). Here, the district court found (Columbus Pet. App. 94), "there should be no confusion concerning the

scope of defendants' liability" because the court had previously found that "liability in this case concerns the Columbus school district as a whole." In contrast to the *Dayton* case, the court pointed out that its determination of liability did not rest on any specific number of violations, but rather on the Board's actions since 1954 that "intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers" (Columbus Pet. App. 94). The court found that although school officials had ample opportunity to show that the admitted racial imbalance in the schools was caused by factors unrelated to the Board's actions, "[t]his they did not do" (Columbus Pet. App. 95).

The court found the Board's original plan inadequate (Columbus Pet. App. 97-107). The Board had adduced no evidence that desegregation of the 22 white schools would require transportation detrimental to health or to the educational process, and the Board made no effort to meet its burden under *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971), to show that the racial composition of these schools was not the result of past or present discriminatory action on its part (Columbus Pet. App. 105). Moreover, an alternate staff plan that required only a marginal increase in transportation distances promised more extensive desegregation without leaving large areas for white flight (Columbus Pet. App. 105). The court stated that the Board could use either the latter plan, which would bring each school within 15% of the district-

wide norm of 32% black students, or a plan submitted by the State Board of Education, as a starting point in drafting an acceptable plan (Columbus Pet. App. 107, 111).

The court also rejected the Board's amended plan, which would have desegregated only the schools specifically referred to in the court's opinion on liability, leaving 41 identifiably black schools and 73 identifiably white schools unaffected (Columbus Pet. App. 99-102). The court found (Columbus Pet. App. 102) that the Board had made no effort to show that the imbalance in these schools was not the result of its past and present discriminatory actions.

The Board subsequently submitted a plan for student reassignment that the court found constitutionally acceptable (Columbus Pet. App. 126-127).

C. The court of appeals' decision

The court of appeals affirmed (Columbus Pet. App. 140-207). The appellate court held the record "fully supports" the district court's findings that "[a]s of 1954 the Columbus School Board had 'carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system'" (Columbus Pet. App. 159-160, quoting *Keyes v. School District No. 1*, *supra*, 413 U.S. at 201-202). Under *Keyes* the court of appeals held (Columbus Pet. App. 165-166) that the burden then shifted to the Board to show that the high degree of racial separation present in the schools at the time of trial was not the result of the Board's segregative actions.

After noting "the substantial evidence of segregation in pupil, teacher and administrator assign-

ments," the court of appeals considered the evidence pertaining to the Board's selection of school sites and its construction program (Columbus Pet. App. 166). It found (Columbus Pet. App. 172) that the record amply supports the trial court's findings. The appellate court added (Columbus Pet. App. 173) that the racially identifiable character of the vast majority of new schools created "a very strong inference of intentional segregation," but that "the record actually requires no reliance upon inference" because there was evidence that the Board repeatedly chose sites that it knew would have a segregative effect even when there were alternative sites that would have had an integrative effect. Finally, the appellate court held that the record supported the district court's findings that the Board had intentionally employed gerrymandering, optional attendance zones, and discontinuous attendance areas as "devices which allowed white students to avoid attendance at a primarily black school, or which required black students to attend a primarily black school in place of a closer white school" (Columbus Pet. App. 174-175). The court stated (Columbus Pet. App. 175) that although the specific instances of gerrymandering of attendance boundaries and use of optional attendance zones cited by the trial court were "isolated in the sense that they do not form any systemwide pattern," they were significant because they demonstrated that the Board's "'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation."

Turning to the question of "the incremental segregative effect" of the Board's actions, the court of appeals affirmed the district court's finding that the Board's discriminatory actions had "systemwide application and impact" that justified the district court's order of a systemwide remedy (Columbus Pet. App. 198-199).

D. The stay applications to this Court

The Board then applied to this Court for a stay of the district court's order. Mr. Justice Stewart denied the stay, but on further application, on August 11, 1978, Mr. Justice Rehnquist granted a stay of the district court's order pending disposition of the Board's petition for certiorari, and, if the petition were granted, until further order of the Court (Columbus Pet. App. 217). In a brief opinion accompanying the order, Mr. Justice Rehnquist stated (Columbus Pet. App. 213) that in this case and the Dayton case the court of appeals appeared to have given this Court's opinion in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), "an unduly grudging application." He concluded (Columbus Pet. App. 213-214) that the court of appeals "is apparently of the opinion that presumptions, in combination with such isolated violations, can be used to justify a systemwide remedy where such a remedy would not be warranted by the incremental segregative effect of the identified violations."

A motion to vacate the stay was then presented to Mr. Justice Stewart and denied by him. A motion to convene the Court for a special term to vacate the

stay was denied on August 25, 1978 (Columbus Pet. App. 218).

II. DAYTON

A. The proceedings to and including this Court's decision in *Dayton I*

Much of the procedural history of this case is recounted in this Court's decision in *Dayton I*, *supra*. At the initial hearing, the district court found a three-part cumulative violation consisting of (1) substantial racial imbalance in the schools, (2) the use of optional attendance zones and (3) the Board's rescission of a resolution admitting past discrimination and calling for various remedial measures (Dayton Pet. App. 12a). Based on these findings, the court ordered limited relief (Dayton Pet. App. 26a-31a).

Cross-appeals were taken. Plaintiffs contended that the Board's discrimination went well beyond the three-part violation found by the district court and warranted systemwide relief. Although the court of appeals questioned many of the district court's findings, it found it unnecessary to rule on the question whether the court had erred in failing to find additional discrimination (Dayton Pet. App. 56a-67a). Instead, it held that the desegregation plan ordered by the district court was inadequate to remedy the cumulative violation it had identified (Dayton Pet. App. 48a).

On remand the district court subsequently adopted a systemwide desegregation plan (Dayton Pet. App.

99a-117a), and the court of appeals affirmed (Dayton Pet. App. 118a-123a).

This Court reversed. Viewing the district court's findings in the light most favorable to plaintiffs, this Court concluded that the court of appeals "had no warrant in our cases for imposing the systemwide remedy which it apparently did." 433 U.S. at 417. "[I]nstead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." *Ibid.* The Court remanded the case to the district court to make more specific findings, and, if necessary, to take additional evidence. 433 U.S. at 419. The Court concluded (433 U.S. at 420):

The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington v. Davis, supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such

constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

B. The district court's decision on remand

On remand, following a supplemental hearing, the district court issued an opinion denying all relief and dismissing the complaint (Dayton Pet. App. 142a-188a). The court found that there was little dispute concerning the historical discrimination against black students until the early 1950's in Dayton (Dayton Pet. App. 148a). Although it found that the evidence demonstrated "an inexcusable history of mistreatment" of black children from the early 1900's through approximately 1950, the court concluded that plaintiffs had failed to meet their burden of proof because they had not demonstrated the incremental segregative effect of these practices on the racial distribution of the current school population (Dayton Pet. App. 149a).

1. Faculty segregation

The court found that until approximately 1950 the Dayton Board of Education followed a policy of racially discriminatory faculty assignment under which black teachers were permitted to teach black students only (Dayton Pet. App. 151a). The Board replaced this policy in 1951 with a policy of "dynamic gradualism" that permitted the introduction of black teachers into schools having a mixed or white population when there was evidence that such communities were ready to accept black teachers (Dayton Pet.

App. 151a-152a, 195a n.11). As a result of this policy, each school in the system had at least one black teacher by 1969 (Dayton Pet. App. 152a). In 1971 the Board reached an agreement with the Department of Health, Education, and Welfare that provided for faculty desegregation similar to the plan approved in *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969). Despite this long history of faculty segregation, the court found no current segregative effects, concluding that if the schools to which black faculty members had been assigned were racially identifiable, it was because of the composition of their student bodies, not the composition of the faculty (Dayton Pet. App. 153a-154a).⁵

2. Attendance zones and boundary changes

Although it had previously found the use of certain optional attendance zones "embraced desires motivated by racial considerations" and had "significant potential effects in terms of increased racial separation" (Dayton Pet. App. 8a), the district court now found no segregative intent or effect in connection with the option zones affecting neighborhood schools (Dayton Pet. App. 162a-169a). With regard to one of the two city-wide high schools, Dunbar, which opened in 1933 with an all-black staff, a black principal, and an all-black student body, and was maintained as an all-black school until it closed in

⁵ Indeed, the district court apparently did not consider the policy of dynamic gradualism to be racially discriminatory (Dayton Pet. App. 152a-153a).

1962, the court held that "the relationship between the Board's past segregative acts and the all-black status of Dunbar High School in 1962 has 'become so attenuated' as to be incapable of supporting a finding of de jure segregation warranting judicial intervention" (Dayton Pet. App. 171a, quoting *Keyes v. School District No. 1, supra*, 413 U.S. at 211). The court also found (Dayton Pet. App. 159a, 171a) the subsequent conversion of Dunbar into all-black McFarlane Elementary and the opening of the new Dunbar High as an all-black school were non-discriminatory because they were consistent with the Board's policy of assigning children to the nearest school.

3. Site selection

Between 1950 and 1972 the Board opened 24 new schools, 22 of which opened with more than 90% enrollment of students of one race (Dayton Pet. App. 173a). The court described the Board's process of site selection as "a most imprecise science" that "approached the level of haphazard in some instances" (Dayton Pet. App. 173a). It concluded (Dayton Pet. App. 174a-176a) that the defendants' evidence that racial considerations played no part in site selections was virtually undisputed for most schools, and that in the case of Roth, Gardendale, Highview, and Miami Schools, that the preponderance of evidence showed no segregative intent.⁶

⁶ In 1971 the Board reorganized its school structure and created five middle schools (Dayton Pet. App. 157a). The court found that the reorganization had both an integrative and a segregative effect and that there was no evidence of a segregative purpose (Dayton Pet. App. 158a).

C. The court of appeals' second decision

The court of appeals reversed, holding many of the district court's findings clearly erroneous (Dayton Pet. App. 189a-217a).

1. The creation of a dual system prior to Brown I

The court of appeals first held that the district court had erred in concluding (Dayton Pet. App. 75a) that the Dayton Board of Education was not operating a dual school system at the time of the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Dayton Pet. App. 194a-205a). The court of appeals found that in the 1951-1952 school year "the Dayton school board pursued an overt policy of faculty segregation and, through a variety of measures, endeavored to segregate pupils on a racial basis" (Dayton Pet. App. 195a).

The court noted that the underlying facts were essentially undisputed (Dayton Pet. App. 196a). In the 1951-1952 school year, 77.6% of all the students in the Dayton system attended schools in which one race accounted for 90% or more of the students, and 54.3% of the black students attended four schools that were 100% black (Dayton Pet. App. 197a). The faculty at each of the four 100% black schools was 100% black (Dayton Pet. App. 196a). With only one exception, the faculty at all other schools in the system was 100% white (*ibid.*). Until 1951, the Board's explicit policy was to assign no black teacher to a white or mixed classroom (Dayton Pet. App. 195a). In 1951 the policy was changed to an

equally unacceptable one of "introduc[ing] negro teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro teachers" (Dayton Pet. App. 195a n.11).

The court found that the four all-black schools, which in 1952 served more than half of the black students in the Dayton system, had been earmarked as black schools by official purposeful discriminatory action.

Garfield was the site of intra-school racial segregation that began in 1912 (Dayton Pet. App. 198a). Even after the Dayton Board's practice was specifically held to be unlawful in a decision by the Ohio Supreme Court in 1926, racial segregation at Garfield persisted (*ibid.*). During the 1930's, the Board permitted white students assigned to Garfield to transfer to predominantly white schools, so that by 1936 Garfield had become all black (Dayton Pet. App. 198a-199a). The Board then assigned an all-black faculty to the school, and thereafter Garfield was maintained as an all-black school (Dayton Pet. App. 199a).

Dunbar was intentionally established as a school for blacks only, and blacks from throughout the district were automatically assigned or induced to attend Dunbar, although in many cases they had to cross attendance boundaries to do so (Dayton Pet. App. 199a). The Board's intentional operation of Dunbar as an all-black school until it closed in 1962 had the effect of keeping other high schools throughout the district predominantly white during those years (Dayton Pet. App. 200a).

During the 1940's, the Board permitted white students to transfer to predominantly white schools (Dayton Pet. App. 201a). In 1945 Wogamon closed with an all-white staff and reopened the following school year with an all-black faculty and black principal (*ibid.*). Wogamon subsequently became and remained all black (*ibid.*).

Similarly, the Board permitted whites to transfer out of Willard so that by 1935 it was overwhelmingly black (*ibid.*). The Board then assigned an all-black faculty and the remaining whites left (*ibid.*).

There was also evidence of other officially sanctioned racial separation. Separate swimming pools and locker rooms were maintained for black and white students at Roosevelt High School until approximately 1950 (Dayton Pet. App. 201a). Moreover, in the late 1940's and early 1950's, the Board operated one-race classrooms in housing projects that were strictly segregated according to race (*ibid.*).

In light of these fundamentally undisputed facts, the court of appeals found that at least from the early 1900's to the early 1950's Dayton operated two school systems, one primarily for white students, and the other primarily for blacks (Dayton Pet. App. 204a-205a). It held that there was "ample evidence to support the finding that at the time of *Brown I* defendants were carrying out 'a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities'" (Dayton Pet. App. 202a (footnote omitted), quoting *Keyes v. School District No. 1, supra*, 413 U.S. at 201). It

held (Dayton Pet. App. 202a-203a; footnote omitted) that "[t]he district court failed to attribute the proper legal significance to the deliberate policy of faculty segregation which, at the time of *Brown I*, made it possible to identify a 'black school' in the Dayton system without reference to the racial composition of pupils," and to the fact that Garfield, Willard, Wogamon and Dunbar were segregated due to defendants' actions. These facts, the court found, "were sufficient to constitute a prima facie violation of the fourteenth amendment under the rule of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971),] and to shift the burden of proof to defendants."

The court concluded that the district court also erred in failing to recognize that discriminatory purpose and intent may be inferred from circumstantial evidence and may be established by the use of reasonable presumptions (Dayton Pet. App. 203a). Quoting *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975), the court observed (Dayton Pet. App. 203a) that "[a] presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation." The court found (Dayton Pet. App. 204a) that the evidence in the instant case "clearly establishes that the natural, probable and foreseeable result of defendants' actions was the creation and perpetuation of a dual school

system." The court also held that the district court had ignored the teaching of *Keyes v. School District No. 1, supra*, 413 U.S. at 208, that once there is "a finding of intentionally segregative school board actions in a meaningful portion of a school system" the burden shifts to the defendants to show that other racially imbalanced schools are not the result of intentional segregation.

Employing these standards, the court of appeals held (Dayton Pet. App. 204a-205a) that the defendants had not shown that the character of the 1954 school district was not the result of their racially segregative actions. It also held (*id.* at 205a) that the effect of "defendants' segregative practices at the time of *Brown I* infected the entire Dayton public school system."

2. The Board's conduct subsequent to *Brown I*

The court of appeals concluded (Dayton Pet. App. 205a) that the district court's failure to recognize that the defendants were operating a dual system at the time of the *Brown* decision had resulted in that court's "failure to evaluate properly the Board's post-*Brown I* actions, which must be judged by their efficacy in eliminating the continuing effects of past discrimination." Despite the fact that the defendants had been under a duty to dismantle this dual system since 1954, the district court had specifically found (Dayton Pet. App. 150a, 206a) that "with one exception * * * no attempt was made to alter the racial characteristics of any of the schools"; moreover, the only attempt that was made was a failure. The dis-

trict court, however, "neither charged defendants with the affirmative duty to eliminate the effects of their discrimination nor did it place upon the Board the burden of proving that it had done so" (Dayton Pet. App. 206a). The court found (*ibid.*) that the record not only "demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination," but also that the defendants "have intentionally maintained a segregated school system down to the time the complaint was filed in the present case." The court also found (*ibid.*) that there was also evidence of actions by the Board subsequent to 1954 that "actually have exacerbated the racial separation existing at the time of *Brown I*."

a. Faculty assignments

The court of appeals found that the Board continued to assign faculty on the basis of race until at least the 1970-1971 school year, and held that the district court's finding to the contrary was clearly erroneous (Dayton Pet. App. 206a). Moreover, the Board's systematic discrimination in faculty assignments made it reasonable to presume that other practices of the Board were likewise undertaken with segregative intent (Dayton Pet. App. 207a). For example, when old all-black Dunbar was closed in 1962, it reopened that fall as the all-black McFarlane Elementary School, and a new (and overwhelmingly black) Dunbar High School was opened at the same time (*ibid.*). The all-black Garfield and Willard schools were also closed at this time and most of

their students were assigned to McFarlane or to other identifiably black schools (Dayton Pet. App. 207a). Both McFarlane and the new Dunbar were assigned virtually all-black faculties (*ibid.*).

The court held (*ibid.*) that the Board had failed to rebut "the reasonable presumption that the simultaneous assignment of both a predominantly black faculty and student body at these schools was the product of segregative intent and an effort to perpetuate the dual school system extant at the time of *Brown I.*"

The court also found (Dayton Pet. App. 209a) that "[n]owhere in the record have defendants demonstrated that the present systemwide racial imbalance would have occurred even in the absence of their segregative acts."

3. Optional attendance zones

The court found (Dayton Pet. App. 209a) that the Board's use of optional zones for racially discriminatory purposes bolstered the conclusion that racial imbalance within the Dayton school system was "not merely adventitious." The appellate court found that the district court's repudiation of its earlier findings of segregative intent and effect were clearly erroneous, and was the result of its failure to apply the proper standards for determining segregative intent and to shift the burden of proof to defendants once plaintiffs made a *prima facie* case (Dayton Pet. App. 210a).

4. School construction

The court of appeals held the district court's finding that the Board's site selections were not segregative in purpose and effect to be clearly erroneous, concluding that the Board's pattern of school construction "unmistakably increased or maintained racial isolation" (Dayton Pet. App. 211a). The coordinate assignment of faculty on a racial basis reinforced the natural inference that these decisions were racially motivated (*ibid.*). The court found no evidence that the Board's construction practices were motivated by racially neutral policies (*ibid.*).

5. Reorganization of grade structure

The court of appeals held (Dayton Pet. App. 213a) that the district court had erred in failing to recognize the Board's conversion in 1971 to a system of middle schools as a component of the Board's dual system. That conversion was characterized by the Ohio Department of Education in a 1971 report as offensive to the Constitution and degrading to school children (Dayton Pet. App. 212a). And un rebutted expert testimony concluded that its effect was to maintain or increase segregation (Dayton Pet. App. 213a).

Upon consideration of the entire record the court concluded that (*ibid.*):

rather than eradicate the systemwide effects of [their] dual system extant at the time of *Brown I* defendants' racially motivated policies with re-

spect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization perpetuated or increased public school segregation in Dayton.

Focusing on the effects of these violations, the court held that the district court had erred in examining each alleged constitutional violation as if it were an isolated occurrence and in placing the burden on the plaintiff to show the precise incremental segregative effect of each such occurrence (Dayton Pet. App. 215a). Because plaintiffs had shown "a systemwide pattern of intentionally segregative actions" it was reasonable to presume that these discriminatory practices had contributed to segregation throughout the school system (Dayton Pet. App. 216a). The Board had not rebutted the presumption that the current racial composition of the schools had been affected by the systemwide impact of its segregative acts, and accordingly the court reinstated the systemwide remedy it had approved on the prior appeal (Dayton Pet. App. 216a-217a).⁷

⁷ This plan was drafted in accordance with an earlier order of the district court. The remedial order permitted the Board to choose among various plans and techniques, subject only to the requirement that each school in the system have no less than 33% nor more than 63% black students (Dayton Pet. App. 102a-103a). The court provided that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis" (Dayton Pet. App. 104a), and it further provided that "[v]ariations from the [percentage range] may be permitted in exceptional

D. The Board's stay applications

The court of appeals denied the Board's application for a stay of its order on August 21, 1978 (Dayton A. VIII). On August 28, 1978, Mr. Justice Stewart also denied a stay, and on further application Mr. Justice Rehnquist denied a stay on August 30, 1978 (*ibid.*). The plan has therefore remained in effect.

SUMMARY OF ARGUMENT

I

Both the Dayton and Columbus school systems exhibit extreme conditions of racial separation. The plaintiffs had the burden of showing that these conditions resulted from the Boards' intentional policy of segregation. In both cases the record fully supports the court of appeals' conclusion that plaintiffs proved the existence of systemwide policies of intentional racial segregation.

A. The court of appeals properly began its analysis of the causes of the current conditions in the Dayton and Columbus schools with a review of the virtually undisputed evidence that in the early 1900's the Boards created separate school systems for white and black students, which they maintained and oper-

circumstances without destroying the desegregation * * * (Dayton Pet. App. 106a). The court granted an exception for high school juniors and seniors (Dayton Pet. App. 103a). The Dayton school system is sufficiently compact that excessive travel times are not involved. The court-appointed Master concluded that the longest travel time should not much exceed twenty minutes (Dayton A. 39).

ated until at least the 1950's. In both cases, the Board isolated most black students in a small enclave of schools, thereby ensuring that the remainder of the schools would be exclusively, or predominantly, white. Moreover, black teachers were assigned only to schools with black students. Since this evidence established a systematic program of state-enforced segregation affecting a substantial portion of the Dayton and Columbus school districts, the court of appeals correctly concluded that petitioners were operating dual systems for white and black students at the time of the decision in *Brown v. Board of Education*, 349 U.S. 294 (1955).

In urging that their conduct at the time of the *Brown* decision has little relevance to current conditions, petitioners ignore the crucial point that even racially neutral policies may effectively maintain and perpetuate an entrenched dual system. In the face of the evident potential for perpetuation of their deliberately established dual systems, petitioners' failure to take meaningful steps to convert these dual systems to unitary systems violated their constitutional duty to eliminate their unlawful dual systems "root and branch." Although the impact of past segregative acts may eventually become too attenuated to warrant remedial action, petitioners did not establish that the current racial separation in the schools was not the result of their past segregative acts.

B. But the court of appeals did not rest its findings of systemwide discrimination solely on proof

of unremedied historical practices of racial discrimination. Respondents offered substantial evidence that the Boards' intentional discrimination continued to the present, and the court of appeals expressly based its findings of systemwide segregation on those recent practices, as well as the past practices just described. In determining whether the Boards intentionally maintained segregative policies, the court of appeals properly evaluated the Boards' contemporary practices in light of its findings regarding the 40-year history of intentional segregation in the design and operation of these school systems, which gave rise to a strong inference that both Boards continued to practice racial discrimination.

1. The court of appeals attributed substantial weight to the evidence that until the early 1970's—when state and federal enforcement agencies intervened—the Columbus and Dayton Boards continued to practice overt systemwide racial discrimination in faculty assignments. The evidence of the Boards' continuing assignment of teachers on the basis of race convincingly rebutted their contention that after the early 1950's they abandoned their segregative policies and adopted a racially neutral neighborhood school policy. As the court of appeals pointed out in the Columbus case (Columbus Pet. App. 174), "[o]bviously it was no 'neutral' neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974."

2. The court of appeals concluded that the Boards also continued to manipulate their neighborhood school policies to separate students on the basis of race. The court found that both the Dayton and Columbus Boards deviated from the neighborhood school concept in ways that can rationally be understood only as part of an overall policy to maintain racial segregation. Both Boards employed optional attendance zones—which are not consistent with the neighborhood school concept—in neighborhoods undergoing racial transition, without an adequate educational or administrative explanation. In Dayton, the Board operated a district-wide all-black high school until 1962, when it closed this school and opened a new school with a virtually all-black student body and facility. In Columbus, the Board made boundary changes that removed white residential areas from predominantly black areas, and operated noncontiguous attendance zones where white students were bused past black schools. The court found no satisfactory nonracial explanation for these actions. The Boards' construction programs were clearly segregative in effect. In Dayton, 22 of the 24 schools constructed since 1950 opened with a student body that was 90% or more black or white (Dayton Pet. App. 210a). Particularly in light of their history of deliberate segregation, the pattern of the Boards' rejection of sites that were compatible with a neighborhood school policy and that would have had an integrative effect gave rise to an inference that the Boards' decisions were intended to encourage racial

separation. Again, neither Board rebutted this inference.

The court of appeals properly treated the Boards' choice of policies that had the natural and foreseeable consequence of creating and maintaining racial separation as evidence that the Boards had segregative intent. The court correctly recognized that disparate effect is not the equivalent of purposeful discrimination. But evidence of disparate effect may provide an important starting point in establishing the presence of discriminatory purpose.

The segregative effect of the Boards' policies was simply one of many factors tending to show the Boards' intent. The court of appeals' findings of segregative intent rested on the patterns that emerged from both direct and circumstantial evidence establishing that the Boards' actions in both cases were motivated by racial considerations. In characterizing their acts of discrimination as isolated rather than systemwide, the Boards apparently assume that a systemwide policy or practice cannot be shown without noncircumstantial proof, on a school-by-school basis, of racially motivated Board actions. That is not, and never had been, the plaintiffs' burden of proof in a desegregation case. Normal evidentiary principles apply to the determination whether the plaintiffs have proved that school officials followed a general policy of racial discrimination. The court of appeals correctly concluded that the evidence in these cases demonstrates systemwide segregation.

II

Dayton I emphasizes that in formulating a remedial decree in a school desegregation case, the court must tailor the remedy to fit the nature and extent of the violation. Since the purpose of the remedy is to correct the condition that offends the Constitution, a systemwide remedy may be ordered only where school officials' segregative policies have had a systemwide impact. Applying these principles, the court of appeals correctly concluded that because of the systemwide impact of the Boards' policies, systemwide relief was warranted. The remedies here were designed to convert the dual systems to unitary systems, eliminating all vestiges of prior segregation in Dayton and Columbus "root and branch."

Petitioners argue that despite the findings that they maintained systemwide segregative policies, under *Dayton I* respondents had the further burden of proving the precise degree to which petitioners' segregative policies caused the current conditions of racial separation, wholly apart from other factors such as residential patterns. In petitioners' view, respondents failed to carry this burden.

Dayton I does not support petitioners' claim. Although the opinion in *Dayton I* did not directly address the central issue here—the proper allocation of the burden of proof at the remedial stage when a court is formulating a decree to eliminate all vestiges of systemwide discrimination "root and branch"—it does cite and follow *Keyes v. School District No. 1*, 413 U.S. 189 (1973), and *Swann v.*

Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), which establish the governing principles here.

1. *Keyes* and *Swann* establish that once a systemwide violation has been shown, a systemwide remedy will be imposed unless school officials show that some portion of the racial separation is not attributable to their discriminatory conduct. Once systemwide discriminatory practices have been proved, the court should rebuttably presume that those practices achieved their full potential in contributing to the current racial separation in the schools. The burden then shifts to school officials to show the extent to which racial separation would have existed in the absence of such discrimination. This is consistent with the established principle that the perpetrator of a constitutional wrong has the burden of showing that his violation was without, or was of only limited, effect. School officials are in the best position to produce evidence on this question.

As a practical matter, if plaintiffs were required to show the precise effects of official discrimination while school officials who had engaged in systematic discrimination stood silent, the plaintiffs in school desegregation cases would often face an insuperable burden. It is extremely difficult to calculate the precise effects of a pervasive pattern of discrimination by school officials. Certainly the effects are not limited to the immediately perceptible changes in the racial composition of the student body. The identification of schools by race may have a profound recip-

rocal effect on the racial makeup of the surrounding neighborhood. Under general remedial principles the task of proving what would have happened in the absence of the constitutional violation should be placed on the wrongdoers, not their victims.

Where it is not possible to separate the effects of official segregation from other factors that may have encouraged racial separation, this uncertainty should not preclude an effective remedy. The victims of purposeful school discrimination are entitled to a remedy that eliminates all vestiges of prior discrimination "root and branch." A systemwide remedy will accomplish this end, and school officials who believe a more limited decree will remedy the violations have the burden of proving that such a decree will effectively do so.

2. The court of appeals correctly approved systemwide remedies in these cases, because the Boards did not establish that less extensive remedies would cure the "incremental segregative effects" of the systemwide policies of discrimination on the basis of race. In each case the court shifted the burden to the Board to show that the racial composition of the student bodies was not caused by the Board's systemwide segregative policies. The Boards adopted an all or nothing approach on the issue of remedy. Neither demonstrated that any portion of the racial separation in its district would have occurred in the absence of its segregative conduct. Although both Boards contend that the racial composition of the schools merely reflects the residential patterns in

each city, they offered no proof that the residential patterns developed independently of the prescribed racial character of the schools. Respondents—although it was not their burden to do so—presented undisputed expert testimony that a pattern of systematic school discrimination does affect residential decision-making.

3. The remedial principles of *Keyes* and *Swann*—which are grounded on considerations of "fairness" and "policy"—are not inconsistent with *Dayton I*, and there is no justification for petitioners' contention that *Keyes* and *Swann* should be overruled. The principles announced in those cases have proved a practical and effective means of eliminating the effects of longstanding pervasive discrimination in violation of the Fourteenth Amendment. Those decisions have provided the basis for desegregation plans now in operation in hundreds of school districts throughout the United States.

ARGUMENT

I

THE COLUMBUS AND DAYTON SCHOOL BOARDS ENGAGED IN SYSTEMWIDE POLICIES OF INTENTIONAL RACIAL SEGREGATION

The Columbus and Dayton school systems exhibit conditions of extreme racial separation. In Columbus, 32% of all public school children are black (Columbus Pet. App. 19). Yet about 70% of all students attend schools that are more than 80% white or 80% black (Columbus Pet. App. 18). Of the Columbus

system's 172 schools, 137 are "racially identifiable"—that is, their racial compositions are substantially different from the district-wide percentage. One half of the Columbus schools are more than 90% black or 90% white (Columbus Pet. App. 163). In Dayton, slightly less than 50% of all public school children are black (Dayton A. 34-35). Racial separation is even more pronounced in Dayton than in Columbus. Of the 69 public schools in Dayton, 51 are virtually all-white or all-black (Dayton Pet. App. 149a-150a).

The court of appeals correctly recognized (Columbus Pet. App. 150; Dayton Pet. App. 202a) that these conditions of racial separation, standing alone, do not violate the Constitution. See, *e.g.*, *Dayton I*, *supra*, 433 U.S. at 417; *Washington v. Davis*, 426 U.S. 229, 240 (1976). The plaintiffs in each of these cases had the burden of proving "not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Keyes v. School District No. 1*, *supra*, 413 U.S. at 198.

In these two cases the court of appeals' findings of systemwide intentional segregation were premised on similar subsidiary factual findings. First examining historical practices, the court of appeals found that continuously until the early 1950's both the Dayton and Columbus school boards had deliberately isolated most black students into small enclaves of all-black schools (Dayton Pet. App. 202a-203a; Columbus Pet. App. 155-160). During the same period, the Boards did not permit black teachers to teach in white schools (Dayton Pet. App. 202a-203a; Colum-

bus Pet. App. 157-159). Turning to more contemporary practices, the court of appeals found that the Dayton Board and the Columbus Board both continued to assign faculty by race until the early 1970's, and that this discrimination in faculty assignments ended only upon the intervention of governmental agencies (Dayton Pet. App. 206a; Columbus Pet. App. 173-174). As for student assignments since the 1950's, the court of appeals found that neither the Dayton nor the Columbus Board had followed a consistent neighborhood school policy. Rather, both engaged in a number of manipulative practices which were designed to separate the races. Those practices included, in both cases, discriminatory site selections for new schools and the use of optional attendance zones to avoid integration (Dayton Pet. App. 210a-212a; Columbus Pet. App. 168-173). In addition, the court concluded that the Dayton Board had reorganized the system's grade structure so as to create middle schools that would increase or maintain segregation (Dayton Pet. App. 212a-213a). The Columbus Board, in turn, used a number of classically segregative devices, including redrawing school boundary lines, adopting noncontiguous attendance zones, and busing white students past black schools (Columbus Pet. App. 194-195). Finally, the court of appeals found that neither school board took any meaningful steps to dismantle the dual school systems they had created (Dayton Pet. App. 213a; Columbus Pet. App. 198).

Both petitions raise the question whether these findings constitute a sufficient predicate for the conclusion that the Boards had engaged in systemwide policies of segregation warranting remedial judicial action. They argue that in finding there was systemwide segregation the court of appeals erroneously gave controlling significance to the Boards' past segregative practices, and improperly required petitioners to shoulder the burden of proving that the current racial imbalance is not the result of their past segregative practices. Finally, petitioners urge that the court of appeals improperly held conduct designed to serve legitimate educational objectives to be purposefully discriminatory merely because racial separation was a foreseeable consequence.

The Dayton Board of Education also challenges (Br. 26-39) the subsidiary findings of the court of appeals, arguing that the appellate court erred in setting aside the district court's findings on the segregative purpose and effect of the Board's post-*Brown I* conduct. Since our primary concern is the common legal issues raised by these two petitions, we will not here undertake a review of the evidence supporting the court of appeals' subsidiary factual findings. We note, however, that after a thorough review of the record the United States filed an amicus brief in the court of appeals urging that the district court's findings in the Dayton case were clearly erroneous, and we generally concur in respondents' detailed analysis (Br. 9-67) of the evidence supporting the court of appeals' findings.

A. The Causes of Current Racial Separation In The Columbus And Dayton Schools Must Be Evaluated In Light Of The Historical Creation And Maintenance Of Dual Systems

The court of appeals concluded that from the early 1900's through the 1950's, the Columbus and Dayton Boards of Education unquestionably created and operated dual systems of education. To be sure, Ohio law prohibited compulsory segregation, and the school boards therefore could not overtly segregate every student within the system. But the record shows that petitioners nonetheless sought to segregate the races to the greatest possible degree. By a variety of manipulative devices, each Board established a small enclave of schools for blacks and was able to isolate most black students in these schools. The isolation of black students had the obvious reciprocal effect of earmarking other schools in both systems as identifiably for whites. See *Keyes v. School District No. 1, supra*, 413 U.S. at 201 & n.12. The Boards' discriminatory intent was also manifested in their strict policy of assigning black teachers only to schools with black students. And in Dayton, the intensity of that Board's discrimination led the district court to characterize the mistreatment of black students as "inhumane," "reprehensible" and "inexcusable" (Dayton Pet. App. 149a). Not only did the Dayton Board of Education intentionally confine black children to a segregated education, it even overtly segregated swimming pools, locked rooms and athletic competitions (Dayton Pet. App. 201a).

Petitioners scarcely dispute the fact that they practiced far-reaching and systematic racial discrimination in student and faculty assignments for many years, at least until the early 1950's. They urge, however, that the court of appeals erred in finding that they were operating dual systems, and further erred in finding that these historical practices had current significance.

1. Petitioners erroneously contend (Columbus Br. 69-70; Dayton Br. 16) that the segregated conditions they created and maintained could not—even in the early 1950's—properly be characterized as “dual systems.” Petitioners emphasize that Ohio law did not mandate racial separation, and that many black students attended schools with whites. A similar argument was squarely rejected in *Keyes v. School District No. 1, supra*, 413 U.S. at 198-205, where there was no statutory dual system, and this Court held that evidence of the school board's deliberate, segregation in Park Hill city schools—affecting 37.69% of the total black student population, as well as teachers and staff—sufficiently supported a finding of a dual system. Where “school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.” 413 U.S. at 201. Unless there is a showing that the geographic structure of a district or natural boundaries divide it into “separate, identifiable and un-

related units,”* *Keyes* holds that “proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system.” 413 U.S. at 203.

The records establish that such a systematic program of state-imposed segregation in a substantial portion of the Dayton and Columbus districts existed at the time of *Brown I*, and accordingly the court of appeals correctly concluded that petitioners had operated dual school systems for whites and blacks.

2. Petitioners argue that even if they were operating dual systems at the time of the *Brown I* decision, in view of the “evidence of a myriad of intervening events and forces” their conduct more than 20 years ago is of little value in determining whether the Columbus or Dayton schools “were unconstitutionally segregated at the time this case was tried” (Columbus Br. 70; see Dayton Br. 16-18).

a. Petitioners ignore the fact that even if it is assumed that their segregative intent ended in the early 1950's, “neutral” practices thereafter could simply perpetuate and maintain the dual system. “Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.” *Keyes v. School District No. 1, supra*, 413 U.S. at 211. When a school board has through pervasive techniques isolated most black students and faculty in an enclave of schools, the

* There is no contention that Dayton or Columbus is divided into separate unrelated units. See Dayton Pet. App. 205a n.43.

unmistakable message that these schools are earmarked for blacks while many others are reserved for whites "may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." 413 U.S. at 202. Subsequent neighborhood zoning practices, no matter how scrupulously "neutral," may have the direct effect of "further lock[ing] the school system into the mold of separation of the races." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971). See also *id.* at 28. Thus, the effect of building upon a dual system already in place may be only to preserve its existence.

b. Moreover, in the face of the clear potential for perpetuating their dual systems, petitioners took no meaningful affirmative steps to convert their dual systems into unitary ones without "'white' school[s] and * * * 'Negro' school[s], but just schools." *Green v. County School Board*, 391 U.S. 430, 442 (1968). Petitioners therefore violated their constitutional duty to eliminate promptly their entrenched dual systems "root and branch." *Id.* at 438. Nevertheless, they now argue that their long-standing practices of racial discrimination and their persistent refusals to eliminate the effects of those practices must be discounted solely because of the passage of time, and that respondents bear the burden of proving the extent to which the current conditions of segregation in each system are causally related to the historical creation and maintenance of the dual systems.

Keyes provides the full response to these contentions. In *Keyes* the Court acknowledged that "at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." 413 U.S. at 211. But it concluded that "certainly plaintiffs in a school desegregation case are not required to prove 'cause' in the sense of 'non-attenuation.' That is a factor which becomes relevant only after past intentional actions resulting in segregation have been established. At that stage, the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions." 413 U.S. at 211 n.17. Finally, *Keyes* holds that unless the school board can prove it had no segregative intent,⁹ "it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition." 413 U.S. at 211.

The court of appeals' decisions reflect careful adherence to the principles expressed in *Keyes*. Petitioners contend (Columbus Br. 70-73 & n.38) that in applying the *Keyes* presumption, the court of appeals failed to follow *Dayton I*, which, they argue,

⁹ The Court expressly "reject[ed] any suggestion that remoteness in time has any relevance to the issue of intent," holding that "[i]f the actions of school board authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'" 413 U.S. at 210-211.

overrules or limits *Keyes*. To the contrary, however, although *Dayton I* does not specifically address the procedure the lower courts should follow in making liability findings, it cites *Keyes* (433 U.S. at 410, 420; *id.* at 421, 423 (Brennan, J., concurring)), and nowhere suggests that in making the "complex factual determinations" required on remand the district court should not apply the principles established in *Keyes*.

Accordingly, the court of appeals correctly concluded that neither the Columbus Board nor the Dayton Board had shown that its past segregative acts did not create or contribute to the current segregated condition of the schools (Columbus Pet. App. 165-166; Dayton Pet. App. 208a-209a). Thus, even if the Columbus and Dayton Boards had shown that they ceased practicing intentional discrimination in the 1950's, judicial remedial action would have been warranted.

B. The Boards' More Contemporary Practices Deliberately Perpetuated And Increased Racial Separation In Their School Systems

But the court of appeals' findings of systemwide discrimination in the present cases do not rest solely on proof of historical practices. Respondents offered substantial evidence that the Boards' intentional discrimination continued to the present, and the court of appeals expressly based its findings of systemwide segregation on those recent practices taken against the background of the past practices just described. In making these findings of current segregative policies and practices, the court of appeals correctly concluded

that the evidence did not support the Boards' claims that they were operating a neutral neighborhood school system, but rather showed an overall policy of promoting racial separation. The court correctly considered the fact that racial separation was a foreseeable effect of a neighborhood school policy as a factor in determining the Boards' intent. It did not, as petitioners charge (Columbus Br. 81-95; Dayton Br. 20-26), simply equate intent to discriminate with the fact of disproportionate impact.

1. The Boards' current practices were evaluated in light of their history of discrimination

In determining whether the Boards had maintained and continued their policies of segregation, the court of appeals correctly evaluated the Boards' contemporary practices in light of their past discriminatory practices. As this Court explained in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977), in determining whether invidious discriminatory purposes is a motivating factor, the "historical background" of official action is an important evidentiary source—"particularly if it reveals a series of official actions taken for invidious purposes." Absent some cogent explanation, it should not be lightly assumed that a school board that practiced intentional racial discrimination over a forty-year period suddenly began to act in a totally neutral fashion. See *Keyes v. School District No. 1*, *supra*, 413 U.S. at 209-210.

The court of appeals applied this principle. In the *Dayton* case, the court stated (Dayton Pet. App. 197a):

We recognize that racial imbalance in student attendance is not in itself a constitutional violation. See *Dayton Board of Education v. Brinkman*, *supra*, 433 U.S. at 413, 417 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Keyes v. School District No. 1*, 413 U.S. 189, 198 (1973). However, such racial imbalance does assume increased significance in the historical context of repeated intentional segregative acts by the school board directed at the four schools which were 100 percent black in 1954. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

See also *id.* at 207a, 209a. The court likewise made it clear in the Columbus case that it was undertaking its review of the school board's current practices in the context of their "historical background" (Columbus Pet. App. 166, quoting *Village of Arlington Heights v. Metropolitan Housing Corp.*, *supra*, 429 U.S. at 267).

This emphasis on the longstanding history of segregation was entirely proper. Although the membership of school boards changes periodically, and isolated or sporadic acts of discrimination may be caused by the predilections of individual members, in the face of long-standing, continuous, and pervasive acts of racial discrimination, courts should carefully scrutinize claims that a school board suddenly experienced a complete change of heart.

Neither the Columbus nor Dayton Board points to any event in the early 1950's indicating that they had a dramatic change of purposes.¹⁰ The Boards' actions and motivations cannot be neatly compartmentalized into discrete time frames. Given the largely undisputed findings that the Boards had a forty-year history of pervasive intentional segregation in the design and operation of their "neighborhood school" systems through at least the early 1950's, a strong inference arose that they continued to practice racial discrimination in the subsequent operations of those same systems. See *Keyes v. School District No. 1*, *supra*, 413 U.S. at 209-212. Cf. *Hazelwood School District v. United States*, 433 U.S. 299, 309 n.15 (1977), citing, *inter alia*, 1 J. Wigmore, *Evidence* § 92 (3d ed. 1940); 2 J. Wigmore, *Evidence* §§ 302-305, 371, 375 (3d ed. 1940).¹¹

¹⁰ For example, neither Board contends that new members were then elected who proposed to alter significantly the previous policies. Nor did either Board then openly renounce its past practices or adopt a formal resolution to achieve substantial desegregation. Such a renunciation and resolution were adopted in Dayton in late 1971, but, following the election of a new board, these actions were rescinded (see Dayton Pet. App. 180a-185a).

¹¹ In some circumstances, this Court's 1954 decision in *Brown v. Board of Education*, 347 U.S. 483 (*Brown I*), might have introduced new legal obligations and acted as the catalyst for a fundamental change in school board policy. Unfortunately, even in those areas of the country where *Brown I* made compulsory segregation illegal, many school boards acted in open defiance of the decision for more than a decade. See, e.g., *Swann v. Charlotte-Meckleburg Board of Education*, *supra*, 402 U.S. at 13-14. In any event, *Brown I* was con-

2. *The Boards continued to assign faculty by race*

As we have shown (*supra*, pages 6-7, 29-30), for two decades following the early 1950's, the Columbus and Dayton Boards continued to practice overt and systemwide racial discrimination in faculty assignments. These practices ended in the early 1970's because of intervention by federal and state enforcement agencies. In evaluating the Boards' contentions that the continuing racial imbalance in both systems was the result of a neutral neighborhood school policy, the court of appeals correctly attributed great weight to this long history of deliberate racial discrimination (Columbus Pet. App. 173-174; Dayton Pet. App. 206a-207a). As the court of appeals pointed out in the Columbus case (Columbus Pet. App. 174), "[o]bviously it was no 'neutral' neighborhood school concept which occasioned generations of black teachers to be assigned almost exclusively to black schools until the Ohio Civil Rights Commission complaint was settled in July of 1974."

The court of appeals' emphasis on the Boards' overt racial discrimination in faculty assignments is consistent with this Court's recognition that faculty discrimination is "among the most important indicia of a segregated system. * * * Independent of student

sistent with prior Ohio law, which since 1887 had prohibited intentional school segregation. The Columbus and Dayton Boards had violated the unambiguous state prohibition against segregation since the early 1900's. There is no basis for assuming that the Columbus and Dayton Boards ended practices that they already knew to be illegal because *Brown I* held school segregation also violated federal law.

assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, * * * a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 18. As the Ninth Circuit has succinctly explained (*Kelly v. Guinn*, 456 F.2d 100, 107 (1972), cert. denied, 413 U.S. 919 (1973) (footnote omitted)):

[T]eacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems, that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. "[T]he school district's obvious regard for race in assigning faculty members and administrators is a factor which may be considered in assessing motives underlying past decisions which resulted in segregation." *Davis v. School District of Pontiac, Inc.*, 443 F.2d 573, 576 (6th Cir. 1971).

We have argued above that courts should closely scrutinize the claim of a school board with a history of pervasive discrimination that its policies suddenly changed to complete neutrality at a particular time. Here, the suggestion of the Columbus and Dayton Boards that an abrupt shift in purpose occurred in the early 1950's is refuted by the Boards' continuing

assignments of teachers on an overtly racial basis. Petitioners' behavior was not suddenly transmuted into racial neutrality, and no plausible reason has been offered to explain why they would have continued invidiously motivated practices as to teachers but not as to students (to whom a pattern and practice of discriminatory teacher assignments is inevitably a lesson in itself). Indeed, the Dayton Board publicly articulated its systemwide discriminatory policy of not allowing blacks to teach white students until the community was "'ready to accept negro teachers'" (Dayton Pet. App. 195a-196a n.11).¹² A strong inference arises that a school board that so readily yielded to actual or assumed community opposition to integration in faculty assignments continued to allow similar impermissible considerations to influence its student assignment policies.

3. The Boards continued to manipulate their "neighborhood school" policies to separate students by race

The Columbus and Dayton Boards have attempted to explain their student assignment policies since the early 1950's as based entirely on the "neighborhood school" concept. In our view, even scrupulous adherence to neighborhood attendance zone assignments would not necessarily have absolved petitioners from responsibility for the creation and maintenance of a

¹² The Board's policy also provided that it would "'not attempt to force white teachers, against their will'" to teach "'in schools now in negro areas that are now staffed by negroes'" (Dayton Pet. App. 195a-196a n.11).

dual system. Of course, the disparate impact of a policy of operating neighborhood schools does not by itself deprive minority students of the equal protection of the laws. See *Washington v. Davis, supra*. As the Court observed in *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 28, "[a]ll things being equal, with no history of discrimination, it [may] well be desirable to assign pupils to schools nearest their homes."¹³ But *Swann* also recognized that in school systems that have been "deliberately constructed and maintained to enforce racial segregation," such as Columbus and Dayton, "all things are not equal" and neighborhood school assignments may operate to maintain an artificially created racial separation. *Ibid.* The use of a neighborhood school policy by a school board that created a dual system may be a further constitutional violation if the board intentionally uses the policy to reinforce segregation.¹⁴ And, for the reasons stated

¹³ Congress has likewise stated in Sections 202 and 206 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701, 1705, that "the neighborhood is the appropriate basis for determining public school assignments," though it has also provided that the assignment of students to neighborhood schools "for the purpose of segregating students on the basis of race, color, sex, or national origin" constitutes a violation of "equal protection of the laws."

¹⁴ The Equal Educational Opportunities Act expressly declares that no state shall deny equal education opportunities to any individual by either (1) "the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools," or (2) "the

above, segregative intent is manifested when the school board maintains a purposefully discriminatory pattern of faculty assignments in such schools.

But the present cases do not raise the question whether scrupulous adherence to an otherwise neutral neighborhood school policy, standing alone, may constitute the deliberate maintenance of a dual system. For here, as in *Keyes*, the record demonstrates that "the 'neighborhood school' concept has not been maintained free of manipulation." *Keyes v. School District No. 1, supra*, 413 U.S. at 212.

a. The court of appeals correctly concluded that the Columbus and Dayton Boards readily departed from strict neighborhood school assignments when increased racial separation would result. For example, both Boards made extensive use of optional attendance zones in neighborhoods undergoing racial transition (see pages 8-9, 30, *supra*). As the district court recognized in the Dayton case, optional zones are inconsistent with the concept of neighborhood school assignments (Dayton Pet. App. 12a-13a). In cases where school boards, particularly those with a history of discrimination, have offered students the choice of attending schools of substantially differing racial compositions, the lower courts have properly inferred segregative intent absent some persuasive non-racial explanation. See, e.g., *United States v. School Dis-*

failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system." Section 204(a) and (b), 20 U.S.C. 1703(a) and (b).

trict of Omaha, 521 F.2d 530, 540-543 (8th Cir.), cert. denied, 423 U.S. 946 (1975), and cases cited therein. As this Court pointed out in *Village of Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 267 (footnote omitted), "[s]ubstantive departures" from usual policies may be relevant in determining intent, "particularly if the factors usually considered important by the decision-maker strongly favor a decision contrary to the one reached." Neither the Columbus nor Dayton Boards came forward with adequate educational or administrative explanations for the continued use of optional zones in areas undergoing racial transition. Accordingly, the court of appeals correctly concluded that the use of such zones was motivated by segregative intent (Dayton Pet. App. 209a-210a; Columbus Pet. App. 175, 179, 182-183).

The Columbus and Dayton Boards also deviated from neighborhood school assignments in other ways that can rationally be understood only as part of an overall policy to maintain racial segregation. In Dayton, the Board maintained Dunbar High School as a district-wide school for black students until 1962 (Dayton Pet. App. 199a-200a). When this school was closed, a new Dunbar High School was opened with a virtually all-black student body and faculty (Dayton Pet. App. 207a). In Columbus, the Board made boundary changes that removed white residential areas from predominantly black zones and operated noncontiguous zones in which white students were bused past black schools (Columbus Pet. App.

179-183, 184-186). The court of appeals found that no adequate non-racial explanation was offered for any of these practices.

Thus, the records show that neither the Columbus nor the Dayton Boards pursued a bona fide neighborhood school policy. As the court of appeals succinctly put it (Columbus Pet. App. 175), "the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." This observation applies equally to the Dayton Board (see Dayton Pet. App. 209a-210a).

b. As the Columbus and Dayton school systems expanded in the 1950's and 1960's, both boards undertook ambitious school construction programs. These programs resulted in extreme patterns of racial separation in both systems. In Columbus, 87 of the 103 schools built since 1950 opened as racially identifiable (Columbus Pet. App. 173). In Dayton, 22 of the 24 schools constructed since 1950 opened 90% or more black or white (Dayton Pet. App. 210a).

The court of appeals correctly recognized that a close examination of this pattern of school construction was "'a factor of great weight'" in determining whether the school systems were deliberately segregated (Columbus Pet. App. 168, quoting *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 21; see Dayton Pet. App. 210a-211a). School construction programs of this magnitude ordinarily will have a profound effect on segregation or integration within the system as a whole. As this

Court explained in *Swann*, the consequences of school construction programs are far-reaching (402 U.S. at 20-21):

The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. * * * The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segre-

gated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight.

As we have shown, the post-1950 pattern of school construction in Columbus and Dayton was undisputably segregative in effect. Both Boards were, of course, fully knowledgeable of the racial residential and school attendance patterns within their systems, and were thus aware of the potential impact that their construction decisions would have on integration or segregation. They had the option of making these construction decisions with the goal of achieving meaningful integration, or for the purpose of perpetuating or aggravating existing racial separation.

Particularly in light of the Boards' practices of deliberate segregation, the pattern of rejection of alternate sites that were compatible with a neighborhood school policy and that would have had an integrative, rather than a segregative effect, raised an inference that racial separation was a factor motivating the Boards' construction decisions. Neither Board rebutted this inference. In Columbus, the district court identified several instances where the Board had rejected integrative sites without offering any explanation for their choice (Columbus Pet. App.

21-24). The court of appeals held that the district court had properly relied in part on these instances in finding deliberate systemwide segregation (Columbus Pet. App. 173). In the Dayton case, although the district court did not credit it, respondents also offered evidence that the Board had rejected sites that would have had an integrative effect (see Dayton Pet. App. 174a-176a). The inference that these sites were rejected because of segregative intent was strengthened by evidence of the "coordinate racial assignment of professional staffs to [newly constructed] schools and additions on the basis of the racial composition of the pupils served by the schools" (Dayton Pet. App. 210a). No racially neutral plan for school construction in Dayton was proved. To the contrary, the district court described the process of site selection in Dayton as "a most imprecise science" that "approached the level of haphazard in some instances" (Dayton Pet. App. 173a). In view of the strong history of segregation in the Dayton schools, the use of such a subjective decision-making process reinforced the inference that racial considerations played a role in the Board's construction decisions. See *Castaneda v. Partida*, 430 U.S. 482, 497 (1977).

c. The Boards do not seriously contend they pursued policies intended to promote integration, but they deny that they had any intent to discriminate. They argue that racial considerations were irrelevant to their decisions and were subordinated to the achievement of valid educational objectives, and that the court of appeals erroneously equated their decision

to pursue a neutral neighborhood school policy—where the foreseeable effect was racial separation—with intentional segregation.

In both the Dayton and Columbus cases the court of appeals treated the Boards' adoption of policies that had the natural and foreseeable consequences of creating and maintaining racial separation as probative of the Boards' segregative intent (see Dayton Pet. App. 203a-204a; Columbus Pet. App. 173). And in Dayton, the court stated, quoting *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), cert. denied, 421 U.S. 963 (1975), that (Dayton Pet. App. 203a):

A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of the public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

We agree with petitioners that awareness of disparate effect is not the same as purposeful discrimination. But proof that a challenged official act has a disparate effect on a particular group may be important in ascertaining the intent of the decision-maker.¹⁵ As the Court stated in *Village of Arlington*

¹⁵ In his concurring opinion in *Washington v. Davis*, *supra*, 426 U.S. at 253, Mr. Justice Stevens explained the importance of disparate effect in proving intent as follows:

Frequently the most probative evidence of intent will be objective evidence of what actually happened rather

Heights v. Metropolitan Housing Corp., *supra*, 429 U.S. at 266:

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it “bears more heavily on one race than another,” *Washington v. Davis*, *supra*, at 242—may provide an important starting point.

Where disparate effect is very difficult to explain except as the product of purposeful discrimination, the evidence of effect may for all practical purposes establish the violation. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Guinn v. United States*, 238 U.S. 347 (1915).¹⁶ And in some circumstances, evidence of a grossly disproportionate effect on a protected class justifies shifting the burden to the state to produce evidence that this effect was not the product of purposeful discrimination. See *Castaneda v. Partida*, 430 U.S. 482, 494 & n.13 (1977); *Washington*

than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation.

¹⁶ Nothing shows intent as well as a demonstration that a series of decisions *all* have a similar disparate effect. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Such a demonstration shows a cumulation of disadvantage inexplicable on grounds other than the forbidden but unstated characteristic.

v. *Davis*, *supra*, 426 U.S. at 241; *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972).

Accordingly, several courts of appeals have held that, once plaintiffs demonstrate that particular official action naturally and foreseeably resulted in segregation in the schools, that evidence creates a rebuttable presumption that the action was taken with a discriminatory purpose, shifting the burden to the school officials of coming forward with evidence proving that they had no segregative intent. See, e.g., *United States v. Texas Education Agency*, 579 F.2d 910, 912-914 (5th Cir. 1978), petition for cert. pending, No. 78-897; *United States v. School District of Omaha*, 521 F.2d 530, 535-536 (8th Cir.), cert. denied, 423 U.S. 946 (1975). See generally Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317 (1976).

But ultimately the court of appeals' decisions in these cases did not rest on a presumption that the Boards intended to bring about the racial separation that was the natural and foreseeable consequence of its actions.¹⁷ Although the segregative impact of their policies "provide[d] an important starting

¹⁷ As the court commented in the Columbus case (Columbus Pet. App. 173), although an inference of segregative intent could be drawn from the evidence that the vast majority of the new schools opened and remained racially identifiable, "the record actually requires no reliance upon inference" because of the evidence that the Board deliberately selected segregative sites and refused to consider alternatives that would have had an integrative effect.

point" in determining the Boards' intent, ultimately "a clear pattern, unexplainable on grounds other than race," emerged from the court's examination of all the "circumstantial and direct evidence of intent." See *Village of Arlington Heights v. Metropolitan Housing Corp.*, *supra*, 429 U.S. at 266. The court's findings of intent to segregate rested not on a presumption, but on a pattern of both direct and indirect evidence of overt racial intent illuminated by the historical context of the Boards' actions.¹⁸

d. In sum, the court of appeals applied proper legal standards and correctly concluded that the

¹⁸ In granting a stay in the Columbus case, Mr. Justice Rehnquist stated his concern that the court of appeals had "employed legal presumptions of intent to extrapolate system-wide violations from what was described * * * as 'isolated' instances." *Columbus Board of Education v. Penick*, No. A-134 (Aug. 11, 1978) (Rehnquist, J., in chambers), slip op. 3. In the portion of the Columbus opinion to which Mr. Justice Rehnquist referred, the court of appeals commented (Columbus Pet. App. 175) that the post-*Brown I* instances of Board gerrymandering of attendance boundaries and establishing optional attendance areas "can properly be classified as isolated in the sense that they do not form any systemwide pattern." The court found, however, that these instances "are significant in indicating that the Columbus Board's 'neighborhood school concept' was not applied when application of the neighborhood concept would tend to promote integration rather than segregation." This comment in no way undermines the court's finding of systemwide intentional segregation. These particular instances of segregative conduct—which were in one sense "isolated"—were not the primary source of its finding of a violation. Instead they supplemented and gave color to the more systematic and far-reaching effects of the Board's pre-1954 segregation, and the post-1954 practices of discriminatory school site selections and faculty assignments.

Columbus and Dayton Boards continued to pursue a systemwide policy of deliberate racial discrimination from the early 1900's through the dates of trial. The Boards attempt now to characterize their acts of discrimination as discrete or isolated. The thrust of petitioners' argument is that a finding of systemwide segregation cannot be made unless there is non-circumstantial proof, on a school-by-school basis, of invidiously motivated Board action. No such insurmountable burden of proof has ever been placed on plaintiffs in a school desegregation lawsuit. Disputed questions of intent in cases such as these are not easy to resolve, see *Dayton I, supra*, 433 U.S. at 414; and a "sensitive inquiry" must be made "into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. at 266. But when this inquiry is made, the plaintiffs' burden of proof is no different than in any other civil case; and the courts should apply normal evidentiary principles in answering the question whether it is more probable than not that the school boards followed a general policy of racial discrimination in assigning students and faculty. Given the strength of the proof adduced in these cases, the court of appeals correctly found that petitioners followed a general policy of racial discrimination.

II

SYSTEMWIDE REMEDIES ARE APPROPRIATE IN THESE CASES BECAUSE THEY ARE TAILORED TO CURING THE CONDITION THAT OFFENDS THE CONSTITUTION

Courts are not at liberty in school desegregation cases to command results merely to achieve socially desirable ends. As this Court explained in *Dayton I, supra*, 433 U.S. at 419-420:

The power of the federal courts to restructure the operation of local and state governmental entities "is not plenary. It 'may be exercised "only on the basis of a constitutional violation." ' [Citations omitted.] Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.' " [Citations omitted.]

* * * If [constitutional] violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U.S., at 213.

The task of a remedial decree "is to correct, by a balancing of the individual and collective interests,

the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 16. See also, *e.g.*, *Milliken v. Bradley*, 433 U.S. 267 (1977); *Hills v. Gautreaux*, 425 U.S. 284 (1976).¹⁹

Applying these principles, the court of appeals correctly concluded that because of the systemwide impact of the Boards' discriminatory policies, systemwide relief was warranted.

A. The Columbus And Dayton Boards Are Under An Affirmative Constitutional Duty To Convert The Dual Systems They Created And Maintained Into Unitary Systems Without "White" Schools And "Black" Schools

Dayton I reaffirms the holding in *Keyes* that where school officials' segregative policies have a "systemwide impact" the court should order "systemwide relief." 433 U.S. at 420. In these cases, the condition found to offend the Constitution is the creation and maintenance of a dual system of education, with each Board operating one set of schools primarily for white students and another set of schools primarily for black students. Under this Court's repeated holdings, the only remedy that will cure this condition is prompt conversion to a unitary system in which there are no longer white schools or black

¹⁹ Congress has expressed a similar judgment. Section 213 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1712, provides that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court * * * shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

schools but "just schools." *Green v. County School Board*, *supra*, 391 U.S. at 442. See also, *e.g.*, *Keyes v. School District No. 1*, *supra*, 413 U.S. at 200 & n.11; *Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 15. In order to eliminate all vestiges of the dual system "‘root and branch,’" "all-out desegregation" must be undertaken. *Keyes v. School District No. 1*, *supra*, 413 U.S. at 213-214. The remedial decree must therefore seek "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971).

The remedies challenged in these cases are faithful to these principles. They effect conversions to unitary systems by removing the racial identifiability of schools which have heretofore been identified and operated as schools intended for whites or blacks. They do not require fixed mathematical norms,²⁰ but instead allow reasonable ranges for flexibility. There is no claim that either decree is impractical. Finally,

²⁰ The Columbus Board argues (Br. 79-81) that the district court ordered strict mathematical ratios. However, the district court's remedial order did nothing more than suggest that a staff plan that brought every school within 15% of the district-wide norm could be used as a starting point (Columbus Pet. App. 11). This range is reasonably broad. It permitted ample flexibility and thus was an appropriate "starting point in the process of shaping a remedy, rather than an inflexible requirement." *Swann*, *supra*, 402 U.S. at 25. The court made clear that exceptions to this already flexible range would be allowed on grounds of practicality (Columbus Pet. App. 105-106).

it is undisputed that neither decree will require excessive travel times for students.²¹

B. The Boards Did Not Meet Their Burden Of Proving That Less Extensive Relief Would Fully Eradicate

The Effects Of Their Systemwide Discrimination

Petitioners contend that despite the findings that they had systemwide segregative policies, and that extreme conditions of racial separation are now found in both school systems, no relief should have been ordered. They urge that the racial separation in the schools simply corresponds to the racial patterns in the residential areas served by the schools. Under *Dayton I*, they urge, respondents had the burden of proving not only the systemwide nature of petitioners' intentionally discriminatory policies, but also the precise degree to which these segregative policies caused the current conditions of racial separation, wholly apart from other factors such as residential patterns. In petitioners' view, respondents failed to carry this burden.

1. *When systemwide discrimination has been shown, the burden shifts to the defendants to establish that the remedy need not be systemwide*

In holding that judicial remedies must be addressed to the incremental segregative effects of a school board's discriminatory policies, *Dayton I* did not

²¹ Petitioners do not contend that the remedies ordered here are inconsistent with the remedial priorities stated in Section 214 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1713.

establish new principles. Rather, it reiterated the settled precept that a remedy must be tailored to cure the condition that offends the Constitution by eradicating the effects of the violation. When there have been only isolated and sporadic acts of school board discrimination affecting a limited number of schools or students, a similarly limited remedy is appropriate. On the other hand, when there has been a general policy of discrimination in the operation of the school system as a whole, pervasively eliminating whatever opportunities existed for substantial racial integration (see *Keyes, supra*, 413 U.S. at 201-203), a systemwide remedy will generally be required. As *Dayton I* reaffirms "[t]here is no doubt that federal courts have authority to grant appropriate relief of this sort when constitutional violations on the part of school officials are proved," 433 U.S. at 410, but "only if there has been a systemwide impact may there be a systemwide remedy." *Id.* at 420. The Court therefore reversed the systemwide remedy ordered in *Dayton I* because it plainly went far beyond the scope of the isolated violations relied on by the court of appeals. 433 U.S. at 417; see also *id.* at 422 (Brennan, J., concurring).

Dayton I does not directly address the central issue here, which is the proper allocation of the burden of proof at the remedial stage when a court must enter a decree which eliminates all vestiges of systemwide violations "root and branch." But *Dayton I* does cite and follow *Swann* and *Keyes*, which

establish the governing principles. 433 U.S. at 410, 420.²²

Keyes and *Swann* establish that once a systemwide violation has been shown, a systemwide remedy will be imposed unless school officials can establish that some portion of the racial separation in the system is not attributable to their discriminatory conduct. The Court addressed precisely this point in *Swann*, stating (402 U.S. at 26):

Where the school authority's proposed plan for conversion from a dual to a unitary system con-

²² Petitioners rely (Columbus Br. 58-59) heavily on the per curiam decisions in *School District of Omaha v. United States*, 433 U.S. 667 (1977), and *Brennan v. Armstrong*, 433 U.S. 672 (1977). Despite petitioners' arguments to the contrary, neither case is inconsistent with our reading of *Dayton I.* In both cases, uncertainty as to the scope of the constitutional violations precluded affirmance of findings that there had been systemwide discrimination. In *Omaha*, the court of appeals was directed to reconsider the evidentiary presumptions that it had employed to determine intent in light of the intervening decision in *Arlington Heights*. Upon reexamination of the violations, the court of appeals was also directed to reconsider whether a systemwide remedy was warranted. 433 U.S. at 668-669. In *Brennan*, no remedy had yet been ordered. But the district court's finding of a systemwide violation appeared inconsistent with a specific finding that the Milwaukee Board's boundary and construction decisions (a key element in the alleged violations) were entirely racially neutral. See *Armstrong v. Brennan*, 539 F.2d 625, 635-636 (7th Cir. 1976). Notwithstanding this patent inconsistency, the court of appeals upheld the conclusory finding of segregative intent by affording the district court a "presumption of consistency." 539 F.2d at 635-636; see 433 U.S. at 672. The case was therefore remanded to redetermine the scope of the actual violations so that a proper remedy could be developed commensurate with those violations. 433 U.S. at 672-673.

templates the continued existence of some schools that are all or predominately of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

See *Keyes v. School District No. 1, supra*, 413 U.S. at 211 n.17.

Once systemwide racially discriminatory practices have been proved, it is proper for the court rebuttably to presume that those practices achieved their full potential as a contributing factor to the current racial imbalance in student attendance patterns. The burden should then shift to the school officials to show the extent to which racial separation would have existed in the absence of the discrimination. For it is ordinarily the school board that is most likely to have access to the information necessary to demonstrate the effects of its racial discrimination, and to be in the best position to establish what conditions would have been but for official discrimination on the basis of race. And it is, after all, the very illegality of the school officials' behavior and their refusal to discharge their constitutional duty promptly to eradicate the effects of their violations that created the uncertainty in measuring the damage caused by those violations. As a practical matter, if plaintiffs are required to demonstrate not only the existence of a

general policy of discrimination but also the specific current effects of that policy, in many cases they will face an insuperable burden since the defendants will often be able to suggest other factors that might have encouraged racial separation in the schools. The perpetrators of racial discrimination should not be permitted to stand silent while their victims are required to shoulder so heavy a burden.

Indeed, it is the established rule that the perpetrator of a constitutional wrong must bear the burden of proving that his violation was without, or was of only limited, effect. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Corp.*, *supra*, 429 U.S. at 270-271 n.21 (proof of racially discriminatory purpose would "have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered"); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The same rule is applied where the cause of action is statutory. See, e.g., *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 771-773 (1976); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). And see generally W. Prosser, *Law of Torts* § 52 (4th ed. 1971).

For example, when a broad-based pattern of racial discrimination in employment is shown, all minority class applicants are presumptively entitled to awards of full retroactive seniority. *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 772-773;

Teamsters v. United States, 431 U.S. 324, 358-362 (1977). Proving whether each applicant would have qualified under neutral and valid standards, whether there were other more qualified applicants, and what the applicant's performance on the job would have been if he were hired is necessarily a difficult and uncertain task. This Court has held that the burden of proof on such matters is properly placed on the wrongdoer, not the victims, even though the remedy sought will directly affect the interests and expectations of incumbent employees. *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 772-773 & n.32, 777-778.²³

Similarly, it will often be impossible to calculate the precise effects of a pervasive pattern of discrimination by school officials. Certainly those effects are not limited to immediately perceptible changes in the racial composition of the specific schools that were the subject of the plaintiffs' proofs. Once a pattern and practice of discrimination by the school board

²³ The district court in *Dayton* therefore erred in concluding that the plaintiffs in a school desegregation case must carry the burden of proving the effects of official discrimination because the interests of "innocent" children and parents would be affected (see *Dayton* Pet. App. 146a-147a). Indeed, the interests of the parents and children in these cases are affected far less dramatically than the interests of the incumbent employees in *Franks*, since the relief respondents seek will not deprive any child of an opportunity to attend school, although many children may not attend the school in their own neighborhoods. Moreover, while the expectations of the employees in *Franks* were contractually secured, a school board has no obligation to continue a neighborhood school policy.

has been established, the inference arises that other acts may have been motivated by racial considerations. Cf. *Teamsters v. United States*, *supra*, 431 U.S. at 359 & n.45, 362. School officials might have adopted different operating policies—perhaps not even favoring the neighborhood school concept—but for their consideration of the factor of race. And although petitioners contend that the racial separation in the Dayton and Columbus schools is the result of residential patterns, not school segregation, racial residential patterns do not develop wholly independently of the operation of a dual school system. The earmarking of schools by race “may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools.” *Keyes v. School District No. 1*, *supra*, 413 U.S. at 202. Where it is not possible to separate the effects of the operation of a segregated school system from the other factors that may also have increased racial separation in the schools, “[c]onsiderations of ‘fairness’ and ‘policy’” dictate that this uncertainty should not preclude an effective remedy. See *Keyes v. School District No. 1*, *supra*, 413 U.S. at 214.²⁴

²⁴ The Third Circuit recently reached precisely this conclusion in a unanimous en banc decision. In *Evans v. Buchanan*, 582 F.2d 750, 765 (3d Cir. 1978), petitions for cert. pending, Nos. 78-671, 78-672, the court upheld an order remedying pervasive inter-district violations, despite the defendants’

The principle that the risk of uncertainty should not be borne by the victims of illegal action is particularly applicable in cases, such as these, where the plaintiffs seek to vindicate rights that are at the core of the Fourteenth Amendment. The victims of purposeful school segregation are entitled to a remedy that eliminates the effects of discrimination “root and branch.” A decree acting upon the school system as a whole will plainly achieve that end. A systemwide remedy will not only remove the racial identifiability of the dual system but it will also visibly rectify the stigma of inferiority which is a product of the pervasive violations. If a school board wishes

contention that it was not possible to identify the precise incremental effects of their segregative conduct:

We hold that, in a case such as this, where there is an historical pattern of significant *de jure* segregation with pervasive inter-district effects, where a facially reasonable plan is proposed to remedy those effects, where the defendant itself admits that it is not feasible to separate out the incremental segregative effects of the constitutional violations from the segregative effects of demographic changes, where the defendant itself is in the best position to ascertain what the pattern of segregation would have been “but for” the constitutional violations, and where the defendant has dragged its heels and obstructed progress toward desegregation for twenty-six years, then the burden of proof shifts to the defendant. Thus the *defendant*, if it opposes the remedy put forward by the plaintiff or the district court, must show the incremental segregative effects of the constitutional violations, and must show how the proposed remedy goes beyond that incremental impact. To hold otherwise would be tantamount to holding that the plaintiffs are without remedy.

to contend that a less inclusive decree would purge all taints of its proven systemwide racial discrimination, it has the burden to propose and justify such a decree.

2. *Since the Dayton and Columbus Boards did not establish that a less extensive remedy would cure the effects of their segregative policies, systemwide remedies were appropriate*

The court of appeals, following the principles announced in *Keyes* and *Swann*, properly placed the burden on petitioners to show that despite the systemwide nature of their segregative conduct, a systemwide remedy was not required. The appellate court also recognized that the remedy should be designed to cure what this Court in *Dayton I* called the "incremental segregative effect" of discrimination in the schools. As the court of appeals explained (Dayton Pet. App. 214a), "[t]he purpose of the remedy is to eliminate the lingering effects of intentional constitutional violations and to restore plaintiffs to substantially the position they would have occupied in the absence of these violations."²⁵ The record in each

²⁵ Petitioners seize on other portions of the court's discussion that, they urge, misconstrue the phrase "incremental segregative effect" (Dayton Br. 40-41; Columbus Br. 59-60). In the Dayton case, the court stated (Dayton Pet. App. 214a-215a):

The word "incremental" merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is "incremental" in that it occurs gradually

case supports the court of appeals' conclusion that petitioners failed to show that a remedy that was not systemwide would be effective to eliminate the incremental effects of their segregative policies.

In the Dayton case, the court of appeals, citing *Keyes*, held (Dayton Pet. App. 216a) that "[w]here plaintiffs prove, as here, a systemwide pattern of intentionally segregative actions by the defendants, it is the defendants' burden to overcome the presumption that the current racial composition of the school population reflects the systemwide impact of those violations." "Nowhere in the record," the court found (*ibid.*), had defendants "rebutted this presumption." The court found (Dayton Pet. App. 216a-217a) that "[t]he impact of defendants' practices

over the years instead of all at once as in a case where segregation was mandated by state statute or a provision of a state constitution.

Similarly, in the Columbus case the court stated (Columbus Pet. App. 197):

It is clear to us that the phrases "incremental segregative effect" and "systemwide impact" employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own "increment" to the totality of the impact of segregation.

Although these statements, standing alone, do not clearly define the concept of "incremental segregative effect," the court of appeals evinced a clear understanding that a remedial order should cure only the "incremental segregative effects," that is, it should (Dayton Pet. App. 214a) "restore plaintiffs to substantially the position they would have occupied in the absence of these violations."

with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clearly was systemwide in that the actions perpetuated and increased public school segregation in Dayton."

In the Columbus case the court of appeals affirmed the district court's findings and its remedial order. The district court found (Columbus Pet. App. 61) that "[d]efendants have not proved that the present admitted racial imbalance in the Columbus Public Schools would have occurred even in the absence of their segregative acts and omissions * * *." ²⁶ After this Court's decision in *Dayton I*, the district court reviewed and reaffirmed this finding, concluding (Columbus Pet. App. 95; citation omitted):

Defendants had ample opportunity at trial to show, if they could, that the admitted racial imbalance of the Columbus Public Schools is the result of social dynamics or of the acts of others for which defendants owe no responsibility. This they did not do.

Accordingly, the district court held (Columbus Pet. App. 75) that if the Columbus Board proposed a plan

²⁶ The court rejected petitioners' claim that segregation in housing alone accounted for the segregated condition of the schools. It found (Columbus Pet. App. 58) that "the actions of the school authorities have had a significant impact upon the housing patterns. The interaction of housing and the schools operates to promote segregation in each. It is not now possible to isolate these factors and draw a picture of what Columbus schools or housing would have looked like today without the other's influence."

that would not affect some of the predominantly or exclusively white schools in the district, the Board would have to establish that the racial composition of those schools "is not the result of present or past discriminatory actions or omissions of defendant public officials or their predecessors in office." The court recognized (*ibid.*) the difficulty of the Board's task of "attempt[ing] to roll back the clock at this point and determine what the school system would look like now had the wrongful acts and omissions discussed earlier in this opinion never occurred." The court subsequently rejected the limited remedial plans proposed by petitioners on the ground that petitioners had failed to carry their burden of proving that the racial imbalance in the schools excluded from those plans was not the result of their discriminatory conduct (Columbus Pet. App. 102-103, 105). The court of appeals upheld the district court's findings and affirmed its systemwide remedial order (Columbus Pet. App. 196-200, 207).

The record in each case supports the lower courts' findings. As the district court observed in the Columbus case (Columbus Pet. App. 102), petitioners, because of their interpretation of *Dayton I*, submitted an amended plan that affected only the schools specifically referred to in the district court's liability opinion, and did not make any attempt to "shoulder the burden of showing that the amended plan's remaining one-race schools are not the result of present

or past discriminatory action on their part * * *.”²⁷ The Dayton Board likewise adopted an all or nothing approach on the question of remedy, premised on its contention that no systemwide violation had been established.²⁸

Despite the fact that in both cases petitioners’ primary argument is that the racial imbalance in the schools resulted from residential patterns, not the segregative policies of the schools, neither Board presented evidence that its practices of racial discrimination did not affect residential patterns.

In contrast, in both cases plaintiffs—although it was not their burden to do so—presented undisputed expert testimony describing the various ways in which a policy of discrimination in schools affects residential decisionmaking (see Dayton R. I 1425, 1447-1450, 1472-1473, 1599-1601, 1605-1606, 1684-1686; Columbus A. 294-296, 341-343, 353-355). This

²⁷ The Columbus Board now relies on a law review article (Columbus Br. 77 n.41) to refute the undisputed expert testimony that schools influence residential decisionmaking. This post-trial attempt to show what petitioners failed to prove at the trial should be rejected. Again relying on secondary sources, the Columbus Board argues that economics accounts for up to 50% of residential segregation. However, the undisputed expert testimony is that economics can account for only a small portion of residential segregation (Columbus A. 293-294). See also Farley, *Residential Segregation And Its Implications For School Integration*, 39 Law & Contemp. Prob. 164, 174-177 (1975); K. Taeuber, *Patterns of Negro-White Residential Segregation* (Rand Corp. Jan. 1970).

²⁸ Respondents’ brief in the Dayton case describes the arguments on this point to the court of appeals (Br. 133-135).

evidence showed, for example, that schools that are operated as disproportionately black in racial composition are commonly perceived as inferior schools. Because the quality of schools is an important factor in home-buying decisions, school board action that causes a school to become identified as a black school may well influence residential movement. Also, the very fact that a school board practices racial discrimination exerts a powerful moral influence on the community, affecting community attitudes and conduct.

In sum, the record supports the court of appeals’ conclusion that no showing was made that part or all of the racial separation and imbalance in the Dayton or Columbus systems was not attributable to petitioners’ discriminatory policies. Petitioners failed to prove their claim that the racial separation in their districts was caused, in whole or substantial part, by residential patterns existing independent of the segregative policies of school officials. Accordingly, the court properly approved systemwide remedies.

3. *The remedial principles of Keyes and Swann, upon which these decisions rest, should be reaffirmed*

Petitioners seek to impose on the plaintiffs in school desegregation cases the burden of proving, with mathematical certainty,²⁹ school by school

²⁹ *Dayton I* does not suggest that the effects of a systemwide violation must be determined with mathematical certainty. Indeed, the same day that *Dayton I* was decided, this

throughout a district, the precise degree to which a school board's widespread racially discriminatory conduct affected the racial composition of the student body. A similar approach was rejected in *Keyes*, where this Court explained (413 U.S. at 200, 208-209):

We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system.

* * * * *

[A]t that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregated actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by the segregative intent.

Much of petitioners' argument constitutes an attack on the remedial principles of *Keyes* and *Swann*, which, they contend, are inconsistent with

Court approved a remedy for systemwide discrimination providing compensatory education for minority students, even though it was impossible to determine the level of educational achievement those students would have attained absent the school board's discrimination. *Milliken v. Bradley*, 433 U.S. 267 (1977). See also *Hutto v. Finney*, 437 U.S. 678 (1978).

Dayton I. As we have shown, the remedial principles announced in those cases are fully consistent with *Dayton I.* Moreover, those principles are, as this Court stated in *Keyes* (413 U.S. at 209), grounded on considerations of "fairness" and "policy," and designed to provide a practical and effective means of eliminating longstanding and pervasive segregation of the public schools in violation of the Fourteenth Amendment. Petitioners have suggested no justification for overruling these decisions, which have been "considered maturely and recently" (*Runyon v. McCrary*, 427 U.S. 160, 186 (1976) (Powell, J., concurring)), and are both sound and consistent with generally applicable remedial principles.

There is an additional compelling reason for adhering to those principles. Based upon a review of the reported decisions and Department of Justice files, we have determined that approximately 200 school districts with a combined enrollment of more than 5 million students are presently operating under court ordered desegregation plans that are premised in whole or in part on the remedial principles of *Swann* and *Keyes*. In addition, the Department of Health, Education, and Welfare has advised us that it has obtained desegregation plans from more than 200 additional school districts based on the *Swann* and *Keyes* decisions. Overruling or limiting *Swann* and *Keyes* would call into question the validity of every one of these plans. The potential for disrupting settled expectations is enormous.

Since the court of appeals correctly, applied the principles announced in this Court's prior decisions, its judgments should be affirmed.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1979

* The Solicitor General is disqualified in these cases.

MOTION FILED
MAR 30 1979

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.
Respondents.

**MOTION AND BRIEF AMICUS CURIAE OF THE
CLEVELAND, OHIO CITY SCHOOL DISTRICT
IN SUPPORT OF PETITIONERS**

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GARY L. PENICK, et al.
Respondents.

On Writ of Certiorari To The United States
Court of Appeals For the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS

The Cleveland, Ohio, Board of Education, a political subdivision of the State of Ohio, respectfully moves, pursuant to Rule 42 of the Rules of this court, for leave to file a brief *amicus curiae* in support of both petitioners Columbus Board of Education in case No. 78-610 and Dayton Board of Education in Case No. 78-627.

Applicant Cleveland Board of Education is interested in the disposition of these cases because the opinions of this court should control the disposition of applicants' own appeal presently pending before the Sixth Circuit Court

of Appeals, *sub nom*, *Reed v. Rhodes* and docket no. 76-2602, 76-2603 and 78-3218.

Applicant does not propose to review either the law or the facts in the cases at bar, but to point out a few relevant facts, which apply to applicant, the largest school system in the State of Ohio, and to point out a basic controlling question of constitutional law which is relevant to the cases at bar, as well as to many other cases, and which has not been presented by the parties.

On August 31, 1976, District Judge Frank J. Battisti of the Northern District of Ohio found the Cleveland School District, the largest public school district in Ohio, guilty of violating the Federal Constitutional equal protection rights of a class consisting of all the black school children in the district. His opinion, of considerable length, was based on what he described, in detail, as some 163 acts of school officials, extending back at least 50 years, wherein he found segregative intent in what otherwise appeared to be routine administrative steps taken in the assignment of students (and, in a few cases, faculty), and the construction, utilization and abandonment of schools. The court did not consider admitted and undisputed evidence of non-segregative motivation for every challenged act of the board and likewise did not consider undisputed probative evidence of the demonstrated integregative conduct of the present and prior boards and superintendents.

The district court's opinion, *sua sponte*, admitted that its order involved a controlling question of law as to which there was substantial ground for difference of opinion under 28 U.S.C. § 1292 (b), and authorized an interlocutory appeal.

A single judge of the Sixth Circuit Court of Appeals,

sitting during a recess of the Sixth Circuit, granted a stay order, after a hearing, on the ground that there was a substantial probability of success on the appeal. The stay order was thereafter vacated by a panel of the Sixth Circuit but the same panel, after hearing the appeal, remanded the case for new findings of fact and conclusions of law in the light of *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Nine months later the district judge entered a second opinion on liability, reaffirming his earlier opinion, without any additional evidence. While purporting to comply with the mandates of *Washington v. Davis* and *Arlington Heights*, no real attempt was made to follow their guidelines nor the evidentiary record before him on those guidelines.

He found "a one hundred percent present incremental segregative effect" from the challenged acts even though many had occurred over a generation ago at long since closed schools. The second opinion, as the first, did not review the administrative reasons for the challenged acts nor the substantial, undisputed evidence of non-segregative and integregative conduct on the part of the Board of Education and school officials. The second opinion gave brief lip service to but generally ignored the evidentiary standards for determining segregative intent mandated by *Arlington Heights*, although evidence of such was amply supported by the record before him. The District Judge also then issued a remedial order, ordering the system to prepare a system-wide desegregation plan calling for massive pupil reassignment.

A second appeal of the liability order, as well as the remedial order to the Sixth Circuit, was argued in June,

1978. They remain undecided, although the Sixth Circuit, following the granting of certiorari in the cases at bar, granted a stay of the implementation of the desegregation plan and obviously awaits the ruling of this Court before deciding the Cleveland case below.

For the foregoing reasons Applicant respectfully requests that this motion for leave to file an amicus brief be granted. Filed herewith is applicant's brief as *amicus curiae*.

Respectfully submitted,

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On Writ of Certiorari To The United States
Court of Appeals For the Sixth Circuit

**BRIEF AMICUS CURIAE OF THE CLEVELAND,
OHIO CITY SCHOOL DISTRICT
IN SUPPORT OF PETITIONERS**

Interest of Amici

The interest of *amici* appears from the foregoing motion.

Statement of the Cases

Amici incorporate the Statement of the Cases by the Petitioners in both cases at bar.

ARGUMENT

Principles of Judicial "Activism" at the District and Circuit Court Level, Rather than Adherence to Precedent and the Mandates of this Court, Governed the Decisions Below in Columbus, and the Sixth Circuit, and Cleveland.

The careful effort by District Judge Rubin in the *Dayton* case to follow the mandates of this Court is clearly described by the merits brief of the Dayton Board in their case at bar, No. 78-627. The failure of District Judge Duncan in the *Columbus* case to follow the same mandates is likewise clearly described by the merits brief of the Columbus Board in their case at bar, No. 78-610.

The briefs of both Boards thoughtfully and completely analyze the opinions of the Sixth Circuit on the two appeals and persuasively demonstrate that the opinions of that Circuit, in the *Dayton* and *Columbus* appeals, likewise fail to follow the commands of this Court.

Unanswered is one question. Why? Why were instructions so clear as those of *Dayton* and guidelines so specific as those of *Arlington Heights* not followed?

Perhaps the Cleveland case provides an answer.

On October 13, 1978, *The Cleveland Press* of Cleveland, Ohio, published the text of a speech that District Judge Battisti had given before an "exclusive" organization in Cleveland. In that speech the District Judge cogently and unequivocally described the judicial philosophy that guided his judgment in the Cleveland school desegregation case. He espoused the role of an "activist", i.e., a judge who, in any "public law" litigation, does not confine himself to "sound pronouncements of the law", but makes himself "the conscience of our society for justice". Thus

established, the courts below, not restrained by anything other than their own interpretation of appropriate social philosophy, felt no need to follow this Court's instructions but proceeded on their own to alter the very structure of state and local public school government.

Judge Battisti is not alone. He speaks for a whole current school of judicial thought. His statements find academic support in the writings of a law professor at Harvard named Chayes. Professor Chayes' principal publication to date on this subject, "The Role of the Judge in Public Law Litigation", 89 *Harvard Law Review* 1281, (1976) is specifically relied upon by Judge Battisti in his speech. With such academic support, District Judges throughout the United States, as Professor Chayes points out, have become increasingly motivated to take over legislative and executive functions of state, local and even the national government.

The scope of this activism is catalogued by Professor Chayes in his article, as well as the dangers which it brings. But District Judges, being human, and unrestrained by an electorate, have accepted the power without a recognition of the dangers inherent, as Lord Acton well knew, in the corruption which absolute power brings. The cautionary warnings of the good professor that his conclusions are but "preliminary hypotheses", which he himself describes "as yet unsupported by much more than impressionistic documentation", *ibid*, footnote, p. 1281, are now forgotten. Because of its significant disclosures as to how the sincerely held philosophical beliefs of the Judge who decided the Cleveland case can forge a decision that places those beliefs on a higher level than his responsibility to this Court, the speech is reprinted in its entirety as Appendix A.

Amici urge this Court not only to reiterate the clear

guidelines of *Arlington Heights* and the specific commands of *Dayton* but to advise lower courts throughout this country that this Court, and not they, interpret the Constitution's ultimate meaning, and when such meaning has been unequivocally announced, they are bound to obey its mandates not only on direct appeals but in an even-handed manner to all litigants in all cases.

Respectfully submitted,

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APPENDIX A

"This article is the basic text of a speech by Federal Judge Frank J. Battisti before a recent meeting of the 50 Club, an exclusive organization of high-ranking Cleveland business and civic individuals. The Press publishes it as an insight into Judge Battisti's judicial philosophy and his handling of the schools desegregation case, over which he has presided from its inception." The Cleveland Press, October 13, 1978.

by FRANK J. BATTISTI
Chief Judge, U.S. District Court

"From the time of Chief Justice Marshall, and for all judges, lawyers and laymen since then, the role of the court in civil cases has been seen as simply to act as a reasoning, but essentially a passive arbiter in applying the facts and the law of the case in order to settle a rather private dispute between the contesting litigants.

Today, however, the court has found itself cast in a far different role, and unlike the traditional judicial role the new role offers no definite script for a judge to follow. Complainants now crowd the federal court with charges of school segregation, employment discrimination and prison decay, to name a few (in an attempt to make the court the engine of pervasive social change). Prof. Chayes of the Harvard Law School has compared the traditional lawsuit to the new public law case in a most illuminating analysis.

The public law lawsuit, according to Professor Chayes' depiction, differs in many crucial aspects from the lawsuit with which we are all familiar.

First and foremost, fundamental rights, like freedom, liberty and equal opportunity, are at stake, not monetary injury or property damage. The consequences of the loss of these rights, therefore, are far more tragic and harmful to the community and nation as a whole.

Second, the parties to the lawsuit are, on the one hand, public officials, representing you and me, and on the other hand, representatives of a class of aggrieved or injured people, the proceeding, therefore, impacts severely on a large number of persons who are not before the court.

Also, the public official as litigant may provide the additional complication of polling his constituents prior to determining his next legal move; and thus, he will often be put in the embarrassing predicament of claiming authority to represent all of his constituents, while at the same time, attempting to deny the heartfelt needs of some of them.

Third, the type of relief requested is often a pervasive affirmative decree to eliminate the root cause of the deprivation of those fundamental rights. The relief necessary is ongoing, sometimes complex, and often takes officers of the court into areas traditionally foreign to it, such as policy planning and legislative lobbying.

The remedy stage of the proceedings takes on new meaning because the court cannot rely on the facts proffered by the parties, who are themselves not experts in planning the sort of remedy needed, and, because an easily conceptualized and implemented remedy is not available, it is necessary for the court to call in special masters and advisory committees.

The court must be the active center of a team effort that must be assembled to reform social institutions or processes, that may not be completely understood by any

single person. Only by being an active participant can the court assure that the careful evaluation is undertaken that is essential to the implementation of a remedy — one that is efficient and in compliance with constitutional standards.

However, I should add that the court's role in public law litigation is not one of volition, rather it is one of mandate. The judiciary becomes the enforcer of constitutional obligations because the elected officials have either failed or are unable to perform their constitutional duties.

Let me turn now to the Cleveland school desegregation case, which is a classic example of a public law proceeding, without discussing its facts or applicable law.

All the ingredients are present; multiple parties, elected government officials, party representatives asserting the interest of thousands or millions of citizens, pervasive constitutional violations from a long history of intentional segregative conduct, difficult and protracted remedial planning that has created the need for outside experts and a master, we have it all — and it has made life rather difficult for many of us.

First, the school case makes absolutely clear that the Constitution is the true mainstay of a democracy as we know it. As every schoolboy knows, the Constitution was initially adopted without a bill of rights. Those provisions were finally incorporated in order to foreclose the possibility of majority tyranny.

The protection of affirmative rights granted by the Constitution is the most important function of the court. Justice Powell accurately reflected this role in stating: 'the irreplaceable value of the power articulated by Chief Justice Marshall lies in the protection it has afforded the con-

stitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.'

A second feature of the school case is the ironic fact that the very individuals and institutions which have been found liable of impairing constitutional rights are those which are the primary, if not the sole, source of relief. And, aggravating the situation in this and similar proceedings, are the conflicting signals bombarding the defendants, who are public officials. They feel caught, no doubt, between a rock and a hard place.

These public law suits are often plagued by parties who think they continually have to look over their shoulders at the ballot box. This sorely tests the ability and will of such officials to comply with judicial orders.

Another problem is the politicization of the judiciary. The judge faces the dilemma of having glaring media attention, but not having the opportunity to utilize it. In this form of litigation, the publicity may be not only one-sided, but it may also feed back into the political calculus of certain public officials and reinforce their sensitivity to the will of an uninformed electorate.

All of the attributes of a free fair press are thus lost if a crucial player has an ethical gag rule forbidding public rebuttal.

A more perplexing structural problem for the court is the lack of clear guideposts to be followed when, by necessity, a judge becomes involved in the remedial stages of public law litigation. Equity doctrines often have all the substance of a Grimm's Fairy Tale.

Judicial discretion today is not unbridled, and one consequence of the increase in public law litigation is a de-

veloping definition by the Supreme Court and lower courts of the scope of the courts' equitable powers.

However, no clear or exhaustive definition exists yet, and a federal judge involved in the remedying of a constitutional violation is put in the frustrating position of continual delays in the implementation of a remedy (and the aggrieved parties suffer), while the appellate courts attempt to define the limits of the equitable powers involved.

Fourth, a public law lawsuit, like the school case, presents difficult problems of federalism for the federal judge. One aspect of the problem is that the federal court in fashioning a remedy, after holding public officials liable for constitutional violations, must often issue orders that run counter to and, because of the supremacy clause, supersede, local or state laws.

Another aspect of the federalism problem is that the court's remedy impedes the 'carrot and stick' enforcement methods of the executive branch of the federal government — the use of federal funding. Federal funds are usually needed to implement desegregation, but the local officials are not eager to use federal funds for that purpose.

Officers of the court may then be compelled to intervene to secure federal funds. This often requires the establishment of conditions or programs for their use. Such officers may also be required to act to ensure that the federal funds, when received, are used for the intended purposes.

As a result, the court becomes unwillingly, but necessarily, an administrator, lobbyist, legislator, and regulator — all roles outside the traditional judicial function, and all roles which do indeed strain the limited resources of any federal court.

The active and exposed role of the court in public litigation subjects the court to public questioning of the legitimacy of its actions. This questioning is an inevitable result of the change in judicial function brought about by the increasing prevalence of public law lawsuits.

Perhaps, but I hope not, judicial action will achieve legitimacy only by responding to, or serving as, the conscience of our society for justice. Perhaps, but I hope not, the court can no longer rely for legitimacy solely on sound pronouncements of the law.

The school case, despite all of its controversy and problems, is a sterling example of the foresight of our Founding Fathers who promised, and have secured, 'One nation, indivisible, with liberty and justice for all.'

When I came on the federal bench, I came with the solemn pledge to uphold the principles of the Constitution that have made America the unique democracy that it is." (emphasis in original)

in the

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
v. Petitioners,

GARY L. PENICK, et al.

No. 78-627

DAYTON BOARD OF EDUCATION, et al.,
v. Petitioners,

MARK BRINKMAN, et al.

On Writs of Certiorari to the United States
Court of Appeals for the Sixth Circuit

RESPONDENTS' OPPOSITION TO
MOTIONS OF CLEVELAND, OHIO CITY SCHOOL DISTRICT
FOR LEAVE TO FILE BRIEFS AMICUS CURIAE

On March 30, 1979 (four days after the filing of the Briefs for Respondents in each of these cases, and thirty-six days after the filing of the Briefs for Petitioners and timely briefs of amicus curiae supporting Petitioners), the Cleveland, Ohio City School District [hereinafter "applicant"] has filed identical motions in these cases. The motions seek leave to file identical proposed briefs as amicus curiae supporting Petitioners in each of the above-captioned matters. Respondents respectfully urge that the Court deny the motions for leave to file, on the following grounds:

1. The motions are untimely. Rule 42(2) of this Court requires that the brief of an amicus curiae filed with consent of the parties be submitted "within the time allowed for the filing of the brief of the party supported," and Rule 42(3) provides that when consent has been withheld, "a motion for leave to file may timely be presented to the court" (emphasis supplied). In this instance, not only has the applicant failed to file either the brief or the motion in timely fashion -- by February 22, 1979 -- but no effort whatsoever was made to contact counsel for Respondents in these matters to determine whether consent would be granted. Applicant's callous disregard for the Court's orderly processes warrants denial of the motions for leave to file.

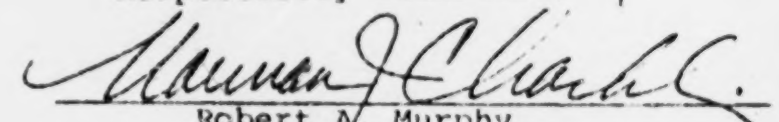
2. No good cause for out-of-time filing has been shown. Certainly there may be instances in which cause exists for allowing the late filing of a brief amicus curiae. Nothing in applicant's motion or brief, however, suggests that such cause exists here. The matters which applicant now finds so critical to this Court's consideration of the Columbus and Dayton school desegregation cases (a speech by another district judge who has had nothing to do with these cases) occurred in October, 1978, months before the writs of certiorari were issued in these cases. Furthermore, as the motion reveals (pp. 3-4), applicant will have a seasonable opportunity to present its concerns about the Cleveland school desegregation case since implementation of any remedy in that case has been stayed by the Court of Appeals for the Sixth Circuit pending decision in the matters at bar. Under the circumstances, there is no reason for this Court in these cases to consider either applicant's exaggerated and misleading charges about the rulings in the Cleveland suit or the extrajudicial statements of the district judge in that matter.

3. Applicant's proposed brief is irrelevant to these cases. The matters which applicant seeks to bring to the attention of

this Court are completely irrelevant to the issues in Dayton and Columbus. Applicant's argument -- based on a flagrant misrepresentation of Judge Battisti's speech as the equivalent of an admission that he "does not confine himself to 'sound pronouncements of the law' " (p. 6) -- would be strained enough if made in a case in which the propriety of Judge Battisti's orders was before the Court. In these cases, involving the judgments of other federal district courts in Ohio, the argument is superfluous and frivolous.

Respondents do not shrink from permitting the Court to read the speech given by Judge Battisti which is reprinted by applicant. We do suggest that the flat ignoring of this Court's rules and the utter irrelevance of applicant's brief to the particular merits of these cases should result in the denial of their motion for leave to file as amicus curiae.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 1979, I served one copy of the foregoing Respondents' Opposition to Motions of Cleveland, Ohio City School District for Leave to File Briefs Amicus Curiae in the above-captioned matters upon each of the following counsel for the other parties thereto, and upon counsel for the Cleveland, Ohio City School District, by depositing same in the United States mail, air mail postage prepaid, addressed as follows:

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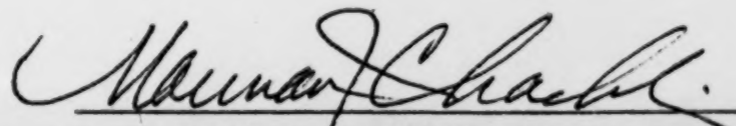
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All parties required to be served have been served.


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